THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 3, 2006 and JULY 13, 2006

IN THE

Supreme Court of Nebraska

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VOLUME CCLXXI

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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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 E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	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
		Marlon A. Polk	Omaha
		W. Russell Bowie III	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 J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkard	Dakota City
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
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy	North Platte
		Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
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 C. 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 B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Max Kelch	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
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, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. 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
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. 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
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 270

KELLY KAY ALBERT
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EMILY ANNE BELLER
JOHN KEVIN BOARDMAN
DAVID MATTHEW ZARITZKY BROWN
JAMESON CARL BRUMMOND
JEFFREY ALAN BULLINS
PATRICIA ANN CANTU
ERIC ROBERT CHANDLER
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AARON JOHN KUNZ
BRANDY RAE MANNSCHRECK
STEPHANIE ANNETTE MATTOON
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KATHRYN LOUISE MULLIN
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ABIGAIL MARIE STEMPSON
CREIGHTON A. THURMAN
DAVID WAYNE TOMLINSON
ERIN MICHELLE URBOM
QUINN HELEN VANDENBERG
TRAVIS LANCE WAMPLER
JUSTIN THOMAS WAYNE
LISA MARIE WOLFF

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No. A-05-1235: **Becker v. PBX, Inc.** Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1241: **State v. Lickliter**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1244: **State v. Minard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1294: **State v. Matteo**. Petition of appellant for further review overruled on June 13, 2006, as untimely filed. See rule 2F(1).

No. A-05-1302: **State v. Henning**. Petition of appellant for further review overruled on May 5, 2006, as untimely filed.

No. A-05-1307: **State v. Schmutte**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1312: **State v. Cline**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1323: **Lockman v. Diekmann**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1329: **Ruegge v. State**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-1335: **In re Interest of Andrew S.**, 14 Neb. App. 739 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1392: **State v. Reid**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1400: **Jones v. Platteview Apartments**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-1413: **State v. Biloff**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1440: **State v. Latzel**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-1447: **State v. Cook**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1470: **Martin v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1471: **Martin v. Board of Parole**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1528: **Saylor v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 15, 2006. See *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on February 13, 2006.

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on March 7, 2006, as premature.

No. A-06-071: **Cole v. Clarke**. Petition of appellant for further review overruled on June 7, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant for further review overruled on June 28, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant pro se for further review overruled on June 28, 2006.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on June 20, 2006, as premature.

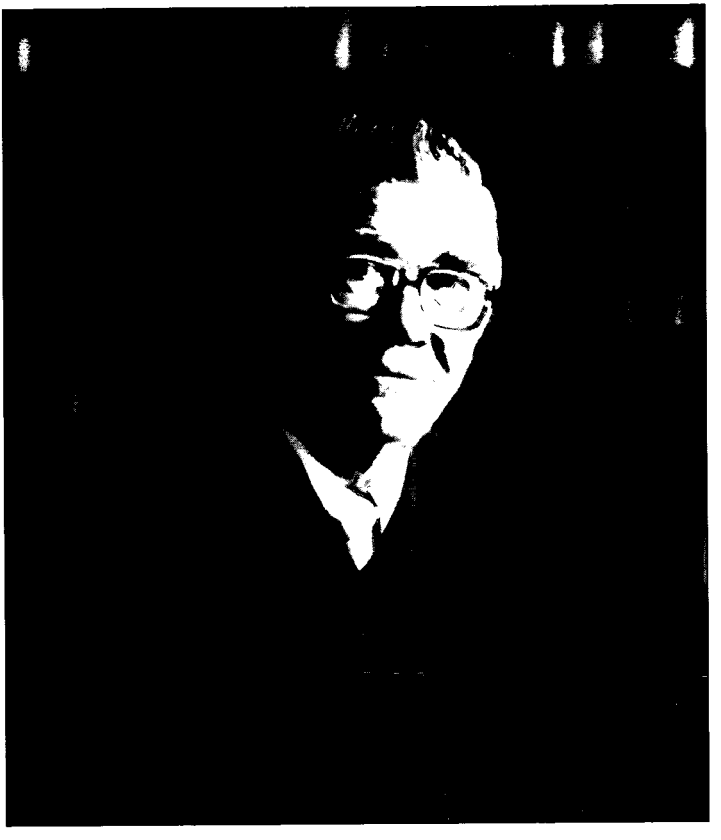
Nebraska Supreme Court

In Memoriam

Justice H. Hale McCown

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
April 27, 2006
2:00 p.m.

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



JUSTICE H. HALE MCCOWN

Proceedings

CHIEF JUSTICE HENDRY: Good afternoon, everyone.

The Nebraska Supreme Court is meeting in special ceremonial session on this 27th day of April, 2006, to honor the life and memory of Former Supreme Court Justice Hale McCown and to note his many contributions to the legal profession.

I would like to take this opportunity to introduce you to my colleagues on the Supreme Court. Beginning to my far left is Justice Lindsey Miller-Lerman. Next to Justice Miller-Lerman is Justice Kenneth Stephan. To Justice Stephan's right is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Judge McCormack is Justice John Gerrard. And to my immediate right is Justice John Wright. And I am Chief Justice Hendry.

The Court further acknowledges the presence of Justice Hale McCown's daughter, Lynn; and son Bill; other members of the family; members of the judiciary; members of the bar; and friends of Former Supreme Court Justice McCown.

At this time the Court recognizes Former Nebraska Supreme Court Chief Justice C. Thomas White, Chairman of the Supreme Court's Memorial Committee, who will conduct these proceedings.

Mr. Chief Justice, good afternoon.

CHIEF JUSTICE WHITE: Good afternoon. May it please the Court, there will be three speakers. The first of these speakers that I'm pleased to introduce is a Former Chief Justice of this Court, the Honorable William Hastings who served with Justice McCown.

Justice Hastings.

CHIEF JUSTICE HENDRY: Good afternoon, Mr. Chief Justice.

CHIEF JUSTICE HASTINGS: Good afternoon, sir.

May it please the Court, William Hastings appearing as a member of the committee to honor and memorialize former judge of this court, H. Hale McCown.

Hale McCown was born January 19th, 1914, and died September 1, 2005.

He served with distinction on this court from 1965 until his retirement in 1983, having been appointed as the first Supreme Court Judge so appointed under the merit plan of selection.

During his tenure he authored more than 750 opinions, of which over 200 were dissents. I remember particularly his comments on many occasions when it came his turn to speak during consultation following oral arguments he would say something like, "Well, I look at this a little differently." You almost could be sure he was going to write a dissenting opinion.

In an interview by the Omaha World-Herald, Former Governor Frank Morrison ruefully recalled his judicial appointee's integrity, when after having signed a controversial tax bill appealed to the Nebraska Supreme Court, he said, quote, My own appointee wrote an opinion that my actions were arbitrary and capricious, end of quotes.

Hale graduated from Hastings College in 1935 and from Duke Law School in 1937. It was while a student at Duke that he became a friend of Former President Richard Nixon. It was that friendship that probably cost him an appointment to the United States Court of Appeals. During the presidential campaign, Hale, although a registered Democrat, chaired a Democrats for Nixon Committee. Unfortunately for him, Johnson was elected president and he was not about to appoint a friend of Nixon's.

During World War II, McCown served in the Pacific as a lieutenant of the United States Navy. Following his discharge from service he returned to private practice of law in Beatrice, Nebraska. During that time he was active in the Nebraska Bar Association, serving as chair of the House of Delegates from 1955 to '56 and as president from 1960 to 1961. He was vitally interested in continuing legal education. He served as a fellow of the American College of Trial lawyers, as a member of the Legal Ethics Committee of the American Bar Association and was elected to the American

Law Institute in 1957 and served on its governing council from 1969 to 2000.

Hale McCown has been listed in Who's Who in America since 1961 and was recognized by Hastings College in 1981 with an Outstanding Alumni Award and was honored by Duke University in 1986 with the Charles S. Murphy Award for outstanding public service. In 1996 the Nebraska State Bar Foundation presented him with the Legal Pioneer Award for a lifetime of achievements of a lawyer who makes innovative contributions to the improvement of justice.

On a personal note, Hale was a consummate gentlemen, avid world traveler and a lover of fine food and Scotch whiskey. His and his wife Helen's annual football season opener luncheon co-hosted with Carl Olson and his wife was a party that many of us looked forward to each year. We all miss his pleasant, gentlemen ways as he lived up to his credo of "treat others with respect, not necessarily because they deserve it, but because you are a gentleman."

Thank you.

CHIEF JUSTICE HENDRY: Thank you, Chief Justice Hastings.

CHIEF JUSTICE WHITE: May it please the Court, the next speaker will be Mr. Thomas Davies, a lifetime colleague and friend of Judge McCown's, a distinguished member of the bar and a fine practicing lawyer.

Mr. Davies.

CHIEF JUSTICE HENDRY: Mr. Davies, good afternoon, sir.

MR. DAVIES: Good afternoon.

May it please the Court, my name is Thomas M. Davies, and I am a member of the Lincoln law firm of Mattson, Ricketts, Davies, Stewart & Calkins.

Hale McCown was my friend, and my assignment is to talk not about the honors that he accumulated, and Judge Hastings has covered all those. My assignment was to talk about Hale, the individual, and the personal things in his life, and I'll try to do that.

There was a family dinner last night and the whole family is here, as you might know, and many others, and friends, and

the — you could — the nostalgia was so thick you could cut it with a knife, but it was a delightful evening and we heard a lot of things. I revised my notes after last night's meeting to bring them up to date.

Now, I cannot discuss Hale McCown without discussing his wife of 67 years, Helen, a beloved wife who was very supportive of Hale, and also of his three children, Bob, who is now deceased; and Bill and Lynn, both of whom are here today.

I first met Hale before World War II, and my vintage rates everything before World War II or after World War II. I knew him before World War II but not well. As you have heard, he and Helen graduated from the same Duke law class in 1937 with other outstanding persons, including Nixon and his wife Pat, and they were good friends of theirs.

Helen, by the way, was the fourth woman to graduate from Duke Law School.

When I graduated and was admitted to the bar in 1937, one of the outstanding law firms in the state was the Beatrice firm of Rinaker, Delehant and Hevelone. Rinaker was deceased, and the law firm looked — needed help and they reached out to Hale because he had grown up in Beatrice, had gone through Beatrice High School and was well known. And Morris Hevelone met Hale, who was coming from the West Coast, and he was coming from Nebraska, they met in Greenriver, Wyoming, and it was decided at that time that Hale would become a member of that firm, and the family did move back to Nebraska.

We were all in World War II and Hale served in the Navy on a CVE, which is an escort carrier. We called them Jeep carriers — I was in the Navy — he told one story, so you'll hear one war story. They were at the time in the Philippines and it was at the landing at Leyte Gulf, and a Japanese shell hit their ship, went through — on through and out the other side and did not explode, so that was something that was riding with him at that time.

He returned to Beatrice after World War II. At that time the Nebraska State Bar Association had a sort of a tax seminar that toured the state and it was sort of a circus in a way. The president of the bar always attended and, of course, talked to the people about the Bar Association and how important it was.

And Hale and Flav Wright were often on that, and I also was on that panel for several years. And it was good.

By the way, George Turner was a clerk of this Court but he was also secretary of the Bar Association, something that you would not do now, but at that time — and he'd been with the circus that headquartered in Fairbury and so he knew how to set up a seminar and make reservations, and we traveled by bus and train and it was quite a deal. And I mention it because that's where I knew Hale. That's where I became acquainted with him.

Now, the one thing to mention on the McCown family is the polio that struck in 1953 and it hit the McCown family. Now, Lynn had it but she was telling me that she had no residue. Bill had a residue for a while; in other words, one side was — he had a problem with one side, but it went away. But Bob had severe paralysis and it never went away and was with him during all of his lifetime and this was a tragedy that was with Hale and Helen and Bill and Lynn all during the time that he was alive. He was an outstanding fella. I'll tell you about him.

We had him in our family for two weeks during one summer when the family went on vacation and it was a great time. We got to know him. I'm sure that he was down quite a bit but we never saw it. He was always upbeat. And imagine that young man lying flat on a hospital bed, or he finally — they were able to work it out that he could be in a wheelchair for part of the time. Had a brilliant mind. He graduated from Hastings College and then had a Ph.D. in physics from Stanford.

Lynn was telling me that they were — that Hale and Helen were looking around for a place where they could handle somebody that was handicapped. The University of Illinois said they could. Then they took Hale — I mean Bob — Hale took Bob to the University of Illinois and they took one look at Bob and said we can't do it. He's too badly paralyzed.

Then they somehow hooked up with Stanford and they went there and Stanford said, well, we're not set up. We really aren't set up for this, but we'll do it. And so they did. And I think during the times that he was in Hastings and also at Stanford, the way they handled it, they had one of the students hired to be with him all the time and take care of him and see that he

got to class, and, of course, that student probably was getting through school with that job.

My son, Tom, Jr., remembers that our family visited the McCowns in Beatrice and my son was in junior high. He remembers playing golf with Bob and that was just before Bob was struck with polio.

Now, Helen and Hale built an addition to their house for Bob. It was his separate room and they had also built a swimming pool and Helen was out every day that it was possible with Bob in that swimming pool for therapy.

Now, the other children, Bill and Lynn, were very supportive of Bob. Bill graduated from the Nebraska College of Law and went with Northwestern Mutual Life Company in Milwaukee and became a vice president in charge of investments before his recent retirement.

Lynn went to Smith College, the University of Nebraska and graduated from Antioch. She married, had three children and has been active in astrology.

Helen and Hale were great travelers and I think they went to something like 67 countries. I was privileged to go with them, they asked me to go, and I think we were the only three from Nebraska of judges and lawyers. It was sort of a, you went and met judges and lawyers from other countries. We went to Poland, Czechoslovakia and Romania.

While we were in Poland there was a side trip that wasn't a part of the main trip, to the Nazi death chamber in Auschwitz. I think we were chicken. We really didn't want to go but we thought that we must. And it was more terrible than we'd ever read about. And since then you've maybe read that people are denying that it happened and some are saying, oh, well, it wasn't as bad as they say it was. It was far worse and it did happen.

Ross McCown is a nephew of Hale, a son of John, who is deceased, and he and his wife, Lynn, are here today. He remarked on Hale and Helen's passion to golf and that they played golf together here in Lincoln very often and that also they played — would play golf on their trips at various places.

Hale was a Big Red fan and a — was interested in all sports. He went to the Drake Relays every year with a group that

he assembled from Beatrice, and son Bill came down from Milwaukee with his special friend, Tom Mayo. Bill and Tom of course are both here today and I think I heard that tomorrow morning they will be going to the Drake Relays, so it's a carry-on of the old tradition. And I was privileged to be a part of that group for several years.

Son Bill commented on Hale's taste for Scotch whiskey and he evidently had some very fine, aged premium Scotch, but he was a rather canny, frugal Scotsman. He very seldom touched that good stuff and he didn't certainly give it to guests very often and he certainly didn't give it to his family, including Bill.

His daughter, Lynn, had a final comment that her father understood gratitude and was truly grateful for his life, his career and his family.

My daughter Joanie had this summary on Hale. He was a gentleman's gentleman, and with that I concur.

Respectfully submitted.

CHIEF JUSTICE HENDRY: Thank you, Mr. Davies.

CHIEF JUSTICE WHITE: May it please the Court, these are the transcribed remarks of Chief — Former Chief Justice Norman Krivosha who is in Florida doing heavens knows what.

"May it please the Court, it is with great respect and deep humility that I join with others today to remember the life of one of our most esteemed colleagues, Hale McCown, who departed this life as he lived his life, quietly, on September 1, 2005, at the enviable age of 91.

"Born in Kansas, Illinois, on January 19, 1914, he received his A.B. from Hastings College, Hastings, Nebraska, in 1935 and his law degree from Duke University College of Law in 1937. While he had a number of classmates who were destined to fame, including President Richard Nixon, he had eyes for only one of his classmates, Helen Lanier, who hailed from the great Northwest, which already told you much about a woman law student in the late thirties. They were married in 1938 and at the time of his death had been happily married for 67 years. Together they had three children, Bob, Bill and Lynn. Bob preceded Hale in death.

"Little needs to be said about Mac's beloved Helen, than to recognize that each was the other's best friend and their life together was a model for any married couple. As they were inseparable in life, so too were they inseparable in death. Within just a few weeks following Hale's death, Helen joined him and those who knew this wonderful couple are sure they are once again together.

"When in 1965, Hale came to the Nebraska Supreme Court, the first appointee to the Court under the newly adopted merit plan for the selection of judges, he brought to the Court a vast and diverse knowledge of the law. He had practiced as a 'country lawyer' in Beatrice since leaving the Navy after World War II and at the time of his appointment he was a senior partner of McCown, Baumfalk & Dalke. While he took unusual pride in calling himself a 'country lawyer,' he was anything but. His knowledge of the law covered all fields. His peers recognized his outstanding trial ability by electing him to the American College of Trial Lawyers, reserved for only the best of the best.

"Additionally, however, he served as a general counsel to a number of corporations who later acquired national recognition. He was truly a full-service lawyer who brought that vast and diverse background to the Court where as a court of appeal as a matter of right, everything was placed upon the docket for the Court's consideration without choice. During the 18 years he served on this Court he wrote more than 750 opinions. More than 100 dissents, a practice with which I can identify. His opinions were clear and concise" — that was Judge Krivosha's observation, Your Honor. "His opinions were clear and concise" —

CHIEF JUSTICE HENDRY: Thank you for clarifying that.

CHIEF JUSTICE WHITE: Yes. Thank you, Your Honor. May I continue?

"His opinions were clear and concise and left none with wondering what he meant, a practice to be emulated by all who are called to render decisions on the law.

"Not only did he devote his legal talent for the benefit of those who brought their claims before the Court, but he likewise gave of his time and talent for the benefit of all in

general. He served the Nebraska Bar Association as its chair of the House of Delegates during 1995, 1956 — 1955, '56 and as its president during 1960, 1961. He was elected as a member of the prestigious American Law Institute in 1957 and elected to its executive council in 1969, where he served until 2000, when he was made an emeritus member of the executive council. A roster of the executive council reads as a who's who in American law and Hale's name was appropriately included among them.

"For me personally, having the experience — the opportunity to serve with Mac on this Court for five years was a chance of a lifetime. While all of the members of this Court were extremely kind to the brass young new Chief Justice whom some of the Court properly called 'Sonny,' Hale was particularly kind and helpful, always being sure that I was pointed in the right direction and warned about where the 'landmines' were located. Although I did not always follow his advice, I had no one to blame but myself. He was always there if I needed him and sought his counsel.

"He was always open to new ideas and tolerant of others, even when he totally disagreed. His dissents were models of civility. He was the prototype of how one could disagree without being disagreeable and he never carried a disagreement beyond the dissent.

"An anonymous psalmist once wrote in part many years ago: 'Even a long life ends soon. But a good name endures forever.'

"While it is true that Hale McCown lived a long life, of greater importance is the fact that he left a good name which will endure forever. When generations in the future years seek to learn of the history of this Court, the name of Hale McCown shall be at the top.

"While we shall miss his smiling gentle face, we shall forever remember his good name. As I suggested at the outset, I am honored to have been selected to be permitted to say a few words in memory of my colleague and friend, Hale McCown. He shall remain in our hearts forever."

That concludes the remarks of Judge Krivosha.

Your Honor, on a brief personal note, I was — served with the Court for a number of years with Judge McCown.

A long time ago a poet or playwright Thomas Bolt wrote of another man who was a warrior, a soldier, a husband, a scholar, a father, a man for all seasons. So was our friend, Judge McCown, a man for all seasons. We will miss him.

This concludes our remarks, Your Honor.

CHIEF JUSTICE HENDRY: Thank you, Chief Justice White.

I would like for the record to acknowledge the presence of a few other people that I see with us today. I see Retired Supreme Court Justice Nick Caporale is here. Current Chief Judge of the Court of Appeals Everett O. Inbody is with us. Retired Supreme Court Justice John Grant is with us this afternoon. Our State Court Administrator, Janice Walker; Retired District Court Judge William Rice; Retired District Court Judge Ronald Reagan; Supreme Court Administrative Assistants, both Jackie Hladik and Bette Johnson, are also with us this afternoon. And we appreciate your presence being here very much.

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

On behalf of the Nebraska Supreme Court, I extend this appreciation to Former Chief Justice C. Thomas White, who chaired the Court's Memorial Committee, and who with the assistance of Janet Bancroft from the Court Administrator's Office was primarily responsible for organizing this ceremonial session.

This concludes the special ceremonial session of the Nebraska Supreme Court.

The Court would encourage any of the participants, family members and friends of Justice McCown to remain in the courtroom for a moment to greet each other on this occasion.

CHIEF JUSTICE HASTINGS: Your Honor, may I suggest that there is one more former judge —

CHIEF JUSTICE HENDRY: Yes, please.

CHIEF JUSTICE WHITE: — Judge Bill Rice from Pawnee City, District Judge.

UNIDENTIFIED SPEAKER: Bill Colwell.

CHIEF JUSTICE HASTINGS: What'd I say, Rice?

CHIEF JUSTICE HENDRY: All right. Thank you very much. The record will so note.

All right. With that we are adjourned. Thank you all.

(Proceedings adjourned at 2:31 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

CLIFTON MCCRAY, APPELLANT, V.
NEBRASKA STATE PATROL, APPELLEE.
710 N.W.2d 300

Filed February 3, 2006. No. S-04-395.

1. **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.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Rules of the Supreme Court: Appeal and Error.** A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal.
5. **Statutes: Convicted Sex Offender.** The Sex Offender Registration Act is a civil, nonpunitive regulatory scheme designed to protect the public from the danger posed by sex offenders.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **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.
8. ____: ____. In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
9. ____: ____. 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.
10. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.

11. **Statutes: Constitutional Law: Judgments.** A legislative act will not be permitted, even if an intent to do so is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. On motion for rehearing, reargument granted. See 270 Neb. 225, 701 N.W.2d 349 (2005), for original opinion. Original opinion withdrawn. Reversed and remanded with directions.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

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

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

STEPHAN, J.

The Nebraska State Patrol (NSP) classified Clifton McCray as a Level 3 sex offender under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2004), and the district court for Lancaster County affirmed the classification. In *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005) (*McCray I*), we affirmed the judgment of the district court. We subsequently granted McCray's motion for rehearing and ordered that the case be reargued. During reargument, counsel for the NSP contended that an amendment to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2002), which became effective on September 4, 2005, applied to one of the issues presented in this appeal. We requested and received supplemental briefing on this issue from both parties. We now withdraw our opinion in *McCray I*, and substitute this opinion, in which we find merit in McCray's arguments that the NSP erred in scoring his SORA risk assessment and conclude that he is entitled to reclassification as a Level 2 offender.

BACKGROUND

In 1998, McCray was convicted of three counts of third degree sexual assault. He was sentenced to 75 days in jail on one count, 45 days in jail on another count, and fined $500 on

the third count. These convictions brought him within the purview of SORA, which requires a person convicted of a sex offense to register with the sheriff of the county in which he or she resides. See §§ 29-4003 and 29-4004. The information obtained as a result of such registration is forwarded to the NSP, which maintains a central registry of persons obligated to register under SORA. § 29-4004(9). The NSP is required to determine each registrant's risk of recidivism and assign a notification level based upon the degree of risk. § 29-4013(2)(b) and (e); 272 Neb. Admin. Code, ch. 19, § 12 (2000). If the risk of recidivism is low, the registrant 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); 272 Neb. Admin. Code, ch. 19, § 13.02 (2000). If the risk of recidivism is determined to be moderate, the registrant 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); 272 Neb. Admin. Code, ch. 19, § 13.03. If a person is classified as a Level 3 offender, indicating a high risk of recidivism, in addition to those groups entitled to notice with respect to Levels 1 and 2 offenders, notification must also be given to members of the public who are likely to encounter the offender. § 29-4013(2)(c)(iii); 272 Neb. Admin. Code, ch. 19, § 13.04. See, also, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

Based upon factors enumerated in SORA that increase the risk of recidivism, the NSP developed a risk assessment instrument which it uses to evaluate all records and data concerning the offender in order to classify every offender in the registry in one of the three risk levels. See *Slansky v. Nebraska State Patrol, supra*. A score of 70 and below on the risk assessment instrument results in a Level 1 classification, a score of 75 to 125 results in a Level 2 classification, and a score of 130 or above results in a Level 3 classification. See *id.*

McCray was initially classified as a Level 3 offender, based upon a score of 155 on a risk assessment instrument completed on December 6, 2000. He requested an administrative hearing to challenge the classification. For reasons which are not entirely clear from the record, a second risk assessment was completed

on September 3, 2002, in which McCray received a score of 195. At the time this risk assessment was completed, McCray's criminal history reflected a number of charges and convictions which were used in scoring. These included convictions for the violation of a restraining order, operation of a motor vehicle without an operator's license, and injury or destruction of another's property, as well as charges for failing to appear in court. McCray's criminal record also included eight sexual assault charges. Of those, three resulted in convictions, three were dismissed, and two were identified as being filed with other citations. In October 2002, McCray filed a request for a hearing to contest his classification.

While administrative review was pending, McCray petitioned the county court for Lancaster County to set aside a 1994 conviction for destruction of property of another, a 1998 conviction for attempted violation of SORA, and a 1999 conviction for violation of a restraining order. See § 29-2264. Section 29-2264(2) empowers a court to set aside certain criminal convictions in which the sentence does not include incarceration. In May 2003, the county court entered separate orders setting aside each of the three convictions pursuant to McCray's petitions.

On October 2, 2003, an administrative hearing was held to review McCray's challenge of his Level 3 classification. At the hearing, McCray challenged the scoring of item 2 on the risk assessment instrument, which assessed 30 points for three or more convicted counts for offenses other than traffic offenses or sex offenses. He also challenged item 14, which assessed 20 points for the fact that 24 months or less had elapsed between McCray's most recent arrest for a felony and/or Class I/II misdemeanor conviction and his prior release from court-ordered confinement or supervision. The parties stipulated that the scoring of items 2 and 14 was based entirely upon the three convictions which had been set aside in May 2003 pursuant to § 29-2264(4). McCray challenged the use of the set-aside convictions for scoring items 2 and 14. He also challenged the scoring of item 9, which assessed 30 points for the nature of his sexual assault behavior, based upon unsworn and unsigned victim statements given to police, which statements McCray argued were not correlated to any specific conviction. McCray argued

that subtraction of the 80 contested points would lower his score from 195 to 115, placing him at a Level 2 risk classification.

On October 17, 2003, the hearing officer recommended that McCray's classification as a Level 3 sex offender be upheld. The hearing officer found that "because an order setting aside a conviction does not completely negate the conviction, proceedings such as sex offender risk assessment . . . may properly consider convictions which have been set aside." With respect to item 9, the hearing officer found that the risk assessment manual does not require that an offender be convicted or even charged for an offense scored under that category. Rather, the hearing officer found that there must merely be officially documented evidence of physical force or restraint. The superintendent of the NSP adopted the recommendations of the hearing officer as the decision of the NSP on October 22, 2003.

Pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), McCray filed a timely petition in the district court appealing his classification as a Level 3 sex offender. The district court affirmed McCray's classification, and McCray filed this appeal in which he contended that the district court erred in finding that competent evidence supported the scoring of items 2, 9, and 14 on the risk assessment instrument.

In *McCray I*, we concluded with respect to items 2 and 14 that § 29-2264 was intended to operate prospectively and that because "McCray's convictions were not set aside until after his risk assessment instrument was completed . . . the convictions were properly considered." 270 Neb. 225, 230-31, 701 N.W.2d 349, 354 (2005). We expressed "no opinion . . . on what effect the convictions that were set aside would have on McCray's SORA assessment if the assessment had occurred after the convictions were set aside." *Id.* at 231, 701 N.W.2d at 354-55. We did not reach the issue of whether item 9 was properly scored because the subtraction of the 30 contested points from item 9 would still leave a risk assessment score of 165, which is 35 points higher than the threshold for classification as a Level 3 offender. McCray filed a timely motion for rehearing, which we granted.

ASSIGNMENTS OF ERROR

McCray originally assigned, restated and consolidated, that the district court erred in finding that competent evidence supported the scoring of items 2, 9, and 14 on the risk assessment instrument. On rehearing, McCray assigns that we incorrectly determined in *McCray I* that the orders setting aside his non-sex-offense convictions could not be considered for purposes of risk assessment because they were entered after the risk assessment instrument was scored.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). 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.*

[4] A party may move for rehearing in an appellate court based upon any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider on the appeal. Neb. Ct. R. of Prac. 13D (rev. 2000).

ANALYSIS

May Events Occurring After Original Scoring of Risk Assessment Instrument Be Considered in Review Hearing Challenging Risk Assessment Classification?

[5] We first address the threshold issue raised by McCray's motion for rehearing, which is whether events which occur after the risk assessment instrument is scored but before the completion of administrative review may be considered by the reviewing officer. SORA is a civil, nonpunitive regulatory scheme designed

to protect the public from the danger posed by sex offenders. *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The Nebraska State Patrol is required by law to "adopt and promulgate rules and regulations to carry out the registration provisions of [SORA]." § 29-4013(1). Under rules and regulations adopted pursuant to SORA, registrants are granted a limited review hearing to contest their classification. *Slansky v. Nebraska State Patrol, supra*; 272 Neb. Admin. Code, ch. 19, § 014 (2000). These hearings are limited to the appropriateness of a registrant's classification. *Id.*

McCray argues that if our opinion in *McCray I* means that the hearing officer may only review the accuracy of the risk assessment as of the date of the initial scoring, then a reviewing officer charged with determining the appropriate level of classification for an offender could not consider evidence of events occurring after the initial scoring, even if those events involved actual sexual recidivism. In the NSP's original brief, it agreed that the rules governing SORA are not intended to work in such a manner and that the hearing officer is "entitled to consider the latest [post-scoring] information" because the hearing officer's task is "not so much to decide whether the scorer erred, but to use the latest and best information in conjunction with the [risk assessment] Instrument and Manual in order to determine into which Risk Level Classification the offender should be placed." Brief for appellee at 12.

Our review of the regulations existing at the time of the administrative review process in this case, considered in light of the protective purpose of SORA, supports the argument that a hearing officer may consider events occurring after the initial scoring of the risk assessment instrument in arriving at a recommendation of what risk assessment level should be adopted by the NSP. The rules provided that "[n]o community notification based upon classification levels shall be made until the hearing and any subsequent appeals are final or eight (8) working days have passed since the classification notification was mailed to the offender and no request for a hearing has been received, whichever is later." 272 Neb. Admin. Code, ch. 19,

§ 014.03. At a review hearing, the offender "may present information which challenges the application of the classification instrument and which has a bearing on the risk of recidivism." 272 Neb. Admin. Code, ch. 19, § 014.02. The rules permit reclassification "if new information is received that would appear to have a bearing on the risk of recidivism." 272 Neb. Admin. Code, ch 19. § 015.01 (2000). Thus, we conclude that the orders setting aside McCray's three prior convictions could properly be considered by the hearing officer in resolving McCray's challenge to his Level 3 classification. We therefore must resolve the issue which we did not reach in *McCray I*: whether the hearing officer and the district court erred in determining that the non-sex-offenses could be used for purposes of scoring the risk assessment instrument, notwithstanding the fact that they had been set aside under § 29-2264.

Does Setting Aside and Nullification of Conviction Pursuant to § 29-2264 Preclude Its Consideration for Purposes of Nebraska Sex Offender Risk Assessment Instrument?

At the time of McCray's review hearing, § 29-2264(2) provided:

> Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.

In determining whether to grant such a petition, a court is to consider the behavior of the offender after sentencing, the likelihood that the offender would not engage in further criminal activity, and any other relevant information. § 29-2264(3). An order granting an offender's petition under § 29-2264 would "(a) Nullify the conviction; and (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction." § 29-2264(4). However, the statute further provided that the setting aside of a conviction pursuant thereto did not preclude proof of the conviction for certain purposes, such as determining the sentence on any

subsequent conviction of a criminal offense. See § 29-2264(5)(a) through (g). In upholding the constitutionality of the set-aside statute, we held as a matter of law that it did not result in the granting of a pardon or partial pardon because it exempted certain civil disabilities from restoration. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

Each of the May 2003 orders setting aside McCray's three non-sex-offense convictions stated as follows:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that defendant's conviction in the above-referenced matter is nullified and all civil disabilities and disqualifications imposed as a result of the conviction are removed, except for those matter [sic] specifically identified in Neb. Rev. Stat. § 29-2264(5)(a-g) (Reissue 1995).

At the time of these orders, § 29-2264(5)(a) through (g) did not specifically provide that convictions which had been nullified and set aside could nevertheless be used for assessment of an offender's risk of recidivism under SORA. However, the hearing officer concluded that because a conviction is not completely negated by a set-aside order under § 29-2264(2), it can be properly counted as a conviction for purposes of scoring the SORA risk assessment instrument. In affirming this decision, the district court concluded that "the use of other convictions in the assessment instrument" was consistent with the other purposes specifically enumerated in § 29-2264(5) for which a set-aside conviction could be used.

[6-10] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). 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. *Id.* In the absence of ambiguity, courts must give effect to the statutes as they are written. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *American Employers Group v. Department of Labor,*

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. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005); *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Warriner, supra*; *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001). At the time McCray's convictions were set aside, § 29-2264(5)(a) through (g) provided a specific list of purposes for which a criminal conviction could be used notwithstanding its nullification by an order entered pursuant to § 29-2264(4). We find nothing in that statutory language which would permit the use of such convictions for purposes of assessing a sex offender's risk of recidivism under SORA. The fact that such use may be logically consistent with other uses enumerated in § 29-2264(5)(a) through (g) does not permit a court to read such language into the statute.

We have, on one occasion, held that a nullified conviction may be used for a purpose not specifically permitted by § 29-2264(5). In *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991), we held that a felony conviction which had been set aside pursuant to § 29-2264 could be used to prove the substantive element that the defendant was a felon in a subsequent prosecution for felon in possession of a firearm. In reaching this conclusion, we relied in part on the reasoning of *United States v. Germaine*, 720 F.2d 998 (8th Cir. 1983), in which the Eighth Circuit Court of Appeals held that a felony conviction which had been set aside under § 29-2264 could be used in proving a person was a felon for purposes of a federal firearms charge. We cited portions of that court's opinion, noting that the setting aside of the conviction did not alter its legality or establish that the defendant was innocent of the crime for which he was convicted. We further reasoned that under Neb. Rev. Stat. § 83-1,130(2) (Reissue 1987), the right of a felon to possess a firearm is not restored even after a pardon in the absence of an express authorization signed by the Governor, which the defendant had not obtained. Nothing in the holding or

reasoning of *Illig* permits us to read § 29-2264(5)(a) through (g) to authorize the use of convictions which have been set aside for purposes of risk assessment under SORA.

During the pendency of this appeal, the Legislature has addressed the precise issue before us. In 2005, § 29-2264(5) was amended to provide that the setting aside of a conviction pursuant to § 29-2264(2) shall not:

> (h) Preclude proof of the conviction as evidence whenever the fact of the conviction is relevant to a determination of risk of recidivism under section 29-4013; or
>
> (i) Relieve a person who is convicted of an offense for which registration is required under the Sex Offender Registration Act of the duty to register and to comply with the terms of the act.

2005 Neb. Laws, L.B. 713, § 3. Section 29-4013, which is a component of SORA, lists various "factors relevant to the sex offender's risk of recidivism" which the NSP is to consider in determining a sex offender's risk classification. These include "[a]ny criminal history of the sex offender indicative of a high risk of recidivism, including . . . [t]he number, date, and nature of prior offenses." § 29-4013(2)(b). The State contends that the amendment to § 29-2264(5) applies to this case because of a contemporaneous amendment to § 29-2264(6), which now provides that "changes made to this section by Laws 2005, LB 713, shall be retroactive in application and shall apply to all persons, otherwise eligible in accordance with the provisions of this section, whether convicted prior to, on, or subsequent to September 4, 2005." See § 29-2264(6) (Supp. 2005).

[11] We conclude that the 2005 amendments to § 29-2264(5) are not applicable to this case. The orders setting aside McCray's convictions are final judgments which nullified the convictions and removed all civil disabilities which were not exempted from restoration by § 29-2264(5)(a) through (g) as it existed on the date of the orders. See *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002). A legislative act will not be permitted, even if an intent to do so is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973). The 2003 orders vested

McCray with a right to have the three set-aside convictions used only for those purposes enumerated in the statute at the time the orders were entered. Applying the amended version of § 29-2264(5) to this case would have the effect of modifying the judgments to add a new purpose for which the set-aside convictions could be used, thereby impairing McCray's rights. While the Legislature is free to expand the statutory list of civil disabilities which are not restored by a judgment setting aside and nullifying a conviction pursuant to § 29-2264(4), such amendments cannot impair rights vested by judgments entered under prior versions of the statute. Accordingly, we conclude that the district court erred in affirming the NSP's use of the set-aside convictions in scoring items 2 and 14 of the risk assessment instrument used to determine McCray's recidivism risk level.

Was There Competent Evidence to Support Scoring of Item 9 of Risk Assessment Instrument?

McCray also challenged the assessment of 30 points on item 9 of the risk assessment instrument, entitled "Nature of Sexual Assault Behavior." The scorer is instructed to check all of the seven listed behaviors that apply. The manual for the Nebraska sex offender risk assessment instrument (Manual) includes the following scoring criteria for item 9: "Score the nature of the sexual assault in the current offense and any previous sexual assaults noted in official documentation. Do not score any category more than once." According to the commentary set forth in the Manual, item 9 "is designed to reflect the level of risk posed by an offender who uses varying degrees of force. The greater the amount of force or the more types of force utilized, the higher the score."

McCray was scored 5 points for behavior that fell into the "Fondling/Manipulate/Seduce/Coerce/Authority" category and 25 points for behavior categorized as "Physical Force or Violence/Restrained Victim/Threatened with Weapon or Dangerous Object." The scoring was based on behavior described in exhibits 6, 7, and 8, which are transcripts of unsworn statements obtained by police from three different persons on January 14 and 15, 1997. McCray's attorney objected to the admissibility of these exhibits on the ground that there was no evidence that the

conduct alleged to have occurred in the statements was true, nor was there evidence that the statements were "relevant to any of the third degree sexual assault convictions that were used to score this instrument." McCray's objections were overruled by the hearing officer. Dr. Shannon Black, testifying on behalf of the NSP, testified that for purposes of scoring the instrument:

> We look for official documentation of those 14 items. If something is never charged or it never comes to a final conclusion, then that item would not be scored, but anything else that — if there's founded allegation, for example, in a CPS record, we would score that. So, as long [as] we have official documentation of it and — then we would score that type of behavior of that sexual assaultive incident. So it doesn't have to ultimately be a conviction because, again, we could have plea bargains or other things [where] that specific case [does] not [result in a] convict[ion], but we have official documentation of that behavior when we score that.

On cross-examination, Black admitted that she was unable to correlate any of the victims' statements to any of McCray's convictions.

The hearing officer concluded that the Manual does not require that the offender be convicted or even charged for the behavior that forms the basis of scoring item 9. She opined that there must simply be evidence of physical force or restraint in official documentation. In its de novo review, the district court agreed that item 9 had been properly scored. McCray primarily contends that exhibits 6, 7, and 8 should not have been used to score item 9 because it is unclear from the record whether the behavior described in those statements formed the basis of a convicted charge, or a charge which was either dismissed or withdrawn.

Under SORA, the NSP must consider any criminal history of the offender "indicative of a high risk of recidivism." § 29-4013(2)(b)(iii). The NSP must specifically consider:

> (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.

Id. We agree that the criminal history to which the statute refers is not limited to conduct for which the offender has been convicted. However, it does not follow that wholly unsubstantiated allegations are necessarily a part of such history. See *Matter of C.A.*, 146 N.J. 71, 89, 679 A.2d 1153, 1162 (1996) (holding criminal history factors similar to § 29-4013(2)(b)(iii) include nonconviction offenses "provided there is sufficient evidence that the offense occurred").

Item 3 of the SORA risk assessment instrument, entitled "Other Sex/Sex Related Attorney Filed Charges Not Resulting in Conviction," specifically permits the scoring of certain criminal charges which do not result in conviction. The Manual sets forth the scoring criteria for item 3 as follows:

> Total number of misdemeanor or felony sex/sex related attorney filed charges that the subject had but was not convicted. ***No*** **convictions** should be used. Include criminal history from Nebraska and other jurisdictions. This would include any sex/sex related charges associated with the current conviction that were plea-bargained. *Include sex offense charges that have an unknown disposition, juvenile criminal adjudications (if available) and dismissed charges that were part of a plea bargain,* ***but not*** *wholly dismissed, declined, not guilty or nolle prosecute.*

(Emphasis in original.) Based upon the Manual and Black's testimony, it seems clear that under item 9, the scorer could include those behaviors related to the convicted sex offenses scored in item 1 as reflected in the official documentation of those convictions, inasmuch as the conviction would ordinarily establish the truth of the documentation. The scorer could also include

behaviors associated with charged offenses not resulting in conviction which are scored under item 3 because the prosecutor's decision to file the charge and the absence of an acquittal or outright dismissal afford some basis for concluding that the facts reflected in the official documentation are true.

In this case, however, there is nothing in the record to correlate the behaviors reflected in the victim statements to any of the three sex offenses for which McCray was convicted. Moreover, McCray received a score of "0" on item 3 of the risk assessment instrument, indicating that he had no attorney filed sex offense charges not resulting in conviction which could be considered for purposes of determining his risk of recidivism. The comment for item 3 states: "Per pre-hearing conference . . . McCray was convicted of 3 counts [sic] charges were not plea bargained as originally scored 08/27/02 Dr. Black." Thus, the truth of the accounts contained in the victim statements cannot be established on the ground that they were relied upon as a basis for prosecution. Nor is there anything else in the record to establish the truth of the unsworn statements.

Section 84-914(1) provides in part: "An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence." In *McKibbin v. State*, 5 Neb. App. 570, 577, 560 N.W.2d 507, 512 (1997), the Nebraska Court of Appeals concluded in an income withholding proceeding that a court clerk's mere "indication" to an attorney that a father owed back child support was insufficient to establish that fact "even under the relaxed evidentiary rule of § 84-914(1)." Here, we conclude that the unsworn victim statements which were not correlated to any offense for which McCray was charged or convicted and which bore no other indicia of probative value did not constitute competent evidence to support the NSP's scoring of item 9 of the risk assessment instrument.

CONCLUSION

For the reasons discussed herein, we withdraw our prior opinion, *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d

349 (2005), and substitute this opinion in which we conclude that the district court erred in affirming the NSP's scoring of 30 points on item 2, 30 points on item 9, and 20 points on item 14 of the risk assessment instrument used to determine McCray's risk of recidivism under SORA. Subtraction of the 80 points erroneously assessed for these three items results in a score of 115, which falls within the range for a Level 2 classification. Accordingly, we reverse the judgment of the district court and remand the cause with directions to reverse the decision and order of the NSP and remand the case to the NSP with directions to reclassify McCray as a Level 2 offender on the basis of a total score of 115 on the risk assessment instrument.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY MASON, APPELLANT.
709 N.W.2d 638

Filed February 3, 2006. No. S-04-852.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. **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 discretion a factor in determining admissibility.
3. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence

admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

6. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
7. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given.
8. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
9. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
10. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
11. **Trial: Rules of Evidence: Expert Witnesses.** 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.
12. ____: ____: ____. The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony. After the factual basis, data, principles, or methods, or their application has been sufficiently called into question, then the proponent of the expert testimony has the burden of showing that the testimony is reliable.
13. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Andrea D. Snowden, and Ryan Esplin, Senior Certified Law Student, for appellant.

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.

NATURE OF CASE

Rodney Mason appeals his convictions and sentences in Lancaster County District Court for first degree murder and use of a deadly weapon to commit a felony. Mason assigns error to, inter alia, the trial court's refusal to give certain requested instructions with respect to the testimonies of the State's main witnesses against him and to the trial court's disposition of his challenge to the testimony of the State's firearms expert. We affirm Mason's convictions and sentences.

STATEMENT OF FACTS

On July 31, 2003, the State filed an information charging Mason with first degree murder and use of a deadly weapon to commit a felony in connection with the April 6, 2003, shooting death of Sergio King in Lincoln. The main evidence against Mason consisted of the testimonies by three eyewitnesses: Nicole Wagy, Prentice Mason (Prentice), and Lolester Mitchell. Prentice is Mason's brother. Wagy and Prentice both generally testified that they were in Wagy's car with Mason and King when Mason shot King. Mitchell testified that he was in another car when he saw King exiting Wagy's car and saw King shot by someone from inside Wagy's car. Mitchell was unable to identify which person within Wagy's car fired the shot and was unable to identify Mason as being one of the people inside the car. The evidence at trial also included testimony by several other witnesses, including expert testimony by the forensic pathologist who performed the autopsy, which results showed that King died from gunshot wounds, and by a firearms expert from the Nebraska State Patrol who testified regarding his examination of the bullets and casings found in or near King's body.

Testimonies of Wagy and Prentice.

Wagy and Prentice were the two witnesses who identified Mason as the person who shot King. Wagy testified that she was at a party at Prentice's house on the night of April 5, 2003. Mason was also at the party. Mason and some other individuals

spent the night at Wagy's apartment. On the morning of April 6, Wagy decided to obtain some marijuana and she contacted King, from whom she had previously bought marijuana. Wagy drove her car to meet King, and she brought Mason with her. Wagy and Mason picked up Prentice on the way to meeting King. Mason rode in the front passenger seat of Wagy's car, and Prentice rode in the passenger's-side back seat. Wagy drove to a location where they met King. Another person was in the car with King. King did not want to stay at that location because it was near a police substation, so they drove both cars to some other locations until they arrived at the place chosen by King. King came out of his car and got into the driver's side back seat of Wagy's car. The parties in the car had a conversation regarding the purchase of marijuana, and eventually the conversation turned to a discussion of purchasing crack cocaine. At one point, Mason pulled out a gun and told King, "Break yourself." Mason then fired a shot at King, and Wagy noticed blood on King's hand. King got out of Wagy's car and ran toward his car, and Wagy drove away. Wagy did not recall hearing or seeing a second shot. She testified that she did not know that Mason was going to shoot King.

After the shooting, Wagy drove to Prentice's home, where she stayed for a while before leaving Prentice and Mason and returning to her home. She checked into a hotel that night with some friends and learned from a television news report that King had been killed. After learning of the killing, Wagy and a friend took her car to a location west of Lincoln, where they intentionally crashed and burned the car. Wagy then returned to the hotel room, where she stayed that night and where the police found her the next day and questioned her regarding King's shooting.

Prentice's testimony regarding the events of April 6, 2003, was similar to the account given by Wagy. Prentice testified that when he got into Wagy's car, he did not know there was going to be a drug transaction, and that he learned about the transaction when he heard Wagy make a call to King. Later, as Mason and King were talking about drug transactions in Wagy's car, Prentice stated that he saw Mason pull out a gun. Prentice testified that he knew Mason had a gun with him because Mason had shown it to him earlier, but Prentice stated that he did not know Mason was going to use it. Prentice stated that the gun

was a "Tech-22." Prentice next testified that he heard Mason tell King, "Break yourself." Prentice testified that "break yourself" meant that Mason was telling King to "Give me what you got. . . . Anything you have, give it to me." Prentice testified that King "looked at [Mason] funny" and that Mason then shot King in the hand. King's hand was resting on his thigh. Prentice testified that King then got out of the car and that as King was leaving the car, Mason shot at King a second time.

Prentice testified that Wagy drove the car away immediately after the shootings and that he did not know whether the second shot hit King or what happened to King after they left. According to Prentice, Wagy, Mason, and Prentice returned to Prentice's apartment, and Prentice threw the clothes he had been wearing into a Dumpster. Prentice learned that night from television news reports that King had died. After learning of King's death, Prentice asked a cousin to take him and Mason to Omaha.

Both Wagy and Prentice were contacted by police some time after King's death and each provided various different stories to police before they eventually told the version of events to which they testified at trial and which identified Mason as the shooter. These stories ranged from Prentice's initial denial of any knowledge or involvement to Wagy's identifying people other than Mason as the shooter. Both Wagy and Prentice were questioned at trial regarding their prior inconsistent statements.

During Wagy's testimony, Mason requested that a limiting instruction based on NJI2d Crim. X5.3 regarding prior inconsistent statements be read to the jury at the end of Wagy's testimony. Mason requested a similar instruction with respect to Prentice's testimony. The court denied both requests. In denying the request at the time of Prentice's testimony, the court noted that it had given an expanded introductory jury instruction at the beginning of trial regarding the evidence that can be considered in determining witness credibility and that the instruction covered significant portions of what Mason requested in this instruction. The court also gave a final jury instruction to the effect that the jury could consider prior inconsistent statements in determining the credibility of witnesses; however, the court denied Mason's request to give final jury instructions specifically naming Wagy and Prentice as witnesses whose prior

inconsistent statements could be considered in determining their credibility.

Mason also requested final jury instructions with respect to both Prentice's and Wagy's testimonies that were based on NJI2d Crim. 5.6, regarding accomplice testimony. Instead of the requested instruction, the court gave an instruction stating, "You should closely examine the testimony of . . . Wagy and Prentice . . . for any possible motive each might have to testify falsely." Mason objected to this instruction.

Firearms Expert Testimony.

Prior to trial, Mason filed a motion in limine seeking to prevent the State from presenting evidence "regarding firearm examination, toolmark examination, rifling characteristics examination, comparison testing or manufacturer identification completed on bullets or shell casings in this case." He asserted that such evidence did "not meet the foundation requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579[, 113 S. Ct. 2786, 125 L. Ed. 2d 469] (1993) and adopted by the Nebraska Supreme Court in *Schafersman v. Agland Coop.*, 262 Neb. 215[, 631 N.W.2d 862] (2001)." Mason requested an evidentiary hearing to determine the reliability of such evidence and whether the witness who would present such testimony was an expert and would give relevant testimony. In response to the motion in limine, the court ordered the State's expert to submit himself for a deposition and ordered Mason to "file a specifications [sic] of the inadequacies of the expert's testimony in sufficient detail to permit the state to respond, together with all documentary evidence he intends to rely on and a brief in support thereof." The court further ordered the State to respond to Mason's filing, ordered Mason to file a reply to the State's response, and set a hearing date.

The State's firearms expert, Mark S. Bohaty, gave a deposition on January 16, 2004, in which he was questioned by Mason. The State was present at the deposition but did not question Bohaty. Thereafter, Mason filed a second motion in limine in which he argued, inter alia, that the evidence was not relevant because the expert could only testify as to what *might* have happened; that any probative value of the evidence would be outweighed by the

danger of unfair prejudice, because the expert's conclusions were based on conjecture; that reliability of the expert's theory and methodology had not been established, because the expert only provided his opinion as to such reliability and did not provide any documentation of testing of such reliability; and that the expert had not provided documentation to show that the instruments he used were routinely tested and assessed to ensure accuracy. At the hearing on Mason's motion in limine, the State entered into evidence the laboratory report of Bohaty's firearms testing. In addition, because Bohaty had testified at the separate trial of Mason's cousin regarding much the same matters to which Bohaty was going to testify in Mason's trial, the State offered the bill of exceptions from the cousin's trial.

On February 25, 2004, the court entered an order overruling the motion in limine. The court stated in the order, inter alia, that

> the testimony Sgt. Bohaty intends to offer will address the bullets retrieved from the body of the victim in this case, . . . King, shell casings found at the scene of the shooting, the type of firearms that would make the markings found on the bullets, and a comparison of the appearance of those firearms to descriptions of the firearm used in this shooting.

Regarding Mason's challenge to the reliability of Bohaty's expert testimony, the court generally found that there was no evidence to suggest that the methodology Bohaty used to form his opinions was unreliable, that Bohaty appeared well qualified to render such opinions, that the opinions Bohaty intended to offer did not appear to overreach the techniques he used to reach his conclusions, and that the techniques he used were accepted in the firearms identification community. The court therefore denied Mason's motion in limine.

When Bohaty testified at trial, Mason renewed his objection based on the motion in limine. The court overruled the objection and noted Mason's continuing objection. Bohaty generally testified regarding his qualifications and the reliability of the methods he used to form his expert opinions. He testified that he had examined the bullets and cartridges related to King's shooting and that although he could not positively identify the bullets as having come from the same gun, the markings on the bullets were consistent with their having been fired from one gun. Bohaty also

testified that from his examination of the markings on the bullets, he determined that they had been fired from one of two types of guns, one of which was a Tech-22. Prentice had testified that Mason had a Tech-22 with him on the day of the shooting. The Tech-22 was not located. Bohaty was shown a drawing of a gun made by Wagy in which she described the gun Mason had, and Bohaty testified that the drawing was consistent with the appearance of a Tech-22.

Testimony of Forensic Pathologist.

During direct testimony by the forensic pathologist, Dr. Matthias Okoye, the State asked that Dr. Okoye be allowed to review his final anatomic report in order to refresh his memory. Mason had no objection upon the initial request. However, after further testimony, Mason objected, stating that Dr. Okoye was "just reading from his [final anatomic] report. He's not testifying from any independent recollection or anything like that at this time."

In connection with his contention that Dr. Okoye was reading from his report, Mason pointed to testimony in which Dr. Okoye stated that a small projectile was recovered in relation to a "gunshot wound of the left anterior thigh area," and then immediately thereafter, Dr. Okoye had corrected his statement saying "Actually, it's a typographical error. It should be right. . . . It was the right thigh. So this is, you know, [a] typographical error. . . . And then on page six, you know, instead of — instead of left it should be right, actually. On the heading should be right." The court overruled Mason's objection, stating, "Well, I'm going to let him proceed. . . . [Dr. Okoye's] not just reading out loud what his report is. . . . I think that's apparent to everybody that he's reading his report and then testifying." Mason did not make a specific objection after this ruling.

Other Matters at Trial.

Mason made two motions for mistrial during the course of the trial. The first motion for mistrial occurred during jury selection. Prior to jury selection, the court had granted Mason's motion to allow him to wear civilian clothing and to remove all visible restraints in order to shield the jury from the fact that Mason was

in jail during the pendency of the trial. During voir dire, jurors had been asked if they knew anyone in the courtroom. At the end of voir dire, the State asked if anyone "for whatever reason would answer something different or wants to offer any other opinions." One potential juror stated that "there is [sic] two people that have changed in this room since this morning and I do know one of them fairly close." The prospective juror stated that the person he knew was "[y]our transport jailer." The State did not pursue the issue, and the prospective juror gave no further elaboration. Immediately thereafter, the proceedings were adjourned, and after recess, before the prospective jurors returned, Mason moved for mistrial based on the potential juror's identification of a person in the courtroom as a transport jailer. The motion was denied. Further, Mason rejected the court's offer to instruct the other potential jurors to ignore the comment, reasoning that such instruction would draw their attention to the comment. Jury selection continued.

The second motion for mistrial occurred during Prentice's testimony. Prior to trial, the court had sustained a motion in limine preventing witnesses from testifying about their own or others' participation in gangs. During direct examination, the State asked Prentice why he initially lied to the police. Prentice replied that he was scared, that he was protecting his brother, and that "if — well, where I grew up, if you sit there and tell somebody it can probably mean your life." Defense counsel immediately approached the bench and moved for mistrial, arguing that Prentice's answer violated the motion in limine against testimony regarding gang affiliation. The court denied the motion for mistrial, and Prentice's testimony continued.

At the final jury instruction conference, Mason requested a lesser-included offense instruction on robbery and attempted robbery as lesser-included offenses of felony murder. The court refused the instruction.

The jury found Mason guilty of first degree murder and use of a deadly weapon to commit a felony. The court sentenced Mason to life imprisonment on the murder conviction and to a consecutive term of 10 to 25 years' imprisonment on the weapon conviction. Mason appeals.

ASSIGNMENTS OF ERROR

Mason asserts that the court erred in (1) refusing to give his requested instructions regarding prior inconsistent statements with respect to Wagy's and Prentice's testimonies; (2) refusing to give his requested accomplice instructions with respect to Wagy's and Prentice's testimonies; (3) refusing to give a lesser-included offense instruction regarding robbery and attempted robbery; (4) overruling his motion in limine and allowing the expert testimony of Bohaty and, specifically, in placing the burden of proof on him and in giving inadequate reasoning for its ruling; (5) allowing the forensic pathologist to testify using his final anatomic report; and (6) overruling both his motions for mistrial. Mason also asserts that there was insufficient evidence to support his convictions.

STANDARDS OF REVIEW

[1] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[5] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility

of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[6] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

ANALYSIS

Prior Inconsistent Statements Instructions.

Mason first asserts that the court erred in refusing to give his requested instructions regarding prior inconsistent statements at the time of Wagy's and Prentice's testimonies. The instructions Mason requested with respect to Wagy's testimony read as follows:

> Members of the jury, the evidence that . . . Wagy allegedly made statements that may be inconsistent with her testimony in court was brought to your attention only to help you decide if you believe what . . . Wagy testified to in court and, if so, how much to rely on that testimony. If you believe that she said something different earlier, then it will be up to you to decide if what she said here in court was true. You may not consider what may have been said earlier as proof of [Mason's] guilt or of any fact contained in those earlier statements.

Mason requested a similar instruction with respect to Prentice's testimony.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). The parties do not appear to dispute that the proposed instructions were correct statements of the law, and as Mason notes, the instructions were based on NJI2d Crim. X5.3. It further appears undisputed that the evidence supported the

instructions because there was evidence that both Wagy and Prentice had made prior statements that were inconsistent with their testimonies at trial. Thus, resolution of this issue depends on whether Mason was prejudiced by the court's refusal to give the tendered instructions. We conclude that Mason was not prejudiced and that therefore, the court's refusal to give the instructions was not reversible error.

Mason argues that he was prejudiced by the refusal to give the instructions because it was critical to his defense to emphasize the numerous inconsistent statements made by the two witnesses whose testimonies served as evidence identifying him as the shooter. He argues that the instructions needed to be given at the time of those testimonies in order to properly focus the jury's attention on the significance of the prior inconsistent statements.

[7,8] We have stated that it is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Id.* In this respect, we note that in both the opening and closing instructions, the court instructed the jury regarding the use of prior inconsistent statements to assess witnesses' credibility. Ordinarily, these opening and closing instructions are sufficient. In the opening instructions, the jury was instructed that it would decide the credibility of witnesses and that in determining credibility it could consider, inter alia, "previously [sic] statements or conduct of the witness that tends to support or to contradict the witness' testimony at this trial." In the closing instructions, the court similarly instructed the jury members that they were "the sole judges of the credibility of the witnesses" and that in determining this they could consider, inter alia, "[a]ny previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial."

Also, contrary to Mason's argument that the jury's attention was not properly drawn to the significance of the prior inconsistent statements, we note that in the cross-examinations of both

Wagy and Prentice there was substantial questioning regarding each witness' prior statements and the inconsistency of such statements when compared to their testimonies given at trial. In addition, Mason's closing arguments focused attention on Wagy's and Prentice's prior inconsistent statements. Because the substance of the requested instructions was covered in both the opening and closing instructions and because the jury's attention was directed toward the importance of the prior inconsistent statements, both in the cross-examinations and during Mason's closing arguments, we conclude that Mason has failed to demonstrate that he was prejudiced by the court's refusal to give the requested instructions at the time of Wagy's and Prentice's testimonies.

Accomplice Instruction.

Mason also assigns error to the court's refusal to give his requested instructions based on NJI2d Crim. 5.6, regarding accomplice testimony, with respect to both Prentice's and Wagy's testimonies. We conclude that the requested instructions were not supported by the evidence and that therefore, the court did not err in refusing to give the requested instructions.

The requested instruction with respect to Wagy read as follows:

> There has been testimony from . . . Wagy, a claimed accomplice of [Mason]. You should closely examine her testimony for any possible motive she might have to testify falsely. You should hesitate to convict [Mason] if you decide that . . . Wagy testified falsely about an important matter and that there is no other evidence to support her testimony.
>
> In any event, you should convict [Mason] only if the evidence satisfies you beyond a reasonable doubt of his guilt.

Mason requested an identical instruction with respect to Prentice's testimony. Instead of the requested instructions, the court gave an instruction stating, "You should closely examine the testimony of . . . Wagy and Prentice . . . for any possible motive each might have to testify falsely." Mason objected to the giving of this instruction.

As noted above, to establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct

statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). We determine that the full instructions requested by Mason were not warranted by the evidence and that Mason was not prejudiced by the court's refusal to give the full instructions.

Mason points to the testimonies given by Wagy and Prentice to the effect that Mason, Wagy, and Prentice all went together to get drugs from King. Both Wagy and Prentice testified that immediately prior to shooting King in the hand, Mason said to King, "Break yourself," and Prentice testified that this statement meant that Mason was telling King to "Give me everything." Mason argues that the jury could have inferred from this that Mason was robbing King of the drugs in his possession and that the three had conspired and planned to rob King. Mason further argues that the two witnesses' status as accomplices is supported by evidence of their behavior after the shooting — both witnesses initially lied to the police regarding their involvement; Prentice threw away his clothes, which had been stained by King's blood; Wagy was attempting to hide from police when they contacted her the day after the shooting; and Wagy had burned her car, which was also stained with King's blood.

With respect to the definition of an "accomplice," this court has stated:

> " 'To constitute one an accomplice he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice . . . .' "

State v. Sutton, 231 Neb. 30, 45, 434 N.W.2d 689, 699 (1989) (quoting *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960). See, also, *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989); *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). Based on this definition, although there might have been evidence

that Wagy and Prentice were accomplices to an attempted drug transaction, there is no evidence that they were accomplices to an attempted robbery or to the shooting. Neither Wagy nor Prentice testified that there was a plan to rob or to kill King. Instead, they testified only that they were meeting King to purchase drugs, and they testified that they did not know Mason was going to attempt to rob or shoot King. Mason testified in his defense that he had no part in the events leading to King's death, and therefore, there was nothing in Mason's testimony which would indicate a plan between himself, Wagy, and Prentice to rob or kill King. Because there was no evidence that Wagy and Prentice were accomplices to the crimes charged in this case, the court did not err in refusing to give the entire accomplice instructions requested by Mason.

To the extent there was evidence that Wagy and Prentice tried to cover up the crime, such evidence points to their possibly being "accessories after the fact." In *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), the defendant requested an accomplice instruction based on NJI2d Crim. 5.6. Instead, the court gave a jury instruction stating that there was evidence that the witnesses at issue were " 'accessories after the fact' " and stating that " '[y]ou should closely examine their testimony for any possible motive they might have to testify falsely.' " 261 Neb. at 45, 621 N.W.2d at 130. We acknowledged that at least one of the witnesses was arguably an accomplice rather than an accessory after the fact, and we stated, "It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error." *Id.* at 61, 621 N.W.2d at 139. However, in *Quintana*, we held that considering the instructions taken as a whole, the substance of the refused instruction was presented to the jury. We found it important in *Quintana* that the jury was instructed to closely examine the witnesses' testimony for any possible motive to testify falsely and that the State was required to prove each and every element of the offense charged beyond a reasonable doubt and that otherwise, the jury was to find the defendant not guilty.

In the present case, as in *Quintana*, Mason was not prejudiced by the court's refusal to give his requested instructions

because the parts of the instructions that were relevant, namely that the jury should be instructed to closely examine the witnesses' testimony for motive to testify falsely and to convict only if there is evidence beyond a reasonable doubt, were given. Instructions identifying Wagy and Prentice as "accomplices" were not necessary, nor were such instructions supported by the evidence. Therefore, the court in this case did not err in refusing to give the entire instructions requested by Mason, and we reject this assignment of error.

Lesser-Included Offense Instruction.

Mason asserts that the court erred in refusing to give an instruction regarding robbery and attempted robbery as lesser-included offenses of felony murder. We conclude that the evidence in this case did not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery and that therefore, the court did not err in refusing the instruction.

[9] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). With respect to whether robbery and attempted robbery are lesser-included offenses of felony murder in this case, we note that in *State v. Bjorklund*, 258 Neb. 432, 472, 604 N.W.2d 169, 207 (2000), we said:

> We have stated that a predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause. See, *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). However, we have not directly confronted the question of whether a defendant in a felony murder case may be entitled to a lesser-included offense instruction on the underlying felony.

In *Bjorklund*, we determined that we did not need to decide the issue because even if the predicate felony were a lesser-included offense, the evidence in that case did not produce a rational basis for acquitting the defendant of felony murder and convicting him of the predicate felonies and, therefore, the second prong of *Williams* was not met.

Similar to *Bjorklund*, in the present case, we need not decide whether robbery and attempted robbery are lesser-included offenses of felony murder because the evidence in this case does not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery. The evidence presented by the State supported a finding of felony murder. Wagy's testimony was that Mason shot King in the hand, although she was not clear on whether he fired a second shot, and Prentice's testimony was that Mason shot King in the hand and shot at him again when King left the vehicle. Although he could not identify Mason as the shooter, Mitchell testified that King was shot by a bullet fired from the car that Wagy and Prentice testified was occupied by Mason, Wagy, and Prentice. Mason's testimony in his own defense was that he was elsewhere at the time the murder was committed and that he was not involved in any of the events. Therefore, either the jury could have believed Mason's story, in which case, he would not have been found guilty of either felony murder or the predicate felony, or the jury could have believed, in whole or in part, the versions told by Wagy, Prentice, and Mitchell, in which case, Mason would be found guilty of felony murder. There was no rational basis on which the jury could have viewed the evidence presented to acquit Mason of felony murder but find him guilty of robbery or attempted robbery. Although Mason argues that the jury could have found that he attempted to rob King but that someone else, such as Mitchell, could have shot King, Mason's theories are based on speculation, there was no evidence presented to support such a finding, and, on the contrary, there was evidence that Mason shot King and that King died of gunshot wounds.

Because the evidence does not produce a rational basis for acquitting Mason of felony murder and convicting him of robbery or attempted robbery, the court did not err in refusing the

lesser-included offense instruction. We therefore reject this assignment of error.

Challenge to Firearms Expert Testimony.

Mason asserts that the court erred in overruling his motion in limine and allowing the testimony of the State's firearms expert, Bohaty. Mason argues that the court specifically erred by (1) putting the burden on Mason to prove the unreliability of the expert's testimony rather than putting the burden on the State to prove reliability and (2) failing in its order to give adequate analysis of its reasons for admitting the evidence. We find no merit to Mason's claims, and we conclude that the court did not abuse its discretion by admitting the testimony.

[10] An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (*Daubert/Schafersman*). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function 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, supra.*

A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and

reliable. To aid the court in its evaluation, the court may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). *Tolliver, supra.*

Mason's arguments on appeal with regard to admission of the firearms expert testimony appear to focus mainly on the second step of this process, in which the court conducts a *Daubert* analysis to determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To the extent Mason challenges the court's rulings on the other steps of the process, we conclude that the foundation established by the State supported the court's conclusions that Bohaty was qualified to testify as a firearms expert, that the methodologies used by Bohaty could be applied to the evidence in this case, and that Bohaty's testimony was more probative than prejudicial.

Regarding Mason's challenges to the trial court's *Daubert* analysis, we note that the substance of Bohaty's testimony involved opinions he developed based on his examination of the casings and bullets related to the King shooting and, in particular, his examination of the markings on the bullets. From this examination, Bohaty was able to testify to his opinions regarding the type of gun or guns from which the bullets were likely fired. The *Daubert* analysis therefore was focused on the reasoning and methodologies Bohaty used to form these opinions.

[11,12] Mason first argues that the court improperly conducted the *Daubert* analysis by putting the burden on him to prove that Bohaty's methodology was unreliable rather than putting the burden on the State to prove that it was reliable.

With regard to the respective burdens of the parties to a *Daubert* challenge, we have stated that "[o]nce 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.' " *Zimmerman v. Powell*, 268 Neb. 422, 429, 684 N.W.2d 1, 8 (2004) (quoting *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)). It is thus apparent that the initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony. After the factual basis, data, principles, or methods, or their application has been sufficiently called into question, then the proponent of the expert testimony has the burden of showing that the testimony is reliable. See *U.S. v. Hicks*, 389 F.3d 514 (5th Cir. 2004).

In the present case, Mason filed an initial motion in limine challenging Bohaty's testimony. The motion in limine was a general challenge which failed to specify the aspects of Bohaty's testimony that Mason asserted to be unreliable. In reaction to the initial motion in limine, the court ordered Bohaty to submit himself for deposition and ordered Mason to specify the inadequacies of the expert's testimony. The court thus aided Mason in sufficiently calling into question aspects of Bohaty's testimony.

After the deposition, Mason filed a second motion in limine, in which he asserted, inter alia, that the reliability of Bohaty's theory and methodology had not been established, because he only provided his opinion as to such reliability and did not provide any documentation of testing of such reliability. Although in his original motion in limine, Mason had made general assertions regarding reliability, in his second motion in limine, Mason specified his objections to the reliability of Bohaty's testimony to the extent that he sufficiently called reliability into question.

Contrary to Mason's argument on appeal, the court did not place the burden on him to prove that the expert testimony was unreliable. Instead, by giving Mason the opportunity to depose Bohaty and by directing him to specify his objections to Bohaty's testimony, the court was guiding Mason in meeting his initial burden to sufficiently call some aspect of the expert testimony into

question. After Mason had done so in the second motion in limine, the State then had the burden of showing that the testimony was reliable. The State undertook to meet this burden by entering into evidence, in addition to Bohaty's deposition taken by Mason, the laboratory report of Bohaty's testing in this case and the bill of exceptions from the trial of Mason's cousin, at which trial, Bohaty testified to the same matters to which he was going to testify in Mason's trial. Bohaty's testimony at the cousin's trial included testimony which provided foundation with regard to Bohaty's qualifications as well as the reliability of the methodology he used to form his opinions. The burden was on the State to establish reliability, and in its order overruling Mason's motion in limine, the court determined that the State had met its burden.

With respect to the court's order, Mason argues that the court failed to give adequate analysis of its reasons for admitting the expert testimony of Bohaty. Mason relies on *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004), in which this court concluded in a jury trial that because the trial court failed to explain its reasoning, the court had abdicated its gatekeeping duty under *Daubert/Schafersman*. Compare *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004) (extensive findings in nonjury case demonstrated gatekeeping duty performed). We stated in *Zimmerman* that a 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.

268 Neb. at 430-31, 684 N.W.2d at 9. We concluded in *Zimmerman* that the record included the court's conclusions, but lacked analysis. We elaborated, stating:

> The court should have explained why [the expert's] trial testimony was sufficient to show that [the scientific method he used] and the manner in which he used it were reliable. For example, if the court believed that [the method] was reliable because [the expert] suggested that it was widely accepted as quality software within the engineering community, it should have said so.

268 Neb. at 435, 684 N.W.2d at 12.

In the present case, the court in its order gave reasons why it found that Bohaty's testimony was reliable. Although the court's analysis was not as extensive as might have been appropriate in a more complicated case, given the subject matter at issue, the court's analysis was adequate. In *Zimmerman*, we acknowledged that the *Daubert* model recognizes that "a range of reasonable methods exists for distinguishing reliable expert testimony from false expertise." 268 Neb. at 429, 684 N.W.2d at 8. We further noted that "the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Daubert/Schafersman*" and that "[t]he trial court's discretion further extends to deciding what factors are reasonable measures of reliability in each case." *Id.*

The type of ballistics and firearms testimony that Bohaty presented in this case was not novel and is fairly routine in cases involving the use of firearms. Therefore, the *Daubert* analysis did not need to be as extensive as it might have been if the testimony involved more complicated, less routine methods of testing. In *State v. Leibhart*, 266 Neb. 133, 144, 662 N.W.2d 618, 628 (2003), with respect to a *Daubert* challenge to expert testimony regarding shaken baby syndrome, we stated:

> We note that the evidence presented at the *Daubert* hearing in this case was not extensive and consisted mainly of [the expert's] testimony and his reference to the relevant literature. However, the level of inquiry in a *Daubert* hearing may vary depending on the nature of the expert testimony challenged, and the inquiry in the present case was appropriate and sufficient. As we stated in *Schafersman* [*v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)], *Daubert* "does not require that courts reinvent the wheel each time that evidence is adduced." 262 Neb. at 228, 631 N.W.2d at 874.

We noted in *Leibhart* that expert testimony regarding shaken baby syndrome had been previously admitted by courts in this state and that courts in other states had found such testimony reliable. We further stated:

> General acceptance is one of several factors that may be considered to determine the reliability of expert testimony.

> In this regard, we note that a reexamination under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), is most appropriate "where recent developments raise doubts about the validity of previously relied-upon theories or techniques." *Schafersman*, 262 Neb. at 228, 631 N.W.2d at 874.

Leibhart, 266 Neb. at 144, 662 N.W.2d at 628.

Similar to the expert testimony in *Leibhart*, the type of ballistics and firearms testimony to which Bohaty testified in this trial has commonly been admitted in this state. See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997); *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994); *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). Expert testimony similar to that given in this case has been found reliable under a *Daubert* analysis in other jurisdictions. See *U.S. v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) (stating that "[w]e have not been pointed to a single case in this or any other circuit suggesting that the methodology employed by [the government's ballistics expert] is unreliable"). See, also, *U.S. v. Foster*, 300 F. Supp. 2d 375 (D. Md. 2004), and cases cited therein.

In a case involving a more novel methodology or a methodology which had been more significantly called into question, a more extensive inquiry and more extensive analysis and reasoning would have been indicated. Considering the nature of the expert testimony involved in this case, we conclude that the court's inquiry, analysis, and ruling with respect to Mason's challenge were adequate and that the court did not abuse its discretion in admitting Bohaty's expert testimony. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005) (admissibility of expert testimony reviewed for abuse of discretion). We therefore reject Mason's assignments of error with respect to the admission of Bohaty's testimony.

Testimony of Forensic Pathologist.

Mason asserts that the court erred in overruling his objection to the testimony of the forensic pathologist, Dr. Okoye. Mason objected on the basis that Dr. Okoye was "just reading from his

[final anatomic] report. He's not testifying from any independent recollection or anything like that at this time." We conclude that the record indicates that Dr. Okoye was not merely reading from his report and that therefore, the court did not err in overruling Mason's objection.

In support of his assertion that it was error for the court to allow Dr. Okoye to testify by reference to his prepared notes under the guise of refreshing his recollection, Mason cites *Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989). Although the Court of Appeals for the Eighth Circuit in *Hall* found the use of notes to be error, the court noted that "[n]o foundation was laid regarding [the witness'] need to refresh his memory or whether the notes would be of assistance." 873 F.2d at 1136. Likewise, in *Baker v. Boren*, 129 Idaho 885, 893, 934 P.2d 951, 959 (Idaho App. 1997), also cited by Mason, the court concluded that "the proper foundation for use of [a witness'] notes was not laid." In the present case, Mason makes no argument with regard to foundation and it appears from the record that proper foundation was made that Dr. Okoye needed to refresh his memory and that the report would help him do so. Although the cases indicate that it was error for the court to allow a witness with no independent recollection to simply read from notes, the record in this case does not indicate that Dr. Okoye simply read from his report. We further note that Mason did not move to strike Dr. Okoye's testimony, nor does he direct us on appeal to portions of the testimony which should have been excluded as prejudicial.

When overruling Mason's objection, the court in this case stated that "Dr. Okoye's not just reading out loud what his report is." For support of his contention that Dr. Okoye was simply reading from the report, Mason points to testimony in which Dr. Okoye states that a small projectile was recovered in relation to a "gunshot wound of the left anterior thigh area" and then immediately thereafter amends the statement saying, "Actually, it's a typographical error. It should be right. . . . It was the right thigh. So this is, you know, [a] typographical error. . . . And then on page six, you know, instead of — instead of left it should be right, actually. On the heading should be right." The portion of the record highlighted by Mason does not indicate that Dr.

Okoye was simply reading his report into the record; to the contrary, the witness' correction of the report indicates that he was testifying from present recollection rather than merely from reading the report.

The trial court observed Dr. Okoye's testimony and stated that Dr. Okoye was not merely reading from his report, and our review of the record does not contradict this statement but instead indicates that Dr. Okoye was testifying from his independent recollection as evidenced by his correcting portions of the report. We therefore conclude that the court did not err in overruling Mason's objection, and we reject this assignment of error.

Motions for Mistrial.

Mason asserts that the court erred in denying both motions for mistrial that he made during the course of the trial. We conclude that the court did not abuse its discretion in denying either motion.

[13] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *Id.*

The first motion for mistrial occurred during jury selection when a potential juror stated that he knew a person in the courtroom and that the person was "[y]our transport jailer." Mason moved for mistrial on the basis that the potential juror's comment could prejudice the other jurors. Mason argued that the comment violated the spirit of rulings that had been issued prior to trial allowing Mason to wear civilian clothing and to remove all restraints except a leg restraint while in court. Mason argued that the object in granting such motions was to shield the jury from the knowledge that Mason was in jail during trial, because such knowledge would be prejudicial to his defense. The court overruled the motion for mistrial.

We conclude that the court did not abuse its discretion in denying the first motion for mistrial. The prospective juror's statement

that he recognized a person in the courtroom as a transport jailer was not a statement that Mason was known to be incarcerated, and in any event, we cannot say that the comment would have prejudiced the jury with respect to its task of fairly weighing the evidence. The State did not further question the prospective juror, and he did not further elaborate. The challenged comment was fleeting and did not violate the specific pretrial rulings.

The second motion for mistrial occurred during Prentice's testimony when Prentice stated that he had originally lied to the police because "if — well, where I grew up, if you sit there and tell somebody it can probably mean your life." Mason argued that the comment violated an order granting a motion in limine preventing witnesses from testifying about their own or others' participation in gangs. The court denied Mason's motion for mistrial.

We conclude that the court did not abuse its discretion in denying Mason's second motion for mistrial. Prentice's comment, "where I grew up," did not violate the motion in limine against testimony regarding gang affiliation. Fear of reprisal for testifying could be a concern whether or not in reference to gang activity, and Prentice's expression of such fear would not necessarily be understood as testimony regarding gang activity.

We note that with regard to the prospective juror's comment in this case, Mason declined the court's offer to give an instruction at the time. Furthermore, with respect to both incidents in this case, neither incident required an instruction or admonition because neither comment was so prejudicial that it could have prevented a fair trial. In *State v. McLemore*, 261 Neb. 452, 466, 623 N.W.2d 315, 327 (2001), we concluded that the court did not abuse its discretion in not granting a motion for mistrial based on a "vague statement [that] did not inform the jury" of potentially prejudicial information. There was no mention in *McLemore* that any admonition or instruction was made with respect to the statement. Similarly, in the present case, the statements upon which Mason moved for mistrial did not, as Mason argues, inform the jury of potentially prejudicial information and therefore, there was no need for an admonition or instruction. Furthermore, if the court had instructed on either incident in this case, it would merely have served to draw the jury's

attention to the comments and raised questions in the jurors' minds regarding the meaning and importance of the comments.

We conclude that the court did not abuse its discretion in overruling the motions for mistrial, and we reject this assignment of error.

Sufficiency of Evidence.

Finally, Mason asserts that the evidence was not sufficient to support his convictions for first degree murder and use of a deadly weapon to commit a felony. We conclude that the evidence in this case was sufficient to support Mason's convictions.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Mason asserts that the only direct evidence of his guilt were the testimonies of Wagy and Prentice. He argues that because their testimonies were "unbelievable," they lacked sufficient probative force for the jury to find him guilty beyond a reasonable doubt. Mason posits that it is possible that Wagy or Prentice committed the murder or that they conspired together and blamed Mason for the killing in order to lessen their punishment. Mason contends that because of Wagy's and Prentice's inconsistent statements and their potential motives to lie, this court should conclude that their testimonies lacked sufficient probative force as a matter of law and that therefore, there was not sufficient evidence to convict Mason.

The issue of the witnesses' credibility was to be decided by the jury, and if the jury believed their testimonies, there was sufficient evidence to support Mason's conviction. As noted above, in reviewing a conviction, this court does not pass on the

credibility of witnesses because such matters are for the finder of fact. *Sanders, supra.* Mason's argument hinges on his proposal that this court should conclude as a matter of law that Wagy's and Prentice's testimonies were unreliable; under the standard of review recited above, we will not do so. The jury was presented with evidence from which it could assess the witnesses' credibility. Despite their inconsistent prior statements and their potential motives, about which the jury was made aware, the jury was properly permitted to believe Wagy's and Prentice's testimonies to the effect that Mason shot King, and such testimonies, along with the other evidence presented, including evidence that King died from gunshot wounds, provided sufficient evidence on which to convict Mason. We therefore reject this assignment of error.

CONCLUSION

Having rejected each of Mason's assignments of error, we affirm his convictions and sentences.

AFFIRMED.

BECKY A. WHITE, APPELLANT, V.
VERLYN J. WHITE, APPELLEE.
709 N.W.2d 325

Filed February 3, 2006. No. S-05-135.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Child Custody: Jurisdiction: Appeal and Error.** The question as to whether jurisdiction existing under the Nebraska Child Custody Jurisdiction Act should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal.
3. **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 conclusions reached by the trial court.

4. **Actions: Child Custody: Time.** Pursuant to Neb. Rev. Stat. § 43-1266 (Reissue 2004), a motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made.
5. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. **Child Custody: Jurisdiction.** A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination if this state is the home state of the child at the time of commencement of the proceeding.
7. **Child Custody: States: Time: Words and Phrases.** "Home state" is defined as the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as a parent, for at least 6 consecutive months.
8. **Child Custody: Jurisdiction: States.** A court of this state shall not exercise its jurisdiction under the Nebraska Child Custody Jurisdiction Act if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with the Nebraska Child Custody Jurisdiction Act.
9. **Child Custody: Modification of Decree: Jurisdiction: States.** A court which has jurisdiction under the Nebraska Child Custody Jurisdiction Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
10. **Child Custody: Jurisdiction: States.** The end goal of the Nebraska Child Custody Jurisdiction Act is that litigation concerning the custody of a child takes place in the state which can best decide the case.
11. **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 asserting the error.

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

John J. Kohl, of Raynor, Rensch & Pfeiffer, for appellant.

Stan A. Emerson, of Sipple, Hansen, Emerson & Schumacher, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Becky A. White, now Becky A. Bedore, appeals the order of the Platte County District Court granting Becky's ex-husband, Verlyn J. White, permanent custody of the parties' children. We

granted Becky's petition to bypass the Nebraska Court of Appeals.

FACTUAL BACKGROUND

Becky and Verlyn were divorced in Kansas in April 1999. At the time of the divorce, the parties had three minor children: Andrea, born July 29, 1992; Cameron, born August 30, 1994; and Blaize, born July 9, 1997. The Kansas district court awarded the parties joint custody of the children, with the "primary place of residence" of the children to be with Becky.

Prior the entry of the divorce decree, Verlyn moved from Kansas to Nebraska. In September 1999, Becky and the children also moved from Kansas to Nebraska, where they lived until August 12, 2000. On August 12, Becky and the children moved to Colorado.

On August 10, 2000, Verlyn petitioned the Kansas district court for a change in the permanent residency of the children. Becky responded by filing a motion to dismiss, challenging the district court's subject matter jurisdiction. On April 6, 2001, the Kansas district court denied Becky's motion to dismiss, concluding that it did have jurisdiction but finding that no material change in circumstance justified a change in permanent residence.

In December 2002, Verlyn again petitioned the Kansas district court for a change in the permanent residency of the children. That petition was granted on February 28, 2003, and the children's residence was transferred to Verlyn in Platte County, Nebraska, where they have lived since the granting of that petition.

Becky appealed from the order of the Kansas district court. In her appeal, Becky challenged the jurisdiction of the court. In a memorandum opinion dated December 5, 2003, the Kansas Court of Appeals concluded that the Kansas district court lacked jurisdiction to grant residential custody to Verlyn. See *In re Marriage of White*, No. 90,429, 2003 WL 22902791 (Kan. App. Dec. 5, 2003) (unpublished disposition listed in table at 79 P.3d 1093). In doing so, it reasoned that as of August 10, 2000, the date Verlyn commenced his initial action in the Kansas district court, "all parties had lived in Nebraska for 11 months prior to the filing of the first motion in August 2000" and that

as a result, "Nebraska was the children's home state in August 2000." *Id.* at *2. It then held that "[w]e vacate the February 28, 2003, order wherein residential custody was changed to Verlyn. Residential custody is in Becky A. White, n/k/a Becky Bedore and the previous orders of the trial court are controlling of custody, support, and visitation." *Id.* at *3.

On December 11, 2003, 6 days following the Kansas Court of Appeals' decision, Verlyn filed a petition to modify and an ex parte application for temporary custody in the district court for Platte County. Verlyn's ex parte application was granted that same day. Shortly thereafter, on or about December 24, Verlyn filed with the Kansas Supreme Court a "Petition for Review" of the Kansas Court of Appeals' decision. That request was ultimately denied by the Kansas Supreme Court on February 10, 2004.

In response to Verlyn's action commenced in the Platte County District Court, Becky filed a motion to dismiss, contending, inter alia, that the Kansas proceedings prevented Nebraska from assuming jurisdiction of Verlyn's action. Becky also filed an application for a writ of assistance, requesting that the sheriff aid her in taking custody of the children pursuant to the Kansas Court of Appeals' decision.

Following a hearing on Verlyn's request for temporary custody, the district court granted Verlyn temporary custody and denied Becky's motion to dismiss and application for a writ of assistance. In denying Becky's motion to dismiss, the district court determined it had subject matter jurisdiction as either the "home state" or the state having the most "significant connection" with the children pursuant to Nebraska's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004). On December 14, 2003, a trial was held on Verlyn's amended petition to modify, and he was granted permanent custody. Becky appeals.

ASSIGNMENTS OF ERROR

On appeal, Becky assigns, renumbered and rephrased, that the Platte County District Court erred in (1) applying Nebraska's version of the UCCJEA rather than the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through

43-1225 (Reissue 1998); (2) finding that it had subject matter jurisdiction; (3) failing to find that Verlyn's pending appeal in Kansas precluded its exercise of jurisdiction; (4) exercising jurisdiction; (5) considering the children's best interests in determining that it had jurisdiction; and (6) "failing to hold that [its] jurisdiction must be determined as of the date the Petition to Modify is filed."

Becky does not assign as error the district court's finding that "there exists a material change in circumstances such that it would now be in the best interests of the . . . children . . . that their physical custody and primary residence be changed and awarded to . . . Verlyn."

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

[2] The question as to whether jurisdiction existing under the NCCJA should be exercised is entrusted to the discretion of the trial court and is reviewed de novo on the record. As in other matters entrusted to a trial judge's discretion, absent an abuse of discretion, the decision will be upheld on appeal. *In re Interest of Kelley D. & Heather D., supra.*

ANALYSIS

[3] In her first assignment of error, Becky argues that the district court erred in analyzing whether it had jurisdiction under the UCCJEA rather than under the NCCJA. The resolution of Becky's first assignment of error involves a question of statutory interpretation. 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 conclusions reached by the trial court. *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 701 N.W.2d 368 (2005).

[4,5] The petition to modify in this action was filed by Verlyn on December 11, 2003. Pursuant to the UCCJEA, and specifically § 43-1266, "[a] motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The plain language of § 43-1266 states that any motion or request for relief filed prior to January 1, 2004, is to be governed by the "law in effect at the time the motion or other request was made." On December 11, 2003, the date Verlyn filed his petition to modify, the law in effect was the NCCJA. Thus, we determine that the district court erred as a matter of law in applying the UCCJEA rather than the NCCJA. That, however, does not end our analysis.

Having concluded that the trial court erred in applying the UCCJEA, we must next decide whether it is necessary to remand the cause to the district court for further proceedings. In answering this question, we are guided by the principle that when a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *In re Interest of Kelley D. & Heather D., supra.*

Initially, we note that neither party argues that remand is required upon a determination that the applicable law is the NCCJA. Furthermore, in their briefs, both parties base their substantive jurisdictional analyses upon the NCCJA. Also, as to any factual findings made by the district court relevant to our analysis, we conclude that such findings are not clearly incorrect. Accordingly, we will proceed to review the jurisdictional issue applying the NCCJA.

Did District Court Have Jurisdiction Under NCCJA?

[6,7] In her second assignment of error, Becky argues that the district court did not have jurisdiction over this custody dispute. We will analyze this issue by looking to the NCCJA, which provides in relevant part:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination . . . if:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding [or]
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; [or]
>
> . . . .
>
> (d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction . . . .

§ 43-1203(1). "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as a parent, for at least six consecutive months." § 43-1202(5).

The petition for modification was filed in the Platte County District Court on December 11, 2003. The record establishes that the children have lived with Verlyn in Nebraska since approximately February 28, 2003. Given that the children had lived in Nebraska for more than 6 months when Verlyn filed his petition for modification, it would appear, pursuant to §§ 43-1202(5) and 43-1203(1)(a)(i), that Nebraska was the children's home state.

Despite these statutory provisions, Becky contends that even though the children had lived in Nebraska for more than 9 months as of the date Verlyn filed his motion on December 11, 2003, such residence was the result of an "invalid" order issued by the Kansas district court. Consequently, Becky argues this 9-month time period is not properly includable in the calculation of whether Nebraska has home state jurisdiction.

In support of her argument, Becky cites to *Luna v. Luna*, 592 N.W.2d 557 (N.D. 1997), and *Weller v. Weller*, 960 P.2d 493 (Wyo. 1998). Neither case, however, addresses the precise issue presented. Rather, both cases stand, in relevant part, for the proposition that a court's jurisdiction must exist at the time an action is filed and cannot be attained after such date regardless of the amount of time spent by the children in the state subsequent to the filing of a custody action. Given that no one contends that the 9-month time period during which the children lived with Verlyn in Nebraska and over which home state jurisdiction was based was subsequent to Verlyn's filing, we conclude that both cases are inapplicable.

Becky also directs this court to *In re Marriage of Hamilton*, 120 Wash. App. 147, 84 P.3d 259 (2004), a case decided under Washington's version of the UCCJEA. Becky contends that *In re Marriage of Hamilton* holds that " 'significant contacts' generated without a valid court order may not be used to establish jurisdiction." Brief for appellant at 19. However, a review of *In re Marriage of Hamilton* does not support Becky's contention. To the contrary, the Washington Court of Appeals did consider the child's contacts with Washington in concluding that Washington had jurisdiction, notwithstanding the fact that the mother had moved from Texas to Washington without the father's knowledge. Despite those circumstances, the Washington court held that where a child had no home state, as was true in the situation presented, that child's significant contacts with a state could be considered in determining jurisdiction. We conclude that *In re Marriage of Hamilton* is not supportive of Becky's argument.

We note that we are not faced with a situation like the one presented in *Marriage of Ieronimakis*, 66 Wash. App. 83, 831 P.2d 172 (1992), which was cited and distinguished in *In re Marriage of Hamilton*. In *Marriage of Ieronimakis*, a mother brought her children from Greece, where they had lived with the children's father, to Washington without the father's permission or knowledge. In concluding that it lacked jurisdiction over the children, the court explained:

> To allow Washington courts to assert jurisdiction because [the mother] generated significant contacts with the state is in effect telling any abducting parent that if you

> can stay away from the home state long enough to generate new considerations and new evidence, that is a sufficient reason for the new state to assert a right to adjudicate the issue. Such a holding circumvents the intent of the jurisdiction laws.

Marriage of Ieronimakis, 66 Wash. App. at 92, 831 P.2d at 177. See, also, *Ortman v. Ortman*, 670 N.E.2d 1317 (Ind. App. 1996) (where mother unilaterally removed children from prior state of residence, allowing change in children's home state would contravene purposes of Indiana's version of NCCJA). See, generally, § 43-1208 (where one party without consent improperly removes child from party with right to custody, court should decline to exercise jurisdiction).

On the record before us, it is undisputed that Verlyn did not abduct the children or otherwise improperly remove them from Becky's custody. On the contrary, Verlyn filed a petition for modification of custody in the Kansas district court. Following a trial, the Kansas court found a material change in circumstances and granted Verlyn custody of the children. It was only after that order was issued that Verlyn obtained custody of the children and moved them to Nebraska. Although the Kansas Court of Appeals later determined that the Kansas court was without jurisdiction to grant custody to Verlyn, that does not change the fact that Verlyn took custody of the children in accordance with what was believed to be a valid court order.

Furthermore, the conclusion that the 9-month period from February to December 11, 2003, is properly considered in determining the children's home state does not, given this record, contravene the general purposes of the NCCJA. Section 43-1201 sets forth the general purposes of the NCCJA. Subsection (e) provides that one such purpose is to "[d]eter abductions and other unilateral removals of children undertaken to obtain custody awards," while subsection (g) provides that the NCCJA should "[f]acilitate the enforcement of custody decrees of other states." Neither of these purposes is inconsistent with the view that Verlyn should be permitted to rely upon the Kansas order in establishing home state jurisdiction. The NCCJA is not concerned with the conduct of a custodial parent acting pursuant to what is believed to be a valid court order, but, rather, with

the unilateral removal of a child from another jurisdiction. Nor would it facilitate the enforcement of custody decrees from other jurisdictions to hold that a party's good faith reliance upon such a decree is of no consequence if it is ultimately determined to have been erroneous.

We conclude that upon this record, the time the children spent in Nebraska pursuant to the Kansas order is properly includable in calculating whether Nebraska had home state jurisdiction. Accordingly, the Platte County District Court had home state jurisdiction over the children.

For the sake of completeness, we note that the district court concluded it possessed subject matter jurisdiction pursuant to the UCCJEA as either the home state or the state having the most "significant connection" with the children. Having determined that the district court acquired home state jurisdiction under the NCCJA, we need not further address its alternative basis of jurisdiction. Becky's second assignment of error is without merit.

Is Nebraska Precluded From Exercising Jurisdiction?

In her third assignment of error, Becky assigns that pursuant to § 43-1206(1), Verlyn's pending appeal in the Kansas Supreme Court "precluded" Nebraska courts from exercising jurisdiction over this custody matter.

The record indicates that on December 5, 2003, the Kansas Court of Appeals issued its opinion finding that the Kansas district court lacked jurisdiction. On December 11, Verlyn filed his petition for modification in Platte County District Court. Thereafter, on or about December 24, Verlyn filed a petition for review of the Kansas Court of Appeals' decision with the Kansas Supreme Court. That petition was denied by the Kansas Supreme Court on February 10, 2004.

Becky argues that given these undisputed filing dates, at the time Verlyn filed his petition for modification in Nebraska, the time period for filing an appeal from the Kansas Court of Appeals' decision had not expired, as evidenced by Verlyn's December 24, 2003, filing in the Kansas Supreme Court. From this, Becky contends that § 43-1206(1) precluded the Platte County District Court from exercising its jurisdiction because the custody issue had not reached a final determination in Kansas.

The matter was therefore "pending" in Kansas when Verlyn filed his petition for modification in Nebraska. We do not believe § 43-1206(1) supports Becky's argument.

[8] The plain language of § 43-1206(1) provides that "[a] court of this state shall not exercise its jurisdiction under [the NCCJA] if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state *exercising jurisdiction substantially in conformity with [the NCCJA]*." (Emphasis supplied.) The undisputed record demonstrates that Kansas was not "exercising jurisdiction" substantially in conformity with the NCCJA at the time Verlyn filed his petition in the Platte County District Court. To the contrary, the decision of the Kansas Court of Appeals, specifically determining that Kansas did not have jurisdiction over this custody proceeding, had been rendered 6 days prior to Verlyn's filing in Nebraska. Assuming without deciding that a "proceeding . . . was pending" in Kansas on the date Verlyn filed his petition for modification in Nebraska, it is undisputed that Kansas had no jurisdiction to exercise under the NCCJA. As such, § 43-1206(1) does not preclude the Platte County District Court's exercise of jurisdiction. See, also, *Swire v. Swire*, 202 N.J. Super. 289, 494 A.2d 1035 (1985) (New Jersey courts could exercise jurisdiction despite mother's pending New York appeal, as New York lacked jurisdiction at time it entered its order). Becky's third assignment of error is without merit.

Should Nebraska Exercise Jurisdiction?

[9] In her fourth assignment of error, Becky assigns that even if the district court had jurisdiction under the NCCJA, it should have declined to exercise that jurisdiction. In support of her position, Becky argues that Colorado, rather than Nebraska, was the most convenient forum to hear this dispute and, further, that the district court's exercise of jurisdiction contravened the purposes of the NCCJA as stated in § 43-1201. Because Becky's arguments rely upon specific provisions of §§ 43-1201 and 43-1207 of the NCCJA, we initially set forth the relevant provisions of those sections. Section 43-1207 provides:

> (1) A court which has jurisdiction under [the NCCJA] to make an initial or modification decree may decline to

> exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
>
> . . . .
>
> (3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:
>
> (a) If another state is or recently was the child's home state;
>
> (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
>
> (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
>
> (d) If the parties have agreed on another forum which is no less appropriate; and
>
> (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 43-1201.

Section 43-1201 sets forth the purposes behind the NCCJA and provides, in relevant part, that the court should strive to:

> (c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
>
> (d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
>
> . . . .
>
> (f) Avoid relitigation of custody decisions of other states in this state when feasible.

Becky and the children moved from Kansas to Nebraska following the entry of the initial divorce decree in April 1999, and then to Colorado in August 2000. As the district court noted, while in Colorado, the children attended several different schools and had several different babysitters. No evidence exists in the record to suggest any ongoing relationships between the children and persons associated with any of these schools or care providers. In fact, with the exception of friendships the children developed in Colorado over their summer visitation, there is no evidence in the record regarding existing relationships between the children and anyone in Colorado, save Becky and her new husband.

Following the decision of the Kansas district court on February 28, 2003, the children moved from Colorado to Nebraska and have resided with Verlyn in Nebraska since that time. As the district court found, the children attend school and church in Nebraska, have friends in Nebraska, and are involved in extracurricular activities in Nebraska. The record also indicates the children receive medical care in Nebraska.

As noted above, in determining whether it should exercise jurisdiction under the NCCJA, a court should consider the factors set forth in § 43-1207(3), as well as the purposes behind the NCCJA as enunciated in § 43-1201. In doing so, we first note that although Colorado was formerly the children's home state, they have not resided in Colorado since February 2003. Moreover, a review of the record shows that the children have closer ties with Nebraska than Colorado and that the bulk of the evidence regarding their "present or future care, protection, training, and personal relationships is more readily available" in Nebraska. See § 43-1207(3).

[10] Furthermore, Nebraska's exercise of jurisdiction would facilitate rather than contravene the purposes behind the NCCJA. In particular, given the children's contacts in Nebraska, Nebraska's exercise of jurisdiction would ensure that litigation takes place in the state with the closest connection to the children and where the most evidence can be found. Nebraska's exercise of jurisdiction would also discourage continuing controversies, promote stability in the lives of these children, and avoid relitigation of a matter which, at a minimum, has been

twice previously heard on its merits. This court has held that the end goal of the NCCJA is that litigation concerning the custody of a child takes place in the state which can best decide the case. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). We believe Nebraska's exercise of jurisdiction best meets this goal.

Contrary to Becky's assertions, we conclude that upon this record, Nebraska, not Colorado, was the more convenient forum to hear this custody matter and, further, that Nebraska's exercise of jurisdiction did not contravene the purposes of the NCCJA. Accordingly, we determine that the Platte County District Court did not abuse its discretion in exercising jurisdiction. Becky's fourth assignment of error is without merit.

Remaining Assignments of Error

In her fifth assignment of error, Becky assigns that the district court "erred in considering the best interests of the children as part of the analysis to determine jurisdiction." In particular, Becky contends that "[t]he district court's order also suggests that the court determined Nebraska had jurisdiction because it believed that the children should remain with their father." Brief for appellant at 23.

An examination of the district court's order does not support Becky's contention. At issue is the district court's order entered on March 17, 2004, following a hearing with respect to both Becky's motion to dismiss and application for a writ of assistance and Verlyn's motion for temporary custody. In response to Becky's motion to dismiss, the district court specifically noted that it had home state jurisdiction over the proceeding, because the children had been present in Nebraska more than 6 months prior to the filing of the petition to modify. As a result, the district court denied Becky's motion and application.

The district court then addressed the issue of Verlyn's motion for temporary custody. In its analysis of that issue, the court concluded that "it would be in the children's best interests that their temporary custody be, and is, awarded to their father, Verlyn." While the court clearly considered the best interests of the children in awarding temporary custody to Verlyn, the court did not consider the children's best interests until after it concluded that it had jurisdiction. Becky's fifth assignment of error is without merit.

In her sixth assignment of error, Becky has assigned the district court's failure "to hold that the court's jurisdiction must be determined as of the date the Petition to Modify is filed." As we understand Becky's argument, she is contending that the district court did not determine its jurisdiction as of December 11, 2003, the date of the filing of Verlyn's petition to modify. In her brief, however, Becky fails to specify the date she believes was improperly utilized by the district court. In any event, it is apparent from the record that the date utilized by the district court when it initially determined that it had jurisdiction was, in fact, December 11. Becky's sixth assignment of error is without merit.

[11] Finally, Becky argues that the Platte County District Court did not, pursuant to § 43-1206, consult with other states before deciding to exercise jurisdiction. However, this argument is not assigned as error in Becky's brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). As a result, we need not consider this argument.

CONCLUSION

We conclude that the district court properly exercised jurisdiction over this custody dispute.

AFFIRMED.

DAVID H. PTAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILMA L. PRITCHARD, DECEASED, APPELLANT, V. LEOTA SWANSON, APPELLEE.

709 N.W.2d 337

Filed February 10, 2006. No. S-04-1009.

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 trial court.
2. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
5. **Rules of the Supreme Court: Constitutional Law: Statutes: Notice.** Neb. Ct. R. Prac. 9E (rev. 2001) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.
6. **Constitutional Law: Courts: Jurisdiction.** Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.
7. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
8. **Actions: Pleadings.** The allegations of a petition establish the character of a cause of action and the remedy or relief it seeks.

Appeal from the District Court for Madison County: DARVID D. QUIST, Judge. Affirmed.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellant.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

David H. Ptak brought the present action in the district court for Madison County to recover amounts improperly distributed to Leota Swanson from the estate of Wilma L. Pritchard. The district court dismissed the action for lack of subject matter jurisdiction. Ptak appealed, and we granted Ptak's motion to bypass the Nebraska Court of Appeals.

BACKGROUND

The following facts are taken from our opinion in *Swanson v. Ptak*, 268 Neb. 265, 266-67, 682 N.W.2d 225, 228-29 (2004):

> 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.

Ptak's claim against Swanson, which was filed in the district court, was dismissed by the district court for lack of subject matter jurisdiction. In dismissing the case, the district court found that the recovery of a distribution erroneously made by Ptak was related to the decedent's estate and was therefore within the exclusive jurisdiction of the county court pursuant to Neb. Rev. Stat. §§ 24-517(1) (Cum. Supp. 2002) and 30-2211 (Reissue 1995). The district court also found that Neb. Const. art. V, § 9, grants both chancery and common-law jurisdiction to the district court, but does not grant the district court probate jurisdiction. Ptak appealed the dismissal of his claim, and we granted his motion to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

Ptak generally asserts that the district court erred in dismissing his claim for lack of subject matter jurisdiction. Ptak specifically asserts that the district court has concurrent jurisdiction with the county court. Ptak also asserts that §§ 24-517(1) and 30-2211 are unconstitutional insofar as they purport to limit the chancery or common-law jurisdiction of the district court under

Neb. Const. art. V, § 9, and to the extent that the application of these statutes would eliminate a litigant's right to a 12-person jury under Neb. Const. art. I, § 6.

STANDARD OF REVIEW

[1] 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 trial court. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

[2,3] Subject matter jurisdiction is a question of law for the court. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

[4] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine. *Schweitzer v. American Nat. Red Cross, supra.*

ANALYSIS

CONSTITUTIONAL QUESTION

We first address Ptak's claims that §§ 24-517(1) and 30-2211 are unconstitutional. Before doing so, however, we must determine whether Ptak has satisfied the procedural prerequisites for appellate review of his constitutional claims.

[5] Neb. Ct. R. Prac. 9E (rev. 2001) requires that a party presenting a case involving the constitutionality of a statute must file and serve notice with the Supreme Court Clerk at the time of filing the party's brief. *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005). Rule 9E also provides that if the Attorney General is not already a party to the action, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk. A review of the record in this case reveals that Ptak

failed to file a notice of a constitutional question and failed to serve upon the Attorney General, who is not a party to this action, a copy of his brief.

This court has repeatedly held that strict compliance with rule 9E is required for the court to address a constitutional claim. See *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998) (refusing to consider constitutional question where record contained no separate written notice as required by rule 9E); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994) (holding this court will not consider constitutional challenge where appellant failed to strictly comply with rule 9E). See, also, *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003); *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992); *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

Because Ptak has failed to comply with the requirements of rule 9E, we decline to address Ptak's constitutional claims on appeal.

District Court Concurrent Jurisdiction

Ptak also asserts that his petition should not have been dismissed because the district court has concurrent jurisdiction with the county court over cases involving the recovery of money, including those cases arising within the context of a probate proceeding.

Exclusive original jurisdiction over probate matters has been given to the county court by the Nebraska Legislature. Section 24-517 provides in pertinent part: "Each county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof . . . ." Section 30-2211(a) provides in part: "To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction

of wills and determination of heirs and successors of decedents, and estates of protected persons." We have stated, however, that the Legislature's grant of exclusive jurisdiction to the county court in matters relating to decedents' estates "is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts." *In re Estate of Steppuhn*, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (1985).

[6,7] Neb. Const. art. V, § 9 states: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999); *In re Estate of Steppuhn, supra.* Thus, in common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991). See *In re Estate of Steppuhn, supra.*

[8] The allegations of a petition establish the character of a cause of action and the remedy or relief it seeks. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). As we read Ptak's petition, it states a claim for statutory recovery under Neb. Rev. Stat. §§ 30-24,106 and 30-24,107 (Reissue 1995) of the Nebraska Probate Code.

Section 30-24,106 provides that the personal representative may recover assets or their value if their distribution was improper. Section 30-24,107 provides that a distributee of property improperly received is liable to return the property and its income since distribution, or the value of the property as of the date of distribution and its income and gain received by distributee if the distributee does not have the property. These statutes create a duty to return estate assets improperly received and create in the personal representative a right to recover such assets.

Ptak's recovery of estate assets is inextricably tied to the probate of the estate. See § 24-517(1). Therefore, Ptak's right of recovery in the instant case arises within the exclusive original

jurisdiction over probate matters in the county court. We therefore conclude that the district court properly dismissed Ptak's petition for lack of subject matter jurisdiction.

CONCLUSION

Because Ptak has failed to comply with the requirements of rule 9E, we decline to address his constitutional claims on appeal. With regard to Ptak's assertion that the district court has concurrent jurisdiction with the county court over the instant case, we conclude that jurisdiction over the recovery of the estate assets improperly distributed in this matter lies exclusively with the county court. We therefore affirm the district court's dismissal of Ptak's petition.

AFFIRMED.

GERRARD, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CHRIS VOICHAHOSKE, APPELLANT.
709 N.W.2d 659

Filed February 10, 2006. No. S-05-132.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** As part of a lawful traffic stop, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
5. ____: ____: ____. A traffic stop investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver.

6. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
7. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
10. **Investigative Stops: Motor Vehicles: Probable Cause: Appeal and Error.** An appellate court must consider both the length of the continued detention and the investigative methods employed when determining whether a detention was reasonable in the context of an investigative stop.
11. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
12. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
13. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
14. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
15. **Probable Cause.** Probable cause is determined by an objective standard of reasonableness: whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found.
16. **Probable Cause: Motor Vehicles.** A drug detection dog's identification of drugs in luggage or in a car provides probable cause that drugs are present.
17. **Search and Seizure: Probable Cause.** A person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.
18. **Search and Seizure: Motor Vehicles: Probable Cause.** Probable cause to search a car does not necessarily justify searching the body of a passenger.
19. **Miranda Rights: Words and Phrases.** Under the *Miranda* rule, a custodial interrogation takes place when questioning is initiated by law enforcement officers after one

has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.

20. **Police Officers and Sheriffs: Arrests.** Neb. Rev. Stat. § 29-215(2)(c)(ii)(C) (Cum. Supp. 2004) does not require that an officer requesting assistance tell the responding officer that he or she fears evidence will be lost; it asks (1) whether the suspect may destroy or conceal evidence of the commission of a crime and (2) whether an officer needs assistance in making an arrest.
21. **Police Officers and Sheriffs: Jurisdiction: Arrests.** Under Neb. Rev. Stat. § 29-215(2)(c) (Cum. Supp. 2004), officers responding to requests for assistance outside their jurisdiction have the same authority as they would in their primary jurisdiction.

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

Bradley J. Montag, of Moyer, Moyer, Egley, Fullner & Montag, for appellant.

Jon Bruning, Attorney General, Matthew M. Enenbach, and Michael W. Jensen for appellee.

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

CONNOLLY, J.

Following a routine traffic stop, Trooper James D. Reilly of the Nebraska State Patrol detained the appellant, Chris Voichahoske. After a drug detection dog alerted to the car in which Voichahoske was a passenger, Voichahoske was taken to jail and strip searched by a deputy from a neighboring county. The deputy found a bag of methamphetamine protruding from Voichahoske's rectum. In a bench trial, the Boone County District Court convicted Voichahoske of possessing methamphetamine. Voichahoske appeals his conviction, claiming that the methamphetamine should have been suppressed because his detention and search were illegal and because the searching officer was outside his jurisdiction.

We affirm because (1) Reilly had reasonable suspicion to detain the car and its occupants for further investigation, (2) the detention was reasonable, (3) Reilly had probable cause particularized to Voichahoske that he was concealing drugs on his

person, and (4) the searching officer had jurisdiction under Neb. Rev. Stat. § 29-215(2)(c)(ii)(C) (Cum. Supp. 2004).

I. BACKGROUND

Around 6:15 p.m. on February 17, 2004, Amy Roan was driving in Boone County, Nebraska, with passengers Voichahoske, Erin Young, and Michael Hall. Suspecting Roan was speeding, Reilly followed her. Before Reilly could turn on his patrol car lights, Roan pulled over into a farmyard. Having clocked her car traveling at 72 m.p.h. in a 60-m.p.h. zone, Reilly decided to conduct a traffic stop and followed them into the farmyard.

Reilly asked Roan for her driver's license, registration, and proof of insurance, and when she said she could not produce them, he asked her to follow him to his patrol car. Roan told Reilly that her name was "Christina Hohn" and that the car belonged to "her cousin, Amy Roan," who was in Iowa. Reilly was familiar with the Roan name, because several weeks earlier, a warrant had been issued for her arrest, and because law enforcement officers "suspected [Roan] of using illegal narcotics." He also asked her about her passengers and travel plans. She said that she did not know the two back seat passengers, but identified the front seat passenger as Voichahoske, who Reilly knew was also suspected of "using illegal narcotics."

According to Roan, she drove from Lindsay, Nebraska, to Albion, Nebraska, to pick up her cousin's child near a hospital; she planned to drop off the back seat passengers by some apartments near the hospital. When Reilly noted that she was not taking a direct route to Albion, she said that the back seat passengers had been looking at a vehicle near Saint Edward, Nebraska, when their ride left them. She also told Reilly that she pulled into the farmyard because it belonged to Voichahoske's relatives and that she needed to get gas money. Later, however, Voichahoske denied that he knew the owners of the farmyard, but he said the driver did.

Reilly then questioned the passengers, while Roan waited in his patrol car. Young was in the back seat on the passenger side, and Hall was in the back seat on the driver's side. Voichahoske told Reilly that they were going to Columbus to get gas money and then were heading back to Albion to drop off Young and

Hall. Hall said they planned to stay with a friend of his there, but could not say whose house he was staying at. Young said the friend lived in Columbus, and Hall corrected her, saying, " 'That's why we're staying in Albion.' "

Reilly also observed what he described as suspicious behavior. He said that while interviewing Roan in his patrol car, he noted that her passengers "continuously moved around" and that at one point, he saw Young lean forward, appearing to shove something under the passenger seat. When questioning the passengers, he noticed that Young appeared "unable to hold still." Young also complained that she had just started her menstrual cycle and "continuously rubbed her vaginal area," which made Reilly suspect that "she might be hiding something there." He suspected that she was on a narcotic.

Reilly then returned to his patrol car, gave Roan a speeding ticket, and asked permission to search Roan, her car, and its contents. When she refused, Reilly called for the Nebraska State Patrol canine unit. But when he learned that its drug dog was not available, he summoned the Nance County, Nebraska, canine unit instead. He told the dispatcher he believed that the Nance County canine unit was working that night and that he knew the Nebraska State Patrol trained the dog. He then told Roan she was being detained. While waiting for the canine unit, Roan explained to Reilly that "she was picking up her cousin's child at the hospital because it had bronchitis, and they were holding the child because they did not want it to get pneumonia." She also told Reilly she would consent to the search if that meant she would not have to wait for the drug dog; Reilly replied that he would wait for the dog to avoid the appearance of coercion.

About 12 minutes after detaining Roan, Sgt. Jeff D. Horn of the Nance County Sheriff's Department arrived. Reilly told Horn about the group's inconsistent stories, said that the stories did not make sense, and asked Horn to run his dog around the car to check for illegal narcotics. Horn asked Reilly to remove the passengers from the car first, but Reilly refused "in case they had narcotics on their person." Horn did as Reilly asked, and the dog alerted to both the passenger-side door and the driver's-side door. The passengers were then removed from the car and handcuffed.

After handcuffing them, Reilly asked Young and Hall for the driver's name. They said that they had just met the driver and that she had told them to say her name was Chrissy or Christina. Suspicious, Reilly questioned Voichahoske again about the driver's name. Voichahoske said that he had just met her that day and that her name was "Chrissy or something like that." Reilly then told Voichahoske that Roan reported earlier that she had known Voichahoske for almost a year. Voichahoske then admitted that Roan's driver's license was in his wallet. Reilly retrieved the license and confirmed that Roan had given him a false name.

Reilly then conducted a "very preliminary search of the vehicle" and asked the Norfolk, Nebraska, dispatcher to have Boone County send additional officers and a tow truck. Deputy Jaromey L. Radford and a Deputy Swanson responded to the dispatch. On arriving, Reilly and Horn informed them that the suspects' stories were "not making sense" and that the drug dog had alerted twice on the car. Reilly and Horn agreed that the occupants of the car needed to be searched, although this exchange was not evident on the videotape. They specifically asked Radford and Swanson to transport and search "the two remaining occupants . . . Hall and . . . Young." The videotape revealed no explicit reference to searching all the occupants, although Reilly did ask the dispatcher to explain "the situation" to the Boone County sheriff's office, to avoid surprise when the suspects arrived.

Before transporting Voichahoske, Horn patted him down and searched his pockets. During the pat-down search, Horn noticed a bulge in Voichahoske's left shoe; he and Reilly agreed that the bulge should be investigated. After the tow truck arrived, Horn and Reilly drove Voichahoske and Roan to the Boone County sheriff's office, dropping them off before taking Roan's car to a garage for processing. Reilly said he could not recall if he specifically gave the Boone County officers instructions to search Voichahoske and Roan, but "[i]t was known that they were to be searched."

Radford drove Hall to the Boone County sheriff's office. At the office, he and a Deputy Maple of Boone County strip searched Voichahoske. During the search, Voichahoske handed over a marijuana pipe hidden in his sock, and when Voichahoske was asked to bend over, the officers noted that a bag of white

powder was protruding from his rectum. The white powder was later identified as methamphetamine. In response to Radford's questioning, Voichahoske admitted that the bag was his and that he believed it contained methamphetamine.

After Reilly and Horn arrived at the garage, they searched Roan's car. Reilly found a clear plastic baggie containing methamphetamine lodged under the back of the front passenger seat between the foam and the springs; he also found a marijuana pipe and a small, blue container containing marijuana under the driver's seat. Horn found a small, brown bottle on the rear driver's side between the seat and the side paneling and a syringe on the floor of the car's hatchback. Horn testified that because of where Voichahoske was seated, Voichahoske did not have access to these items.

After searching the car, Reilly returned to the Boone County sheriff's office; he advised Voichahoske of his *Miranda* rights, and after Voichahoske waived his rights, Voichahoske told him he had picked up his methamphetamine in an old pickup near Fullerton, Nebraska, and that they were heading back to Albion to drop off Young and Hall when stopped. Voichahoske stated that he concealed his methamphetamine while Reilly questioned Roan in the patrol car and that he believed Young and Hall did the same.

The State charged Voichahoske with possessing a controlled substance, methamphetamine. After the Boone County District Court denied Voichahoske's motion to suppress, the court held a bench trial on stipulated facts, preserving Voichahoske's objections to the evidence. The court found Voichahoske guilty, sentencing him to 15 to 36 months' imprisonment.

II. ASSIGNMENT OF ERROR

Voichahoske assigns, consolidated and rephrased, that the trial court erred by overruling his motion to suppress evidence stemming from his strip search, because his continued detention, arrest, and search were illegal and because the officer conducting the search was outside his primary jurisdiction.

III. STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable

cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. See *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

[2] When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005).

IV. ANALYSIS

First, we address whether Reilly had reasonable suspicion to detain Roan while awaiting the drug dog; second, whether Reilly had probable cause to search and arrest Voichahoske; and third, whether Radford had authority to search Voichahoske in Boone County.

1. Continued Detention

Voichahoske argues that Reilly improperly detained Roan and her passengers. Resolving this issue hinges on whether Reilly had reasonable suspicion to believe that criminal activity was occurring.

[3,4] Reilly stopped Roan because she was speeding; a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Verling, supra*; *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. See *id.*

[5] The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. See *id.* Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *Id.* The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver. *State v. Verling, supra.*

[6-9] Here, the original purpose of the traffic stop was completed when Reilly issued the warning citation to Roan. See, *State v. Verling, supra*; *State v. Lee, supra*. In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id.* Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. See *State v. Verling, supra*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. See *id.* Reasonable suspicion must be determined on a case-by-case basis. *Id.* When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *Id.*

Before issuing the citation, Reilly had a reasonable, articulable suspicion that criminal activity was occurring. Several factors contribute to that suspicion; some might be insufficient standing alone, but collectively establish reasonable suspicion. First, Roan pulled into the farmyard after Reilly began following her, but before he turned on his lights; this made Reilly suspect that she sought to evade the stop. Also, when Reilly investigated the stop, Roan provided no proof of identification. See *U.S. v. Green*, 52 F.3d 194 (8th Cir. 1995) (determining that lack of identification does not automatically create reasonable suspicion of criminal activity, but that it can contribute).

Roan and her passengers also gave inconsistent explanations for pulling into the farmyard and inconsistent descriptions of their travel plans. See *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003) (determining that individual's inconsistent explanation of reason for being at particular location can contribute to reasonable suspicion). See, also, *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (determining that inconsistencies between driver's and passenger's explanations of trip's purpose can contribute to reasonable suspicion). Reilly also testified that he was

suspicious because they were not taking the most direct route to their stated destination.

In addition, Reilly testified that Roan's passengers constantly moved around while he spoke with Roan in his patrol car; at one point, he saw Young lean forward and put something under the seat. See *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000) (determining that observing stopped passenger bend over and hide something can contribute to reasonable suspicion). He also noted that Young continuously rubbed her vaginal area while he questioned her and that she said she needed to use a restroom because she had just started her menstrual cycle. He opined that based on his experience and training, he believed her behavior indicated that she was on a narcotic and that she might be hiding contraband.

Reilly also stated that the Nebraska State Patrol's intelligence officer informed him Roan and Voichahoske were suspected of "using illegal narcotics." But Reilly provided vague information and could not explain what facts premised the suspicion. Moreover, Reilly did not realize Roan had given him a false name until after he detained her. Nonetheless, the totality of the circumstances demonstrates that Reilly had reasonable suspicion Roan was involved in illegal activity beyond that which justified the initial stop, and thus, he could detain her and the passengers while awaiting the drug dog.

[10] Having determined that reasonable suspicion exists supporting continued detention, we consider whether the detention was reasonable in the context of an investigative stop. See *State v. Lee, supra*. We consider both the length of the continued detention and the investigative methods employed. See, *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005); *State v. Lee, supra*. Reilly testified that the drug dog arrived about 15 minutes after ticketing Roan. Reilly called for the Nebraska State Patrol canine unit, but when it was not available, he had to wait for the Nance County canine unit, which he believed was both reliable and available. The record fails to show a lack of diligence on Reilly's part, or any unreasonable delay. And because a canine sniff is not a search under the Fourth Amendment, using the drug dog during the lawful detention did not violate any constitutionally protected right. See, *State v. Verling, supra*;

State v. Lee, supra. Thus, the length and method of detention were reasonable.

2. Search and Arrest

Voichahoske argues that the "trial court erred in overruling [his] Motion to Suppress Evidence . . . in that the arrest, detention and strip search of the appellant were without probable cause and therefore illegal." Brief for appellant at 15. We liberally interpret his assignment to raise two distinct issues: (1) whether strip searching Voichahoske was reasonable under the Fourth Amendment and (2) whether handcuffing Voichahoske triggered his *Miranda* rights.

(a) Probable Cause to Search Voichahoske

[11] The Fourth Amendment provides that the people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

[12,13] The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Roberts, supra.*

The State argues that the drug dog's alert while the passengers were inside the car provides probable cause to search both the car and its passengers. However, as explained later, this statement sweeps too broadly.

[14-16] Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Maryland v.*

Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). See, also, *State v. Oltjenbruns*, 187 Neb. 694, 193 N.W.2d 744 (1972). Moreover, we determine probable cause by an objective standard of reasonableness: whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found. See *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Here, Reilly had probable cause to search the *car* because of the dog's alert. A dog's identification of drugs in luggage or in a car provides probable cause that drugs are present. *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994).

[17,18] But a person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. See *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 238 (1979) (holding that search warrant for tavern and its bartender did not permit body searches of all bar's patrons). Specifically, probable cause to search a car does not necessarily justify searching the body of a passenger. *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

"Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*, 392 U.S. 1, 24 25, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Thus,

> [w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Ybarra v. Illinois, 444 U.S. at 91.

We have echoed this standard, saying: "Probable cause to arrest is not some vapor permeating a place, engulfing anyone who happens to be at a site where unlawful conduct may be occurring or may have occurred. Rather, probable cause to arrest is particularized and exists in reference to a specific individual." *State v. Evans*, 223 Neb. 383, 388, 389 N.W.2d 777, 781 (1986).

So we focus on whether Reilly had probable cause sufficiently particularized to Voichahoske.

In *Maryland v. Pringle*, the U.S. Supreme Court considered whether there was probable cause particularized to the defendant, the front seat passenger, when (1) $763 of rolled-up cash was found in the glove box directly in front of him, (2) five plastic baggies of cocaine were hidden within his reach, and (3) all of the car's occupants refused to claim ownership of the money and cocaine. The Court reasoned:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe [the defendant] committed the crime of possession of cocaine, either solely or jointly.

Maryland v. Pringle, 540 U.S. 366, 372, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). The Court also brushed aside the defendant's attempt to characterize the case as one of "guilt-by-association." *Id.* It distinguished *Ybarra* and *Di Re*, pointing out that in *Pringle*, the evidence showed a " 'common enterprise' " among the car's occupants, producing " 'the same interest in concealing the fruits or the evidence of their wrongdoing.' " *Maryland v. Pringle*, 540 U.S. at 373 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)). The Court stated that the evidence indicated that someone in the car was dealing drugs. This was significant because the Court reasoned that drug dealing is an enterprise not likely to be conducted in front of innocent persons who could testify against those involved. *Maryland v. Pringle, supra.*

Voichahoske, however, argues that the State failed to establish probable cause for his arrest, detention, and strip search because no contraband was linked to him until after the strip search. Voichahoske's argument fails. Like the baggies in *Pringle*, the dog's alert provided probable cause to believe that someone in the car possessed drugs. Also like *Pringle*, Voichahoske is not guilty by association. He actively helped Roan conceal her identity by hiding her driver's license in his wallet and lying to Reilly about her identity. This complicity suggests a common enterprise with the same interest in concealing the evidence of wrongdoing.

Moreover, the officers found no drugs during their preliminary search of the car, despite the drug dog's alert, and the passengers had ample time to conceal evidence. We determine Reilly had probable cause to believe that drugs would be found on Voichahoske.

(b) *Miranda*

Voichahoske argues that he was not informed of his *Miranda* rights until after the strip search. The State responds by arguing that Voichahoske was merely detained for investigation during the strip search and was not formally arrested until after Reilly searched the car. We disagree with the State's contention that Voichahoske was not in custody.

[19] Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. See *State v. Veiman*, 249 Neb. 875, 881, 546 N.W.2d 785, 790 (1996). Here, Voichahoske was handcuffed for almost 1½ hours before arriving at the station. And during the strip search, Radford asked Voichahoske if the baggie of white powder was his and if he knew what it was. In response, Voichahoske claimed ownership and admitted it was methamphetamine. Laboratory testing later confirmed that it was methamphetamine. But any error is harmless because the information obtained was cumulative to that legitimately obtained by the search. See *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

3. Radford's Jurisdiction to Search Voichahoske

Voichahoske argues that Radford illegally searched him because Radford was outside his primary jurisdiction when conducting the search and thus had no authority to act. Section 29-215 defines the jurisdiction and powers of law enforcement officers. The pertinent portions of § 29-215 provide:

> (1) A law enforcement officer has the power and authority to enforce the laws of this state and of the political subdivision which employs the law enforcement officer or otherwise perform the functions of that office anywhere within his or her primary jurisdiction.

> (2) *Any law enforcement officer who is within this state, but beyond his or her primary jurisdiction, has the power and authority to enforce the laws of this state . . . or otherwise perform the functions of his or her office, including the authority to arrest and detain suspects, as if enforcing the laws or performing the functions within his or her primary jurisdiction in the following cases:*
>
> . . . .
>
> (c) *Any such law enforcement officer shall have such enforcement and arrest and detention authority when responding to a call in which a local, state, or federal law enforcement officer is in need of assistance. A law enforcement officer in need of assistance shall mean (i) a law enforcement officer whose life is in danger or (ii) a law enforcement officer who needs assistance in making an arrest and the suspect* (A) will not be apprehended unless immediately arrested, (B) may cause injury to himself or herself or others or damage to property unless immediately arrested, or *(C) may destroy or conceal evidence of the commission of a crime*; and
>
> . . . .
>
> (4) For purposes of this section:
>
> . . . .
>
> (b) Primary jurisdiction means the geographic area within the territorial limits of the state or political subdivision which employs the law enforcement officer.

(Emphasis supplied.)

Voichahoske argues first that Radford lacked jurisdiction under § 29-215(2) because "Reilly never told . . . Radford that Voichahoske needed to be searched or they would lose evidence." Brief for appellant at 13. The trial court found that "[a]s contended by the defendant, it does not appear that any of these factors [under § 29-215(2)(c)] are applicable to the facts at hand." Voichahoske's argument initially appears to have traction, but bogs down under further scrutiny.

[20] Voichahoske argues that "Radford testified that . . . Reilly never advised that he was concerned about losing evidence[;] Reilly never told . . . Radford that Voichahoske needed to be searched or they would lose evidence." Brief for appellant

at 13. Voichahoske essentially argues that Reilly never explicitly told Radford that he was concerned that evidence would be lost. But § 29-215(2)(c)(ii)(C) does not call for such specificity. Subsection (2)(c)(ii)(C) does not require that an officer requesting assistance tell the responding officer that he or she fears evidence will be lost. It asks (1) whether the suspect "may destroy *or conceal* evidence of the commission of a crime," § 29-215(2)(c)(ii)(C), and (2) whether an officer "needs assistance in making an arrest," § 29-215(2)(c)(ii). The statute fails to specify whether these questions are answered subjectively—what the requesting officer believed, or objectively—what a reasonable person under the circumstances could believe. But we need not decide this because both standards are met.

(a) Possibility of Destroying or Concealing Evidence

Although Reilly never explicitly told Radford he was concerned about "losing evidence," he did testify that he believed that "anybody in the vehicle could possibly have had narcotics on them." He also asked Horn to pat down Voichahoske at the scene, and in his police report, he described it as a search "for narcotics." Moreover, Reilly testified that he agreed with Horn that the occupants needed to be searched and the videotape reveals that Reilly agreed that the bulge in Voichahoske's shoe needed to be investigated.

Why would Reilly want the occupants searched if not to find concealed evidence? Reilly testified that when he called the dispatcher for assistance, the occupants had already been handcuffed. And the record provides no indication that the occupants threatened his safety. Moreover, if Reilly had not been concerned that the occupants would discard evidence, he and Horn could have driven the four, two to a car. Instead, he opted to wait for separate transportation, so the suspects could not leave contraband in the patrol car and possibly blame their fellow passengers.

Reilly also had an objective reason to believe that Voichahoske was concealing evidence and that given the opportunity, he might destroy it. Reilly already had probable cause to believe Voichahoske was concealing drugs on his person, which, in turn, justified his arrest. See *State v. Dussault*, 193

Neb. 122, 225 N.W.2d 558 (1975) (holding that under Fourth Amendment, standards for determining probable cause for arrest and probable cause for search and seizure are same). Because a search of his person was inevitable, Reilly could reasonably believe Voichahoske would seize the opportunity to destroy or discard the drugs. Thus, the record shows both subjectively and objectively that Voichahoske might conceal or destroy evidence.

(b) Assistance Making Arrest

When probable cause materialized, Reilly was the only officer at the scene with primary jurisdiction. Although the occupants were handcuffed, he had to drive all four of them to the Boone County jail for further processing, search them incident to arrest, and search the car. The occupants outnumbered Reilly, and he could not accomplish all four arrests by himself. Recognizing this, he called his dispatcher to request help. Nance County deputies Radford and Swanson responded to the call. Each of the four officers drove one of the occupants. Swanson drove Voichahoske to the station. Then Radford and Maple, a Boone County deputy, searched Voichahoske, while Reilly and Horn searched the car. To require Reilly to drive each occupant to the station while the Nance County deputies detained the others would be senseless. Although Reilly could have refused assistance from the Nance County deputies and waited for Boone County deputies to arrive, this could pose an unreasonable delay. Moreover, because he requested assistance from Boone County officers but was told that Nance County officers were responding, Reilly could reasonably believe that the Boone County officers could not respond in time. A reasonable person could believe that help was needed to carry out the arrests.

[21] Because Voichahoske might conceal or destroy evidence, and because Reilly needed assistance in making the arrest, we determine that Reilly was "in need of assistance" within the meaning of § 29-215(2)(c). Although Voichahoske argues that Reilly did not explicitly ask for assistance in searching Voichahoske, as before, we do not read the statute as requiring such specificity. Under § 29-215(2)(c), officers responding to requests for assistance outside their jurisdiction have the same authority as they would in their primary jurisdiction. Compare

§ 29-215(1) and (2). It is undisputed that Reilly requested assistance and that Radford responded to that call. Thus, Radford has the same authority in Boone County as he would in Nance County. Because he could have searched Voichahoske incident to arrest in Nance County, it follows that he could also search him incident to arrest in Boone County. Therefore, Radford had authority to administer the strip search under § 29-215.

Voichahoske, however, argues that Maple, as a Boone County deputy, could have conducted the search instead of Radford. The record reflects that both Maple and Radford were in the booking room with Voichahoske during the search, but that Radford told Voichahoske to disrobe. Although Maple could have conducted the search, he had not been at the scene and did not have the details of the stop and arrest. While ideally, Reilly should have conducted the search incident to arrest, it was permissible for Radford to conduct the search under these circumstances.

V. CONCLUSION

Reilly had reasonable suspicion that a crime was occurring. He was thus justified in detaining Roan and her passengers for further, limited investigation. Moreover, the manner and duration of the detention was reasonable. The drug dog's alert, in combination with Voichahoske's complicity hiding Roan's identity, provided probable cause particularized to Voichahoske that he was concealing drugs on his person. Thus, his arrest, detention, and subsequent search were reasonable under the Fourth Amendment. Finally, because of the risk that he was concealing evidence and might destroy it, and because of Reilly's request for assistance making the arrest, Radford was authorized to search Voichahoske incident to his arrest. Voichahoske's conviction is affirmed.

AFFIRMED.

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

709 N.W.2d 675

Filed February 24, 2006. No. S-05-1330.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Thomas A. Gleason. As indicated below, the court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 24, 1975. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On November 1, 2005, an application for the temporary suspension of respondent from the practice of law was filed by the vice chairperson of the Committee on Inquiry of the Second Disciplinary District. The application stated that two grievances had been filed against respondent and were under investigation by the Counsel for Discipline. The application stated that according to the grievances, respondent had, in effect, misappropriated client funds, in the total amount of approximately $57,000. The application further stated that "[i]t appear[ed] that the respondent was engaging in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the legal profession . . . ."

On November 16, 2005, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent, and respondent filed an affidavit in response to the show cause order. On December 14, this court determined

that respondent had failed to show cause why his license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

On February 3, 2006, 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 contest the truth of the allegations in the grievances. 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; stated in writing that he knowingly does not contest the truth of the allegations in the grievances, which, in summary, allege that he misappropriated approximately $57,000 of his clients' funds; and waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent has stated that he does not contest the truth of the allegations in the grievances to the effect that he misappropriated client funds and that his statement 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. 2004), 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

BORLEY STORAGE AND TRANSFER CO., INC., APPELLANT, V. WARREN R. WHITTED, JR., APPELLEE.

710 N.W.2d 71

Filed March 3, 2006. No. S-04-708.

1. **Rules of Evidence: Appeal and Error.** A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 1995) is reviewed for an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
4. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
5. **Damages.** Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.
6. ____. A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.

7. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
8. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
9. **Rules of Evidence: Words and Phrases.** Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

This legal malpractice action is before this court for the second time. In the first appearance, we determined that the district court erred in entering partial summary judgment in favor of the plaintiff and therefore reversed and vacated the judgment and remanded the cause for further proceedings. *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003). Following remand, the cause was tried to a jury and a verdict was returned in favor of the defendant attorney, Warren R. Whitted, Jr. Borley Storage and Transfer Co., Inc. (Borley Storage), the plaintiff below, appeals from the judgment entered on the verdict. We affirm.

I. BACKGROUND

Borley Storage was a family business operated by Harry Borley and Maxine Borley. On December 10, 1982, Borley Storage entered into an agreement to sell its business to Borley Moving and Storage, Inc. (Borley Moving). Borley Moving was a new entity formed by the longtime manager of Borley Storage, Dennis Bauder, and his wife, Wanda Bauder, who were the sole shareholders of the new corporation. Borley Moving had no assets prior to the sale.

Whitted represented Borley Storage in the seller-financed transaction and prepared all of the documents related to the sale of the business. Pursuant to the terms of the purchase agreement dated December 10, 1982, Borley Moving agreed to pay a purchase price of $250,000, payable in monthly installments and bearing interest at the rate of 12 percent per annum. Payments were to begin on February 1, 1983, and continue through January 1, 1993. The purchase agreement also provided that the Bauders would execute a promissory note for the purchase price. A promissory note dated January 3, 1983, in the amount of $250,000 payable to Borley Storage was executed by Dennis Bauder, by Wanda Bauder, and by Dennis Bauder in his capacity as president of Borley Moving. The note provided that the said parties "jointly and severally" promised to pay the principal amount with interest at 12 percent in 119 monthly installments commencing on February 1, 1983. It further provided that "[i]f the makers' [sic] fail to pay any installment when due, then the entire unpaid principal balance, together with accrued interest, shall at the option of the holder, immediately become due and payable without notice."

Pursuant to the purchase agreement and to provide security for the transaction, Borley Moving granted Borley Storage a security interest in the personal property, rolling stock, and accounts receivable associated with the business. Borley Moving also granted Borley Storage a first deed of trust in certain real property. Whitted prepared and filed a mortgage and a financing statement to perfect the security interests in the personal property and accounts receivable. The financing statement was filed on July 12, 1983. By operation of law, this security interest lapsed on July 12, 1988, 5 years after its filing, because no continuation statement was timely filed.

Borley Moving defaulted on the purchase agreement in 1991, and Borley Storage thereafter attempted to recover by foreclosing on the real estate and recovering the collateral. Borley Moving filed bankruptcy in 1993. The bankruptcy court approved a reorganization plan in 1995, and Borley Storage's claim was valued at $308,000. Approximately $140,000 was secured by the real estate and rolling stock. However, because a

second creditor had filed a financing statement with respect to the personal property and Borley Storage failed to file a continuation statement prior to the expiration of the 5-year period, Borley Storage lost its priority with respect to the personal property and accounts receivable. Instead, the second creditor received approximately $64,000 based on its secured interest. Borley Storage never sought recovery from the Bauders on the promissory note.

In this malpractice action, Borley Storage alleged that Whitted negligently failed to file or advise its officers of the need to file the continuation statement necessary to preserve the priority of its security interest in the personal property and accounts receivable associated with the business, thus depriving Borley Storage of security valued at $106,000. Whitted denied that he was negligent, and he alleged as an affirmative defense that Borley Storage failed to mitigate its claimed damages. After trial, a jury entered a verdict in favor of Whitted. Following entry of judgment on the jury verdict and denial of its motion seeking alternative forms of postjudgment relief, Borley Storage perfected this timely appeal. We moved the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Additional facts relevant to the analysis are included therein.

II. ASSIGNMENTS OF ERROR

Borley Storage assigns, restated, that the district court erred in (1) instructing the jury that any failure to mitigate damages was a complete bar to its recovery; (2) failing to give certain tendered jury instructions; (3) failing to direct a verdict on the issue of mitigation of damages; (4) instructing the jury that the Bauders were, as a matter of law, personally liable on the promissory note; (5) instructing the jury that the failure to file a continuation statement did not relieve the Bauders of their obligation on the promissory note; (6) overruling its foundational objection to Whitted's testimony regarding his habit or routine with respect to representing sellers of businesses; (7) receiving Dennis Bauder's personal financial statements over objection, and (8) overruling its motion to set aside the verdict

or judgment, motion for new trial, and motion for judgment notwithstanding the verdict.

III. STANDARD OF REVIEW

[1] A trial court's decision to admit habit evidence based on opinion under Neb. Rev. Stat. § 27-406 (Reissue 1995) is reviewed for an abuse of discretion. See *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

[2] In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003).

IV. ANALYSIS

1. Comakers' Liability on Promissory Note

Several of the issues presented in this appeal relate to the undisputed fact that Borley Storage did not make a claim against the Bauders on the promissory note which the Bauders executed personally in connection with their purchase of the business. Borley Storage argues that any such claim would have been defeated by an impairment of collateral defense and that, in any event, the Bauders' potential liability on the note was not relevant to Borley Storage's claim against Whitted. Borley Storage thus argues that the district court erred in receiving evidence on and instructing the jury about the promissory note and its relationship to Whitted's mitigation of damages defense.

(a) Impairment of Collateral

Over the objection of Borley Storage, the district court instructed the jury as follows:

> The Court has determined that as a matter of law, Dennis Bauder and Wanda Bauder are co-makers of a promissory note and as such they are jointly and serverly [sic] liable to satisfy the indebtedness created by the promissory note.
>
> The Court has futher [sic] determined as a matter of law, that the failure to file the continuation statement, did not

> relieve Dennis Bauder and Wanda Bauder of this obligation to pay the indebtedness created by the promissory note.

Borley Storage argues that the failure to file a continuation statement preserving its security interest relieved the Bauders of their personal liability on the note. This argument is based upon Neb. U.C.C. § 3-606(1) (Reissue 1980), in effect in Nebraska at the time of the sale, which provided: "The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

Generally, this provision of the Uniform Commercial Code has been interpreted to discharge only the obligations of those parties who sign a negotiable instrument in the capacity of a surety. See, generally, Annot., 61 A.L.R. 5th 525 (1998); 21 Shepard's Causes of Action 145, § 23 (1990). This is because § 3-606 is generally regarded as a protection for a surety's right of subrogation. See 61 A.L.R. 5th, *supra*. However, a minority of jurisdictions take the position that all parties to a negotiable instrument, including nonaccommodating makers and comakers, can avail themselves of the defense of discharge. See, *Crimmins v. Lowry*, 691 S.W.2d 582 (Tex. 1985); *Bishop v. United Missouri Bank of Carthage*, 647 S.W.2d 625 (Mo. App. 1983); *Southwest Florida Production v. Schirow*, 388 So. 2d 338 (Fla. App. 1980); *Rushton v. U.M.&M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

Although this court has not specifically addressed this split in authority, we have implicitly followed the majority view that the impairment of collateral defense is not available to the maker or comaker of a promissory note. In *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 419, 520 N.W.2d 189, 194 (1994), we rejected a claim that a party was entitled to assert "the special suretyship defenses set forth in Neb. U.C.C. § 3-606" based in part upon our prior determination that the party "was a principal obligor on the note and not an accommodation party." See, also, *First State Bank v. Peterson*, 205 Neb. 814, 816-17, 290 N.W.2d 634, 635 (1980) (holding that under § 3-606, "a guarantor who is a party to the instrument is discharged by an unjustifiable impairment of collateral" and that under "a general rule of

suretyship," a surety is "discharged only pro tanto by any wrongful loss or release of security"). Moreover, the official comment to former § 3-606 specifically stated that the "suretyship defenses here provided" are available "to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so."

Borley Storage argues that the Bauders were accommodation parties and therefore would have been entitled to assert an impairment of collateral defense in any action to enforce their liability on the promissory note. We note that when the Bauders executed the note in 1983, Neb. U.C.C. § 3-415 (Reissue 1980) was in effect and defined the contract of an accommodation party with respect to a negotiable instrument. Although provisions relating to accommodation parties are now codified at Neb. U.C.C. § 3-419 (Reissue 2001), we apply the law in effect at the time of execution of the promissory note in determining whether or not the Bauders were accommodation parties.

The question of whether a party is an accommodation maker or a principal obligor on an instrument is a question of intent. *Ashland State Bank v. Elkhorn Racquetball, Inc., supra*; *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). Section 3-415 defined an accommodation party as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it." We have held that under this definition, an accommodation party is a surety who by lending its name to the maker of the note, in a sense, guarantees that in the event of default by the principal obligor, the accommodation party will be liable. *Marvin E. Jewell & Co., supra.* In examining this issue, we stated:

> The critical question in determining whether someone intended to lend his name to another is whether the alleged accommodation party was required to sign the instrument to enable the alleged principal obligor to obtain credit. Several courts have stated that a major consideration in determining accommodation party status is the fact that the lender refused to make the loan unless the accommodation party was a party to the instrument.

Id. at 6, 434 N.W.2d at 535. Evidence of the effect of the transaction is also relevant to the issue of intent, as "[t]he best, if not controlling, evidence of the intent of the parties to an agreement is the parties' interpretation of the agreement as evidenced by their actions in performance of the agreement." *Id.*

Borley Storage relies on *Farmers Loan & Trust Co. v. Letsinger*, 652 N.E.2d 63 (Ind. 1995), in support of its argument that the Bauders were accommodation parties entitled to assert an impairment of collateral defense. In that case, two individuals executed a promissory note reflecting a bank loan in their capacities as officers of a corporation and also in their individual capacities. They also executed separate guaranty agreements. After the corporation declared bankruptcy, the bank initiated an action against the individuals, and the individuals sought to assert an impairment of collateral defense based on allegations that the bank had allowed a security interest to lapse. The trial court and an intermediate court of appeals determined that the individuals were accommodation parties entitled to assert the defense with respect to the promissory note, and this determination was not challenged in the appeal to the Indiana Supreme Court. Rather, the opinion of that court focused solely on the issue of whether, under Indiana common law, a party executing a guaranty agreement may assert an impairment of collateral defense. Thus, the opinion provides no reasoning or detailed factual basis for the determination that the individuals signed the note as accommodation parties, and we do not find it persuasive on that issue in this case.

Instead, we look to the record in this case, beginning with documents drawn in connection with the sale of the business. The purchase agreement recites: "The purchase price shall be represented by a promissory note executed by Buyers, Dennis Bauder and Wanda Bauder, husband and wife." The promissory note was signed first by Dennis Bauder, then by Wanda Bauder, and finally by Dennis Bauder in his capacity as president of Borley Moving. These parties are referred to collectively in the note as "makers." In his deposition testimony received at trial, Harry Borley agreed that the Bauders signed as makers of the note. Whitted testified that the parties' agreement was for the Bauders to be personally liable on the note, that the Bauders

signed as comakers, and that the purpose of the note was to make the Bauders jointly and severally liable for Borley Moving's obligations. There is no evidence that the Bauders would have had any right of recourse against Borley Moving if they had paid the note personally. As a result of the sale, all of the assets of Borley Storage were transferred to Borley Moving. The Bauders were the sole shareholders of Borley Moving, which had no assets prior to the sale. Neither the language of the promissory note nor any extrinsic evidence suggests that the Bauders signed as sureties, guarantors, or in any other form of accommodation status. The only reasonable inference which can be drawn from the record is that the Bauders were principal obligors of the promissory note, not accommodation parties, and thus could not have asserted an impairment of collateral defense to a claim on the note. Accordingly, the district court did not err in determining as a matter of law that the Bauders were personally liable on the note notwithstanding the failure to file a continuation statement, and in so instructing the jury.

(b) Mitigation of Damages

Borley Storage contends that the district court erred in receiving certain evidence on, and instructing the jury with respect to, the affirmative defense of mitigation of damages. Borley Storage argues that as a secured creditor, it had a right to choose whether to sue on the promissory note or proceed against the collateral. See *Ceres Fertilizer, Inc. v. Beekman*, 209 Neb. 447, 308 N.W.2d 347 (1981). Borley Storage contends that it "clearly elected to recover its collateral, and did not then, nor has it since, ever sought a dollar judgment against any maker of the note." Brief for appellant at 15. It characterizes the instant action for attorney malpractice as "merely an extension" of its efforts to recover the value of its collateral and argues that Whitted, who is alleged to have caused the loss of collateral, should not be permitted "to dictate the manner in which the secured creditor seeks to recover its losses upon default." Brief for appellant at 16.

[3] However, this is not a proceeding to enforce a creditor's remedy under the Uniform Commercial Code. Rather, it is a legal malpractice action governed by principles of tort law. In civil legal malpractice actions, a plaintiff alleging attorney negligence

must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

We examined these elements in the context of a claim that an attorney negligently failed to obtain security for a debt owed to his client in *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). In that case, the client sued the attorney for the unpaid balance of a loan, alleging that the attorney negligently failed to obtain personal guaranties from shareholders of the debtor corporation. The client recovered a judgment against the attorney, but appealed on the ground that the judgment did not include accrued interest. The attorney cross-appealed, assigning error in the refusal of the trial court to instruct on contributory negligence and failure to mitigate damages. This court did not reach the mitigation of damages issue because it concluded under the plain error doctrine that there was a failure of proof with respect to proximate cause. We reasoned that even if a jury could have concluded that the attorney negligently failed to obtain the guaranties, the client was not automatically entitled to the unpaid principal and interest on the loan, but, rather, was required to present evidence that the failure to obtain the guaranties proximately caused the loss. We concluded that there was a failure of proof necessitating reversal with directions to dismiss because there was no evidence that obtaining the shareholders' guaranties would have prevented the loss.

Applying these principles to the instant case, it is clear that the lapse of the security interest in 1988 did not automatically result in any damage to Borley Storage. Had the Bauders, as comakers, made timely payments on the note, the lapse of the security interest would have been of no consequence. See *Widemshek v. Fale*, 17 Wis. 2d 337, 117 N.W.2d 275 (1962) (holding no actual damage resulted from attorney's failure to obtain first mortgage to secure indebtedness where client recovered full amount of indebtedness). The loss of the security interest deprived Borley Storage of one of its remedies in the event of default by Borley Moving, but it did not extinguish the alternative remedy of enforcing the Bauders' personal liability on the

note. With this background, we turn to the specific assignments of error pertaining to mitigation of damages.

(i) Jury Instructions

Borley Storage assigns error with respect to two jury instructions given by the court over Borley Storage's objection. Instruction No. 2 provided in relevant part:

> In the affirmative defense that the Plaintiff failed to mitigate its damages, the burden is upon the Defendant to prove, by the greater weight of the evidence, each and all of the following:
>
> a) That the Plaintiff failed to take reasonable steps to minimize its damages;
>
> b) That the Plaintiff's damage occurred as a result of its failure to take reasonable steps to minimize its damages.

The same instruction then stated, "If the Defendant has met his burden of proof that the Plaintiff failed to take reasonable steps to minimize its damages, then your verdict must be for the Defendant. If the Defendant has not met its burden of proof, you must disregard the affirmative defenses."

Instruction No. 15 further provided:

> If you assess damages, then you must consider the Defendant's claim that the Plaintiff failed to take reasonable steps to minimize its damages by pursuing Dennis Bauder and/or Wanda Bauder co-makers of the promissory note. The Defendant is not liable for any damages that could have been prevented if the Plaintiff had done so. The Defendant has the burden of proving that the Plaintiff failed to take reasonable steps to minimize its damages.

Borley Storage advances two reasons why the trial court erred in giving these instructions. First, it contends that the instructions should not have been given because it had no obligation to pursue its remedy against the Bauders in order to mitigate the damages sought from Whitted. Second, Borley Storage argues that instruction No. 2 conveyed the incorrect notion that failure to mitigate was an absolute defense.

[4] As noted above, whether and to what extent Borley Storage could have recovered the indebtedness by proceeding against the Bauders on the promissory note was relevant to the determination of what loss, if any, Borley Storage sustained as a result of the

lapsed security interest attributed to the alleged malpractice. While this could be viewed as a question of causation, it is clear from the record that the parties and the trial court considered this issue as being within the affirmative defense of mitigation of damages. As a general rule, an appellate court disposes of a case on the theory presented in the district court. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). We do so here.

[5,6] Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury. See, *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988); *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988). A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts. *Gottsch Feeding Corp v. Red Cloud Cattle Co., supra.* A plaintiff's duty to mitigate damages arises only after a defendant's negligence. *Welsh v. Anderson, supra.*

[7] The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). Instruction No. 15 given by the district court is taken nearly verbatim from NJI2d Civ. 4.70 and is a correct statement of the law. Borley Storage alleged that Whitted negligently failed to take steps to prevent the security interest from lapsing in 1988 and that it discovered the facts on which its claim is based in October 1991, several months after Borley Moving had defaulted. Thereafter, Borley Storage made no attempt to enforce the Bauders' obligation on the promissory note. These facts were sufficient to warrant the giving of instruction No. 15.

Instruction No. 2, which consisted of the statement of the case, outlined the claims and defenses asserted by the parties and instructed the jury that if Whitted met his burden of proof with respect to his mitigation of damages defense, "then your

verdict must be for the Defendant." Read in isolation, there is tension between this statement and the rule that a plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts. See *Gottsch Feeding Corp. v. Red Cloud Cattle Co., supra.* However, in reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). Read together, instructions Nos. 2 and 15 clearly inform the jury that it could find Whitted liable only for those damages which could not have been avoided by reasonable steps to mitigate. We conclude that the district court did not err in giving these instructions.

[8] Although Borley Storage assigns that the district court erred in refusing to give certain of its tendered jury instructions, its brief includes no argument of this issue. Errors that are assigned but not argued will not be addressed by an appellate court. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

(ii) Financial Statements

Borley Storage next assigns error with respect to the receipt into evidence of two financial statements signed by Dennis Bauder reflecting his assets and liabilities in 1990 and 1991. Borley Storage objected to the exhibits on grounds of hearsay, foundation, relevance, and probative value outweighed by unfair prejudice. Foundational requirements with respect to authenticity are satisfied because Dennis Bauder identified both documents and testified that by signing them in connection with a loan transaction, he certified the accuracy of the information which they contained.

[9] Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be

without the evidence. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). Here, the Bauders' financial ability to satisfy a judgment on the promissory note was relevant to the issue of whether it would have been reasonable for Borley Storage to pursue such a claim in mitigation of its damages. Borley Storage contends that any probative value of the financial statements was outweighed by the danger of unfair prejudice in that there was no showing of the methodology used for valuing Dennis Bauder's assets and liabilities, and thus the exhibits should have been excluded under Neb. Rev. Stat. § 27-403 (Reissue 1995). We conclude that this argument goes to the weight of the evidence and that the district court did not abuse its discretion in declining to exclude the financial statements under § 27-403.

Finally, Borley Storage argues that the financial statements should have been excluded as hearsay, in that they constituted out-of-court statements by Dennis Bauder to prove his net worth. Prior to receipt of the financial statements, Dennis Bauder testified at length concerning his financial condition at various times, including those periods covered by the financial statements. Thus, even if the financial statements constituted inadmissible hearsay, their admission would be harmless error because their content was established by other relevant evidence properly admitted. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

(iii) Motion for Directed Verdict

Borley Storage contends that the district court erred in overruling its motion for directed verdict on the issue of mitigation of damages made at the close of the evidence. In denying the motion, the district court determined that "the defense has presented sufficient evidence to have that issue go to the jury." For the reasons discussed above, we find no error in that determination.

2. Evidence of Habit and Custom

Whitted testified that he did not have a specific recollection of informing either Harry Borley or Maxine Borley of the need to file a continuation statement within 5 years of filing the original

financing statement. Over an objection that he lacked personal knowledge, Whitted was permitted to testify as to his habit and custom in advising parties in seller-financed transactions. Borley Storage contends that the district court erred in receiving this testimony over its objection.

The issue presented by this assignment of error is governed by § 27-406, which provides:

> (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (2) Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Although this court has not interpreted or applied this rule, the Nebraska Court of Appeals did so in *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000). In that case, the Court of Appeals examined whether a medical doctor offered sufficient foundation to support his testimony in a malpractice action as to his regular practice and routine. At the outset, the court noted that its analysis was "limited to situations where a party attempts to prove habit by way of opinion rather than by specific instances of conduct," because there was no record made of the doctor's habit based on specific conduct in specific similar situations. *Id.* at 167, 609 N.W.2d at 403. The court further noted the "precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated," and thus concluded that admissibility depends on the trial judge's evaluation of the particular facts of the case. *Id.* Thus, the trial court's decision to admit habit evidence based on opinion will be reviewed for an abuse of discretion. *Id.*

In *Hoffart*, the doctor testified that he regularly saw 140 patients per week for 15 years. He stated that during the relevant time period, he had a policy of advising his patients of mammogram failure rates and he generally told them a mammogram would be "'10 to 15 percent not accurate.'" *Id.* at 169, 609

N.W.2d at 404. Although the doctor could not specifically remember advising the patient at issue of the mammogram failure rates, it was his opinion that he would have informed her because it was his regular practice to do so. The Court of Appeals concluded that although the foundation for this opinion "was not thoroughly or artfully presented," the trial court did not abuse its discretion in finding it to be admissible. *Id.* at 170, 609 N.W.2d at 405. The court noted that "[t]he lack of detail concerning regularity (which involves frequency and consistency), specificity, and involuntary response, which are the hallmarks of proof of habit by specific instances rather than by opinion, does not render the opinion evidence inadmissible." *Id.* Rather, the court found that the absence of detail went to the weight which the fact finder would place on such evidence.

In the instant case, Whitted testified that he drafted all of the documents for the sale of Borley Storage. He stated that he had a procedure or checklist he followed in seller-financed transactions like that in which he represented Borley Storage. He stated that the documents involved in such transactions are generally the same. In addition, Whitted testified:

> Generally in a seller-financed transaction I would go through the documents with the client. And in going through the documents with the client, I would tell them of the effect of the document. For example, I would tell them that the stock pledge entitled to [sic] them to basically enforce the stock pledge and irrevocable stock power and take back the stock. I would have told them what — that the security interest in the personal property entitled them to repossess the personal property or to sell the personal property for satisfaction of the debt. I would tell them that it was perfected by virtue of filing with the Secretary of State, and I would tell them that the financing statement was good for a period of time and subject to later continuation.

Whitted stated that with respect to the Borley Storage sale, he "would have advised" that the financing statement needed to be continued after 5 years because that was his "standard operating procedure."

We agree with the analytical principles applied by the Court of Appeals in *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d

397 (2000), and conclude that the district court did not abuse its discretion in permitting this testimony. As in *Hoffart*, this case focuses on a professional service rendered years prior to testimony in a malpractice action. In *Hoffart*, the court recognized the practical reality that "a doctor cannot be expected to specifically recall the advice or explanation he or she gives to each and every patient he or she sees or treats" and that thus, "evidence of habit may be the only vehicle available for a doctor to prove that he or she acted in a particular way on a particular occasion" and is therefore "highly relevant." 9 Neb. App. at 168, 609 N.W.2d at 404. The same reality exists with respect to advice which is routinely given by a lawyer to a client in particular circumstances. Whitted testified that he has practiced law in Nebraska since 1974, focusing his practice on real estate and corporate transactional law, including the sale of businesses of all sizes. Although Borley Storage argues that Whitted did not provide a specific number of transactions in which he had been professionally involved or the details of any specific transaction, we conclude that this goes to the weight to be given to his testimony and not to its admissibility.

V. DENIAL OF POSTTRIAL MOTIONS

Borley Storage assigns error with respect to the district court's denial of its posttrial motions seeking, in the alternative, the setting aside of the verdict and entry of judgment notwithstanding the verdict or for a new trial. Its argument with respect to this assignment is based upon claimed error in the submission of the mitigation of damages defense and the admission of Whitted's testimony regarding habit and custom. For the reasons discussed above, we conclude that the district court did not err in denying the posttrial motions.

VI. CONCLUSION

For the reasons discussed, we conclude that there was no reversible error, and the judgment of the district court entered upon the jury verdict in favor of Whitted should therefore be affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

SAM KAPLAN AND GERALD PANKONIN, APPELLANTS, V. LORI McCLURG, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, AND THE DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, APPELLEES.

710 N.W.2d 96

Filed March 3, 2006. No. S-04-1097.

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. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Administrative Law: Words and Phrases.** For purposes of the Administrative Procedure Act, a "contested case" is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.
4. ____: ____. A proceeding becomes a contested case when a hearing is required.
5. **Administrative Law: Due Process: Notice.** When an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.

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

Sam Kaplan and Gerald Pankonin, pro se.

Jon Bruning, Attorney General, and Charles E. Lowe for appellees.

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

WRIGHT, J.

NATURE OF CASE

Sam Kaplan and Gerald Pankonin petitioned the Department of Administrative Services of the State of Nebraska (DAS) for a declaratory order related to their requests for reclassification of their positions with the state. The petition concerned the definition of certain words and the use and application of certain

agency documents. DAS declined to issue such an order, and the petitioners sought judicial review of that decision. The Lancaster County District Court concluded it lacked subject matter jurisdiction because DAS' refusal was not "a final decision in a contested case." See Neb. Rev. Stat. § 84-917(1) (Reissue 1999). The court dismissed the petition for judicial review, and the petitioners appealed.

SCOPE OF REVIEW

[1] 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. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[2] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

FACTS

The petitioners were employed as attorneys by the Department of Health and Human Services Finance and Support. They were part of the state's classified personnel system, which is administered by the director of DAS' state personnel division.

In June 2003, the petitioners submitted requests seeking to be reclassified from attorney III to agency legal counsel I. During the time the reclassification requests were pending, the petitioners filed a petition with DAS seeking a declaratory order under Neb. Rev. Stat. § 84-912.01 (Reissue 1999). The petitioners asked that DAS restrict the criteria that could be used in considering their reclassification requests. They sought a determination that internal guidelines, referred to as "guidance documents," could not be considered in their reclassification review. They also sought a definition of the word "unit" as used in the formal class specification for agency legal counsel I.

On January 29, 2004, the DAS director declined to issue a declaratory order, stating: "[Section] 84-912.01 is generally inapplicable to your inquiry, and . . . your inquiry is beyond the scope

of the subject matter related to that section." However, the director addressed two queries made by the petitioners.

First, the DAS director found that the use of the "guidance document" was appropriate as a supplement to published position criteria. She stated that the document's purpose was to clarify and supplement the requirements for positions and that it did not contradict or supplant the published criteria. In response to the petitioners' claim that the "guidance document" was arbitrary and capricious, the DAS director stated that the document

> provide[d] a greater depth of understanding of the tasks and responsibilities outlined in the criteria; viewing positions in the vacuum of only published criteria would lead to more arbitrary and capricious decisions given the skeletal nature of the criteria. Guidance documents are a vital part of viewing all facts of a position and examining the position in a relative fashion.

Second, the DAS director stated that the definition of a "unit" in the context of the legal services division of the Department of Health and Human Services Finance and Support was correct. The petitioners had argued that the word "unit" as used in the formal class specification for agency legal counsel I should be interpreted to mean the separate "teams" of the legal services division.

In their petition for judicial review, the petitioners claimed that a ruling by DAS on the petition for declaratory order was a necessary and preliminary step that DAS failed to take prior to denying their requests for reclassification. They asserted that DAS' action denied their due process rights and other rights under the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003). They alleged that DAS' decision was arbitrary, capricious, and contrary to the law. They asked that the refusal to issue a declaratory order be set aside and that the matter be remanded to DAS for further consideration of their requests for reclassification.

In their answer, the DAS director and DAS denied that the district court had subject matter jurisdiction to hear the petition for judicial review because DAS' declination did not constitute "a final decision in a 'contested case'" appealable to the court under § 84-917(1).

The district court concluded that it did not have jurisdiction over the matter and dismissed the petition for judicial review. It noted that the petitioners had sought review of DAS' determination that it would not issue a declaratory order pursuant to § 84-912.01 and that this petition for judicial review did not relate to the denial of the petitioners' requests for reclassification. The court opined that the existence of a contested case depended upon whether the petitioners were entitled to a hearing on their petition seeking a declaratory order and whether DAS acted in a quasi-judicial manner. If the petitioners had no right to a hearing, there was no contested case. If DAS did not act in a quasi-judicial manner, there was no right to a hearing and, thus, no contested case. The court found that DAS was not exercising a quasi-judicial function in acting on the petition for a declaratory order, which sought (1) to limit the criteria that could be used in considering the petitioners' reclassification requests and (2) to define the term "unit."

The district court found that DAS had declined to issue a declaratory order because the petition did not seek a declaratory ruling with respect to the applicability of any rule or statute subject to the authority or jurisdiction of DAS. The "guidance document" and class specifications did not fall within the category of "statute, rule, regulation, or order." See § 84-912.01(1). The court dismissed the matter, and the petitioners appealed.

ASSIGNMENTS OF ERROR

The petitioners' assignments of error can be summarized to allege that the district court erred in failing to find that it had jurisdiction of the matter and in dismissing the petition for judicial review.

ANALYSIS

Our review is limited to the issue of whether the district court properly concluded that it lacked jurisdiction because the matter was not a contested case under the APA. DAS' declination to reclassify the petitioners' position is not before this court. 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. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

Section 84-912.01 provides in relevant part:

> (1) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order within the primary jurisdiction of the agency. . . .
>
> . . . .
>
> (4) Within thirty days after receipt of a petition for a declaratory order, an agency shall, in writing:
>
> (a) Issue an order . . . declaring the applicability of the statute, rule, regulation, or order in question to the specified circumstances;
>
> . . . or
>
> (c) Decline to issue a declaratory order, stating the reasons for its action.
>
> . . . .
>
> (6) A declaratory order shall have the same status and binding effect as any other order issued in a contested case. . . .
>
> (7) If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, the petition shall be deemed to have been denied.

In addition, 10 Neb. Admin. Code, ch. 20, § 008 (1984), states:

> 008.01 Petition – Any interested person may petition for request of the Department to issue a declaratory ruling with respect to the applicability to [a] person, property, or state of facts of any rule or statute subject to the authority or jurisdiction of the Department. . . .
>
> 008.02 Consideration of Petition – The Director shall give consideration to all petitions submitted . . . and shall make the following determinations:
>
> . . . .
>
> 008.02B Whether the ruling, if issued, would terminate the uncertainty or controversy giving rise to the petition; and
>
> . . . .
>
> If the Director finds that the Department does have authority and jurisdiction, and that a ruling could terminate

> the controversy . . . the Director shall, within ninety (90) days of the filing of the petition, set the matter for hearing. If the Director finds that any of the conditions aforementioned do not exist, the matter will not be set for hearing. The Director shall notify petitioner, within thirty (30) days of the filing of the petition, as to whether or not a hearing will be conducted on the req[u]ested ruling, giving reasons in support of [such] decision.

In the present case, the petitioners sought a declaratory order holding (1) that the state personnel division could not use the "guidance document" in evaluating the petitioners' reclassification requests and (2) that the word "unit" as used in the class specifications be given its plain meaning and not be defined as the entire legal services division of the Department of Health and Human Services Finance and Support. DAS declined to issue such an order.

[3,4] The district court concluded it lacked jurisdiction because DAS' decision declining to issue a declaratory order was not a final decision in a contested case. For purposes of the APA, a "[c]ontested case" is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." § 84-901(3). Accord *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). A proceeding becomes a contested case when a hearing is required. *Id.*

[5] "[W]hen an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings." *Id.* at 484, 577 N.W.2d at 277. Accord *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). If an agency acts in a quasi-judicial manner, a case may be deemed contested. *Stoneman v. United Neb. Bank, supra.* Generally, the exercise of discretion to grant or deny a license, permit, or other type of application is a quasi-judicial function. *Id.*

In the case at bar, DAS was not asked to determine the legal rights, duties, or privileges of specific parties. Rather, DAS was asked (1) to limit the criteria that could be used in considering the petitioners' reclassification requests and (2) to define the

word "unit" as used in the class specifications. The declaratory order requested from DAS would not grant or deny a license, permit, or other application.

The parties did not petition DAS for a declaratory order "as to the applicability to specified circumstances of a statute, rule, regulation, or order within the primary jurisdiction of the agency." See § 84-912.01(1) and 10 Neb. Admin. Code, ch. 20, § 008.01. Thus, § 84-912.01 did not require a hearing before DAS to decide the issues raised by the petitioners, the petition for a declaratory order did not require DAS to act in a quasi-judicial manner, and the proceeding was not a contested case under the APA.

The district court correctly determined that it lacked jurisdiction. DAS was not exercising a quasi-judicial function, and the declination to issue a declaratory order did not create a contested case under the APA.

CONCLUSION

The record demonstrates that DAS' decision not to issue a declaratory order did not create a contested case over which the district court had jurisdiction, and the court correctly determined that it lacked jurisdiction over this matter. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). The district court did not have jurisdiction, and this court also lacks jurisdiction. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

GERRARD, J., not participating.

DEANN C. STOVER, APPELLANT, V.
COUNTY OF LANCASTER, APPELLEE.
710 N.W.2d 84

Filed March 3, 2006. No. S-04-1108.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing 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. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Attorney Fees: Attorneys' Liens: Notice.** The purpose of the notice requirement of Neb. Rev. Stat. § 7-108 (Reissue 1997) is to protect innocent persons who have no notice or knowledge that an attorney claims a lien on the judgment.
5. ____: ____: ____. When an attorney has given appropriate notice of an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1997), the lien is perfected and attaches to funds in the hands of the adverse party and belonging to the attorney's client.
6. **Attorney Fees: Attorneys' Liens: Liability.** Despite the attachment of an attorney's lien, the adverse party may be relieved from liability on such lien by payment of the judgment into the clerk of the court.
7. **Attorney Fees: Attorneys' Liens: Notice.** When an adverse party pays into the clerk of the district court such sums as will satisfy a judgment awarded against that party, and prior to the payment of such sums into the court, notice is given and an attorney's lien has attached, the district court clerk who has notice of the lien by virtue of its filing has a duty to retain that portion of the deposited funds to which an attorney's lien has attached until the rightful owner of the sums retained can be determined. When the funds cannot be fully paid out, as part of the clerk's duty to manage such funds, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds, to effectuate the determination of the rightful owner.

Appeal from the District Court for Lancaster County, KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court reversed, and cause remanded with directions.

Victor E. Covalt III and Mary C. Gaines, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for appellant.

Gary E. Lacey, Lancaster County Attorney, Douglas D. Cyr, and Nathan Evershed, Senior Certified Law Student, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

DeAnn C. Stover, an attorney, appeals from the district court's decision affirming the order of the county court, which had denied her claim brought against Lancaster County, under the

Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002) (Tort Claims Act). At issue in this appeal is the determination of the duties of the clerk of the district court to preserve funds in a case in which an attorney's lien has been filed. We have not previously commented on the duties of the clerk under the circumstances of this case.

In this case, Stover filed a claim against Lancaster County asserting that the clerk of the district court erred when the clerk paid the entirety of the funds deposited by the judgment debtor to the judgment creditor in disregard of an attorney's lien filed by Stover. The Lancaster County Board of Commissioners denied Stover's claim. In subsequent litigation, the county court ruled in favor of Lancaster County and dismissed Stover's complaint. The district court for Lancaster County concluded the clerk did not owe a duty to Stover and affirmed the county court's decision. Because we conclude that under the facts the district court clerk owed a duty to Stover to preserve the funds, pending resolution of Stover's claimed attorney's lien, we reverse the decision of the district court and remand the cause to the district court with directions to remand to the county court for further proceedings consistent with this opinion.

STATEMENT OF FACTS

The facts essential to our consideration of the issue raised in this appeal are not in dispute. Arnold Denison hired Stover to represent him as the petitioner in a divorce action against Lori Denison, filed in the district court for Lancaster County and entitled "Denison v. Denison," case No. CI 01-222. On September 25, 2001, judgment in the amount of $5,000 was entered in the Denison case in favor of Arnold and against Lori.

On November 7, 2001, Stover filed a document entitled "Lien" in the Denison case. In the document, Stover claimed a $2,500 "lien for professional services rendered" during her representation of Arnold in the Denison case. A copy of the lien was mailed to all parties, and thus, the clerk and the parties had notice of Stover's attorney's lien.

On April 19, 2002, Lori paid the sum of $5,153.57 into the district court clerk's office in apparent satisfaction of the judgment rendered against her. The parties in the instant case have

stipulated that the clerk paid Arnold the "entire" amount on or about April 23. The clerk did not advise Stover that Lori had paid the judgment into the clerk's office and did not retain any funds relative to Stover's lien. In May 2002, Stover became aware of Lori's payment of the judgment and the subsequent disbursement of the judgment funds by the clerk to Arnold.

On June 17, 2002, Stover submitted a claim to the Lancaster County Board of Commissioners pursuant to the Tort Claims Act. The board held a hearing on Stover's claim on August 13 and denied the claim on August 14.

On January 23, 2003, Stover filed a complaint under the Tort Claims Act in the county court for Lancaster County. In her complaint, Stover alleged, in summary, that the clerk erred when she disbursed the sum paid by Lori to Arnold, in derogation of Stover's claimed attorney's lien. On March 5, Lancaster County filed an answer to Stover's complaint, in summary denying that it was liable to Stover. On January 8, 2004, the case was submitted to the county court on stipulated facts and exhibits. On February 9, the county court ruled in favor of Lancaster County and dismissed Stover's complaint. In its journal entry, the county court stated as follows:

> While I think [Stover] is certainly getting the bad end of this from the government, I feel the statutes in effect do not allow me to award [Stover] the damages requested. There were certain procedures [Stover] could have taken to assure a valid lien. These steps were not taken.

Stover appealed the county court's decision to the district court for Lancaster County. The case came before the district court on June 10, 2004. In an order dated August 26, 2004, the district court affirmed the county court's ruling. In its order, the district court stated the following:

> Stover chose to give notice of her claim to an attorney's lien by filing the document she captioned "Lien" and sending it to her client and opposing counsel. However, filing a notice of the attorney's lien alone is not sufficient to create a right to the money held by the clerk and, thus, a duty to Stover under [Neb. Rev. Stat.] §25-2214.01 [(Reissue 1995)]. To do that the attorney must proceed by way of intervention to obtain a judgement [sic] for her fee. Stover

took no steps to do that at the time she filed her notice of lien or in the five months thereafter.

I agree with Stover that *Myers v. Miller*[, 134 Neb. 824, 279 N.W. 778 (1938),] contains language that suggests the outcome should be otherwise. (In fact, until I read the law for purposes of deciding this case, I thought the outcome would be otherwise. And if I were allowed to make the law rather than follow what I have concluded the law is, I might rule otherwise.)

Stover appeals from the district court's order.

ASSIGNMENT OF ERROR

On appeal, Stover assigns several errors that we restate as claiming that the district court erred in failing to conclude that the clerk of the district court owed a duty to preserve the judgment funds on deposit so as to be available to satisfy Stover's attorney's lien.

STANDARDS OF REVIEW

[1-3] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. See *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). 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. *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

ANALYSIS

In this appeal, the controlling facts are not in dispute, and we are asked to determine the duty of the district court clerk as it pertained to Stover's claimed attorney's lien. Relevant to our analysis are the attorney's lien statute, Neb. Rev. Stat. § 7-108 (Reissue 1997), and the district court clerk's money and property management statute, Neb. Rev. Stat. § 25-2214.01 (Reissue 1995).

In Nebraska, the statutory provision establishing a lien for an attorney fee is found at § 7-108, and reads as follows:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

The list of responsibilities of the clerk of the district court to manage property and money that come into the clerk's possession is found at § 25-2214.01 and provides in relevant part as follows:

> (1) Whenever any money or other property is received by the clerk of the district court, he or she shall carefully manage it and may, when the money cannot immediately be paid out to its rightful owner, deposit the money in interest-bearing accounts in insured banking or savings institutions.

We note that this case presents this court with its first opportunity to harmonize § 7-108 and its jurisprudence with § 25-2214.01.

As set forth above, on September 25, 2001, a judgment was awarded against Lori in Denison v. Denison, Lancaster County District Court, case No. CI 01-222, in favor of Arnold, Stover's client, in the amount of $5,000. On November 7, Stover filed her attorney's lien in Denison v. Denison in the amount of $2,500, with notice to both parties. Subsequent thereto, on April 19, 2002, Lori apparently satisfied the judgment, by paying into the clerk of the district court the amount of $5,153.57, and the clerk thereafter paid Arnold the "entire" amount.

On appeal, Stover challenges the district court's conclusion that the clerk of the district court owed no duty to Stover under § 25-2214.01. Specifically, Stover asserts that after she filed her attorney's lien under § 7-108, she had asserted an interest to at least a portion of the funds subsequently paid by Lori into the clerk's office, and that pursuant to § 25-2214.01, the district court clerk had a duty to retain possession of funds sufficient to satisfy Stover's lien until such time as the rightful ownership of those

funds could be determined. We agree with Stover that under the facts, the clerk owed a duty to Stover.

[4] Under § 7-108, an attorney has a lien upon "money . . . in the hands of the adverse party" belonging to the attorney's client from the time the attorney gives notice of the lien. We have previously recognized that § 7-108 creates a charging lien and that it " 'is not perfected until notice has been given to the party in possession of the fund.' " *Barber v. Barber*, 207 Neb. 101, 112, 296 N.W.2d 463, 471 (1980) (quoting *Cones v. Brooks*, 60 Neb. 698, 84 N.W. 85 (1900)). We have stated that the purpose of the statute's notice requirement is to "protect innocent [persons] who have no notice or knowledge that an attorney claims a lien on the judgment." *Tuttle v. Wyman*, 149 Neb. 769, 779, 32 N.W.2d 742, 748 (1948). We have further acknowledged that the statute does not mandate any particular form of notice. See, *Barber v. Barber, supra*; *Tuttle v. Wyman, supra*. In the instant case, Stover prepared and served upon the parties in Denison v. Denison a written notice of her claimed attorney's lien, and she filed a copy of her lien in the district court file in Denison v. Denison. Her notice was sufficient.

[5] Because Stover filed her attorney's lien prior to Lori's payment of the funds to the district court clerk, at the time Lori paid the judgment into the court, the lien had been perfected by Stover's notice and had attached to the funds. See, generally, *Kleager v. Schaneman*, 212 Neb. 333, 339, 322 N.W.2d 659, 663 (1982) (discussing attorney's lien "attach[ing]" upon money in hands of adverse party); *Barber v. Barber*, 207 Neb. at 112, 296 N.W.2d at 471 (quoting *Cones v. Brooks, supra*, and noting that lien " 'is not perfected until notice has been given to the party in possession of the fund' "). Notwithstanding perfection of Stover's attorney's lien, under the rulings of this court noted below, Lori, as the adverse party and judgment debtor, was nevertheless permitted to pay the judgment against her into the district court clerk's office to satisfy the judgment and at the same time be relieved from her obligations under Stover's lien.

[6] It is fundamental that "the proper place to pay a judgment by a judgment debtor is to the clerk of the court in which the judgment is obtained." *Myers v. Miller*, 134 Neb. 824, 830, 279

N.W. 778, 781 (1938). In a case involving both an outstanding judgment and an attorney's lien, we have stated:

> We believe, in the absence of fraud or conniving on the part of the judgment debtor against an attorney to defeat his attorney's lien, that such judgment debtor has a right to pay the amount of the judgment to the clerk of the court in which the judgment was rendered, when notice of an attorney's lien has been given to the . . . clerk thereof. To hold otherwise would unnecessarily cause difficulty in the payment of judgments by judgment debtors, especially so in a controversy between the attorney, his client and the court, and unnecessarily work a hardship on a judgment debtor.

Id. at 831, 279 N.W. at 781-82. Based on our decision in *Myers*, despite the attachment of an attorney's lien, the adverse party may be relieved from liability on such lien by payment of the judgment into the clerk of the court's office. Therefore, Lori's payment of the judgment against her into the office of the clerk of the district court relieved Lori from her responsibilities with regard to Stover's attorney's lien.

In view of the foregoing, the issue thus arises as to whether, under § 25-2214.01, the district court clerk had a duty to Stover to preserve funds sufficient to satisfy her claimed attorney's lien at the time the clerk transmitted the entire sum Lori had paid into the clerk's office to Arnold. We conclude that the clerk had such a duty, and the district court erred when it concluded to the contrary.

The substance of Stover's complaint was the allegation that the clerk mistakenly paid out funds to which Stover was entitled in some measure pursuant to her attorney's lien. Whether a legal duty in negligence exists is a question of law. *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005). By its terms, § 25-2214.01 obligates the clerk of the district court to "carefully manage" money received and to pay out moneys to the "rightful owner." Moreover, the statute anticipates uncertainty as to ownership by requiring the clerk to retain possession of the money and deposit it into an interest-bearing account "when the money cannot immediately be paid out to its rightful owner."

[7] Given our decisions regarding attorneys' liens, and harmonizing §§ 7-108 and 25-2214.01, we conclude that when an

adverse party pays into the clerk of the district court such sums as will satisfy a judgment awarded against that party, and prior to the payment of such sums into the court, notice is given and an attorney's lien has attached, the district court clerk who has notice of the lien by virtue of its filing has a duty to retain that portion of the deposited funds to which an attorney's lien has attached until the "rightful owner" of the sums retained can be determined. Under such circumstances, when the funds cannot be fully paid out, as part of the clerk's duty to "manage" such funds, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds, to effectuate the determination of the "rightful owner." § 25-2214.01.

In the instant case, we note that both the county and district courts concluded that the district court clerk had no duty to Stover in the absence of her intervention in Denison v. Denison and reached such conclusion by reliance on decisions of this court discussing equitable intervention by attorneys seeking to enforce attorneys' liens. See, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948). See, generally, *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N.W. 1 (1903); *Reynolds v. Reynolds*, 10 Neb. 574, 7 N.W. 322 (1880). However, given the posture of the instant case, the lower courts misperceived the relevance of those decisions to the resolution of the threshold issue of whether the clerk owed Stover a duty. We have concluded that the clerk had a duty to Stover to retain funds and that the clerk should have notified the parties or individuals claiming an interest in the retained funds. Had that occurred, intervention by Stover at that point to prove entitlement and the amount of her attorney's lien would have been appropriate. See *id.* The lower courts' reliance on the intervention cases was misplaced. See, generally, *Myers v. Miller*, 134 Neb. 824, 830, 279 N.W. 778, 781 (1938) (discussing attorney's lien and noting that in Nebraska, "there are no special statutory provisions relating to procedure to enforce an attorney's lien").

Stover brought this action under the Tort Claims Act, and a negligence action brought under the Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages. See *Cerny v.*

Cedar Bluffs Jr./Sr. Pub. Sch., 262 Neb. 66, 628 N.W.2d 697 (2001). Stover has alleged that the clerk erred when she distributed funds in which Stover had an interest and that Stover was damaged thereby. The sole issue raised in this appeal concerned the duty of the district court clerk to retain funds until the "rightful owner" was established, and we have concluded that the clerk owed such duty to Stover. Because the county court erroneously determined that the district court clerk did not have a duty, it dismissed Stover's complaint against Lancaster County without consideration of the remaining elements raised by the allegations in the complaint, and the county court's decision was affirmed on appeal by the district court. In view of the foregoing, we reverse the decision of the district court and remand the cause to the district court with directions to remand to the county court to consider the remaining elements of Stover's claim against Lancaster County under the Tort Claims Act. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006) (appellate court will not consider issue on appeal that was not passed upon by trial court).

CONCLUSION

This is a case of first impression. In this case brought under the Tort Claims Act, we conclude that under the language of § 25-2214.01, when an adverse party pays sums into the office of the clerk of the district court to satisfy a judgment, and prior to the payment of such sums, an attorney's lien has attached to such sums, the district court clerk has a duty without regard to whether the attorney has intervened to retain that portion of the funds to which an attorney's lien has attached until the "rightful owner" of the sums can be determined. In such circumstance, the clerk of the district court should notify those entities of whom the clerk is on notice who have claimed an interest in the funds, of the retention of the funds by the clerk, to effectuate the determination of the "rightful owner."

The district court's order concluding that the clerk owed no duty to Stover and affirming dismissal of Stover's complaint was in error. Because the lower courts erroneously ruled that the district court did not have a duty, no determination was made concerning the remaining elements raised by Stover's complaint. Accordingly, we reverse the decision of the district court

and remand the cause to the district court with directions to remand to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

NELSON MERZ, APPELLEE, AND DOUGLAS E. MERZ, APPELLANT, V. JOHN SEEBA, APPELLEE.
710 N.W.2d 91

Filed March 3, 2006. No. S-04-1129.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
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. **Interventions: Time.** A party seeking to intervene must be diligent and not guilty of unreasonable delay after knowledge of the suit.
4. **Interventions: Equity: Laches.** Under equity principles, laches, or unreasonable delay, is a proper reason to deny intervention.
5. **Courts: Equity: Time.** Under equitable principles, courts of equity have inherent power to refuse relief after an inexcusable delay when not to do so would work an injustice.
6. **Laches.** What constitutes laches depends on the circumstances of the case.
7. **Laches: Equity.** Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.

Appeal from the District Court for Richardson County: DANIEL BRYAN, JR., Judge. Affirmed.

J.L. Spray and Reginald S. Kuhn, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

John M. Guthery and Shawn P. Dontigney, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee John Seeba.

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

CONNOLLY, J.

Douglas E. Merz (Douglas) appeals the district court's order denying his motion to intervene and motion for a new trial. In

2004, Douglas sought to intervene in an action filed in 1990. The district court dismissed the intervention action for two reasons: (1) It was not properly revived and (2) equitable principles prevented intervention. Because the 10-year delay in seeking intervention was unreasonable, we affirm.

BACKGROUND

Nelson Merz (Nelson) filed this action in 1990 against John Seeba seeking an accounting and divestment of stock. Merz held shares in Salem Grain Company, Inc. (Salem), and Seeba was an officer and director of the corporation. According to Nelson's fourth amended petition, Seeba diverted shares and corporate opportunities to himself, harming the other stockholders. The crux of the allegations focused on Seeba's alleged purchase of shares of Salem stock from a bank when the bank had initially offered to sell the stock to Salem. The action remained on the docket for several years, with the court allowing amendments to the petition. The record includes multiple occasions where the court ordered Nelson to show cause why the action should not be dismissed. In 1994, the court ordered that the action be dismissed unless Nelson showed cause within 45 days. The record shows that Nelson did not respond. A docket notation shows that the action was dismissed in 1995, but there is no formal order of dismissal.

Nelson died in 1996, and his estate was closed in 1997. In 2004, Douglas filed a petition in intervention alleging that he was a shareholder in Salem, seeking the same remedies that Nelson sought. The district court denied the intervention. The court first determined that a formal dismissal had never been filed. The court then determined that the case had become dormant and had not been revived within the allowable statutory time, terminating the action. In the alternative, the court denied intervention on equitable principles. The court overruled Douglas' motion for a new trial, and he appeals.

ASSIGNMENT OF ERROR

Douglas assigns, rephrased and consolidated, that the district court erred by applying the revivor statutes and equity powers to deny his request to intervene.

STANDARD OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005). 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.*

ANALYSIS

Douglas contends that he can intervene as a matter of right because the action was never dismissed and the motion was filed before trial. Because the intervention statute presents intervention as one of "right," he argues that equitable doctrines such as laches cannot apply to prevent intervention. See Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004).

Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Nebraska procedure requires that a complaint be filed to intervene. Intervention is governed by the same rules as other pleadings. Neb. Rev. Stat. § 25-330 (Cum. Supp. 2004).

[3] We have previously applied equitable principles to § 25-328 under different circumstances. For example, we have long recognized that when it would be in the interests of justice for a party to intervene after trial has commenced, rules of equity will allow intervention. See *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962). In cases involving intervention after trial has commenced, we have stated that a right to intervene should be asserted within a reasonable time. *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138

N.W.2d 462 (1965). A party seeking to intervene must be diligent and not guilty of unreasonable delay after knowledge of the suit. *Id.* As a result, parties who would otherwise be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without seasonably requesting leave to enter the case. *Id.*

Although we recognize that equity may allow intervention after trial has commenced, we have not addressed whether it can deny intervention when trial has not begun but an unreasonable delay occurs. Courts in other jurisdictions, however, have allowed use of equitable principles to deny intervention when a statutory provision would otherwise apply. *In re Yokohama Specie Bank*, 86 Cal. App. 2d 545, 195 P.2d 555 (1948); *Amer States Ins Co v Albin*, 118 Mich. App. 201, 324 N.W.2d 574 (1982).

In *In re Yokohama Specie Bank*, the California Court of Appeal affirmed an order denying intervention. The court discussed the effect of equitable principles on a statutory "right" of intervention. The court noted that the California statute stated that a person "may" intervene with leave of the court. The court held that the statute gave the trial court power to deny intervention. Therefore, there was not an absolute statutory right to intervention. The court then addressed delay as one reason why the intervention was properly denied. The court stated that the evidence showed that the intervenors were guilty of an "unreasonable delay and laches in asserting their claims." *Id.* at 555, 195 P.2d at 561. The court then stated: " 'Aside from the statutory limitation upon the time of intervention, it is the general rule that a right to intervene should be asserted within a reasonable time and that the interven[o]r must not be guilty of an unreasonable delay after knowledge of the suit.' . . ." *Id.* 555-56, 195 P.2d at 561. See, also, *Amer States Ins Co, supra* (holding that laches or unreasonable delay is proper reason to deny intervention).

Douglas argues that an unreasonable delay rule does not apply because we have previously stated that when intervention is sought before trial, the intervenor is not required to set forth reasons why he or she did not intervene at an earlier time. See *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966). We disagree. In *Pribil*, the court was not presented with the issue whether laches could apply because of an unreasonable delay.

Instead, it was an action brought before trial with no delay involved. Accordingly, *Pribil* is not applicable.

[4] We agree with the California and Michigan courts which have held that under equity principles, laches, or unreasonable delay, is a proper reason to deny intervention. Like the California statute at issue in *In re Yokohama Specie Bank*, § 25-328 provides that a person "may" intervene. To intervene, a party must file a complaint, and the court can deny intervention. § 25-330. Therefore, although the statute uses the title of intervention of "right," it does not provide for an "absolute right" to intervene.

[5-7] Under equitable principles, courts of equity have inherent power to refuse relief after an inexcusable delay when not to do so would work an injustice. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). What constitutes laches depends on the circumstances of the case. *Id.* Laches, however, does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Id.*

In the petition to intervene, Douglas, a shareholder in Salem, alleged that he had been a shareholder during all relevant times and was appointed by the corporation in 1986 to act as its agent to negotiate the purchase of stock from the bank. During that time is when Seeba allegedly breached a duty to the corporation by purchasing the stock. So, from the beginning, Douglas was aware of Salem's claim against Seeba. He did not, however, seek to intervene while Nelson was alive, nor did he seek to revive the action after Nelson's death. Instead, he waited 10 years to revive the dormant action by filing a intervention complaint.

Moreover, because the action was treated as dismissed and was not revived after Nelson's death, Seeba could justifiably believe that the action was final; the statute of limitations for a new action for divestiture and an accounting had also run. Therefore, allowing the claim to be revived through intervention would prejudice Seeba. We affirm.

AFFIRMED.

PAMELA JOANN GRESS, APPELLEE AND CROSS-APPELLANT, V. PATRICK RAYMOND GRESS, APPELLANT AND CROSS-APPELLEE.

710 N.W.2d 318

Filed March 3, 2006. No. S-05-007.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters 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.
3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
5. ____. In determining the best interests of the child in a custody determination, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) 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; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member.
6. **Child Support.** Before determining a parent's child support obligation, there must be a determination regarding the monthly incomes of the custodial and noncustodial parents.
7. **Taxation.** As a general rule, the income of a self-employed person can be determined from his or her income tax return.
8. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
9. **Child Support: Taxation.** Income, for the purpose of child support, is not necessarily synonymous with taxable income.
10. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.
11. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the

net marital estate between the parties in accordance with the principles contained in § 42-365.

12. ____. Property which one party brings into the marriage is generally excluded from the marital estate.
13. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding.
14. **Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
15. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
16. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

Stefanie S. Flodman and Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom, Sedlacek & Stilmock, guardian ad litem.

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

STEPHAN, J.

Patrick Raymond Gress appeals from an order of the district court for Otoe County dissolving his marriage to Pamela Joann Gress. He contests the court's order regarding custody, child and spousal support, property division, and attorney fees. Pamela cross-appeals, arguing that the duration of spousal support was inadequate. We affirm in part, and in part reverse and remand for further proceedings.

FACTS

The parties were married on July 29, 1988. They had four children during the marriage. The couple's youngest son has Down

syndrome and requires special assistance and therapy. At all times during the marriage, Patrick was a self-employed farmer.

Pamela petitioned for dissolution in September 2003, after which Patrick left the marital home and began to reside with his parents on their adjoining family farm. In November, a temporary order was entered, placing custody of the children with Pamela and appointing counsel to represent the children's interests. Patrick exercised regular visitation at all times. Proceedings on the petition were held September 1 and 10, October 1, November 3, 5, and 19, and December 3, 2004. The parties' 14-year-old daughter testified that she wished to live with Pamela, and the children's counsel urged the court to keep the children together with Pamela. Each party called witnesses who testified to his or her fitness as a parent, and each introduced expert testimony regarding the other's mental health.

On December 15, 2004, the district court entered a decree of dissolution. The court awarded sole custody of the children to Pamela, with rights of visitation to Patrick. Pamela was awarded the marital home subject to its mortgage, and Patrick was awarded the farm property, machinery, and equipment. The marital debts were divided, and Patrick was ordered to pay $1,285 per month for child support, $1,000 per month for spousal support, and attorney fees. Other facts will be discussed in the relevant context.

ASSIGNMENTS OF ERROR

Patrick assigns, restated, regrouped, and renumbered, that the court erred in (1) awarding sole custody of the minor children to Pamela and in determining Patrick's visitation, (2) its treatment of depreciated farm assets for purposes of calculating income and child support, (3) ordering spousal support for Pamela, (4) determining the property division, (5) ordering Patrick to pay attorney fees, and (6) admitting certain expert testimony. In her cross-appeal, Pamela assigns that the district court erred in ordering that alimony payments be terminated after 5 years.

STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. See, *Robb v.*

Robb, 268 Neb. 694, 687 N.W.2d 195 (2004); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. See, *Gangwish v. Gangwish, supra*; *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

ANALYSIS

CHILD CUSTODY

[2,3] Patrick first contends that the court erred in awarding custody of the parties' four minor children to Pamela. Alternatively, Patrick contends that the court erred in not ordering that his visitation schedule include Sundays on the weekends the children are not with him. Child custody determinations are matters 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. *Robb v. Robb, supra*; *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.*

In particular, Patrick argues that there are evidentiary issues surrounding the testimony of Pamela's expert regarding Patrick's mental health and the testimony of Patrick's expert regarding the validity of personality tests taken by Pamela. We need not address the evidentiary issues Patrick raises, however, because there is no indication that the court gave any particular weight to the testimony of either expert. Patrick never alleged that Pamela is an unfit parent, and the trial court expressly found that both Patrick and Pamela are fit parents to have custody of the children.

Our de novo review of the record reveals that there was evidence sufficient to support the court's finding that both parents are fit. Both parents had loving, caring relationships with the children prior to the dissolution action, as witnessed by friends and family. During the 15-month pendency of the action, the record shows that Pamela encouraged relationships between the

children and Patrick and that Patrick did not miss any of his opportunities for visitation.

[4,5] When both parents are found to be fit, the inquiry for the court is the best interests of the children. See, *Robb v. Robb, supra*; *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). In determining the best interests of the child in a custody determination, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) 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; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member. Neb. Rev. Stat. § 42-364(2) (Reissue 2004); *Robb v. Robb, supra*; *Marcovitz v. Rogers, supra*.

As noted above, both parents have loving relationships with the children. However, the record reveals that Pamela was the primary caregiver. She was responsible for the children's care from the time they were infants, including bathing the children, purchasing their clothes, doing laundry, cooking the family meals, and taking the children to and from school, activities, and doctor's appointments. Further, the youngest son has Down syndrome and requires special care. Although Patrick is able and willing to care for him, Pamela works only part time outside the home and considers her "vocation in life" to be caring for her children. Thus, Pamela has more flexibility in her schedule than Patrick has when farming. The parties' 14-year-old daughter testified that she wished to live with Pamela because Pamela is the parent that usually helps her with problems and with homework and that her relationship with Patrick is not as good. While in Pamela's sole custody during the pendency of the action, the older children continued to do well in school. Regarding Patrick's contention that he should have Sunday visits on the weekends that he does not have the children, both the daughter and Pamela testified that such an arrangement would not allow the children to spend a complete weekend with Pamela. We conclude that the district court did not abuse its discretion in its custody and visitation order.

CHILD SUPPORT

[6] Patrick next challenges how the trial court calculated his child support obligation under paragraph D of the Nebraska Child Support Guidelines. Before determining a parent's child support obligation, there must be a determination regarding the monthly incomes of the custodial and noncustodial parents. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). Patrick was a self-employed farmer prior to and during the parties' marriage.

[7] As a general rule, the income of a self-employed person can be determined from his or her income tax return. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). However, prior to September 1, 2002, paragraph D provided that if a party was self-employed, depreciation claimed on tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income. *Gase v. Gase, supra.*

Effective September 1, 2002, paragraph D was amended to read in relevant part:

> Depreciation calculated on the cost of ordinary and necessary assets may be allowed as a deduction from income of the business or farm to arrive at an annualized total monthly income. After an asset is shown to be ordinary and necessary, depreciation, if allowed by the trial court, shall be calculated by using the "straight-line" method, which allocates cost of an asset equally over its useful duration or life. An asset's life should be determined with reference to the Class-lives and Recovery Periods Table created pursuant to 26 CFR § 1.167(a)-11. A party claiming depreciation shall have the burden of establishing entitlement to its allowance as a deduction.
>
> . . . Any party claiming an allowance of depreciation as a deduction from income shall furnish to the court and the other party copies of a minimum of 5 years' tax returns . . . .

The amended guidelines were in effect when Pamela filed for dissolution in September 2003. In accordance with the requirement of paragraph D, Patrick produced tax returns for the years 1998 through 2003.

Patrick's tax returns showed that his taxable income during those years was determined after deducting for depreciation of

farm machinery and equipment. Patrick's tax preparer testified that the deductions were for ordinary and necessary assets in farm operations. The district court concluded that Patrick met his burden and established that he was entitled to a depreciation deduction under paragraph D. Neither party contests this portion of the court's findings.

After determining that Patrick was entitled to a depreciation deduction, the court expressed some uncertainty about the appropriate application of paragraph D and opined that allowing Patrick to reduce his income by the full amount of his depreciation deductions would "work against the best interests of [the] children." The court adopted Pamela's proposed calculations of Patrick's monthly income, which averaged the income of the years 2000 through 2003 after adding one-half of the depreciation deductions for each year back to the corresponding year's taxable income. Patrick contends that once the district court determined that he was entitled to a depreciation deduction, the court erred in using the income calculation proposed by Pamela. We agree.

[8] This is our first opportunity to review a case involving the proper treatment of depreciation deductions under the September 2002 amendment to paragraph D. Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

Depreciation as set out in paragraph D is a matter of proving the ordinary and necessary expenses of doing business. Part of that burden is showing the court that the deduction does not represent artificial treatment of assets for the purpose of avoiding child support obligations. Once the burden is met, the appropriate procedure is for a court to use the straight-line depreciation method in calculating the parent's monthly income. Because a monthly income calculation under paragraph D is mathematical in nature, the effect of a depreciation deduction on child support is not a proper question under paragraph D.

The district court in this case determined that Patrick met his burden and established that he was entitled to a depreciation

deduction. The court was then required to calculate Patrick's income using the straight-line method of depreciation without any manipulation of the figures. Patrick's tax preparer testified that Patrick's 1996 through 2003 tax returns were prepared using the declining-balance method of depreciation, but provided the court with straight-line method depreciation figures for the same years. The district court did not compute Patrick's income using the straight-line figures provided by Patrick's tax preparer. Instead, the court adopted Pamela's calculations, which used the 2000 through 2003 declining-balance depreciation figures and which improperly manipulated Patrick's monthly income by adding back one-half of the depreciated amounts. We conclude that the district court erred in its calculation of Patrick's monthly income under paragraph D.

[9,10] Pamela suggests that the court's calculation demonstrates a desire to make a warranted deviation from the guidelines, pointing to Patrick's own evidence that he is able to pay expenses that well exceed his depreciated income. Income, for the purpose of child support, is not necessarily synonymous with taxable income. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure. *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001).

Although what effect depreciation has on child support is not a proper question under paragraph D, once a potential child support obligation has been determined based upon the calculations under paragraph D, paragraph C permits a deviation from the guidelines "whenever the application of the guidelines in an individual case would be unjust or inappropriate." See, *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). The trial court in this case indicated that it would be contrary to the children's best interests to calculate child support based upon Patrick's depreciated monthly income. We are unable to reach this issue, however, because there is no record of what amount of child support Patrick would be required to pay based upon proper calculation of his depreciated income under paragraph D or why it would not be in the best interests

of the children to order Patrick to pay that amount. Deviations from the guidelines must take into consideration the best interests of the child, and in the event of a deviation, the trial court must state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file. *Moore v. Bauer*, 11 Neb. App. 572, 657 N.W.2d 25 (2003).

Accordingly, we reverse the district court's decision ordering Patrick to pay $1,285 per month for child support and remand the matter for further proceedings in conformity with this opinion.

Spousal Support

Patrick next assigns that the trial court erred in ordering him to pay Pamela $1,000 per month in spousal support; an amount that Patrick argues exceeds his earning capacity. In her cross-appeal, Pamela argues that the district court erred in ordering that the support payments terminate after 5 years.

The Nebraska Child Support Guidelines provide at paragraph M that the guidelines "intend that spousal support be determined from income available to the parties after child support has been established." The guidelines require that Patrick's child support obligations be calculated prior to the calculation of any alimony. See *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). Because we are remanding the matter of child support, we reverse the alimony order and remand the matter for determination after Patrick's child support obligations have been calculated. Accordingly, we need not address Pamela's cross-appeal.

Property Division

Patrick next assigns that the trial court erred in its property distribution by (1) failing to first separate out nonmarital assets that Patrick brought into the marriage or that belong to Patrick's parents in whole or part and (2) failing to show how it valued the farm machinery. Patrick contends that at the time of the marriage, he owned certain farm machinery and held cash assets in three bank accounts and two investment accounts.

[11,12] Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first

step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). Property which one party brings into the marriage is generally excluded from the marital estate. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[13] The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005). The record shows that Patrick depleted the cash assets he brought into the marriage for various family expenses during the marriage. As to the farm machinery, Patrick offered evidence that his parents owned all or part of items valued at about $57,000. He also established that at the time of the dissolution proceeding, he had nonmarital personal property worth approximately $19,000, some of which he purchased before the marriage and still owned, and other items claimed as nonmarital by virtue of the traceable trade-in of property purchased before the marriage. Pamela confirmed that Patrick owned farm equipment and other property prior to the marriage, though she did not know its value.

The court's division of property awarded Pamela the marital home valued at approximately $250,000, and a car, personal property, and cash accounts valued at $14,631. She was given responsibility for $26,130 in marital debt, making her portion of the net marital estate $238,501. Under the decree, Patrick's portion of the net marital estate was $241,475.16. The court awarded Patrick marital assets valued at $533,771.46 and $292,296.30 in marital debt. Patrick was awarded all income-producing property, including farmland valued at $97,000 and farm machinery valued at $260,000.

[14] The court did not discuss premarital property or individually list or value each piece of farm machinery in its decree. Even if the court overlooked the value of the nonmarital machinery, as Patrick suggests, the court did not abuse its discretion in distributing the marital property. Although the division of property

is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

Even adjusting the award by deducting the value of the disputed machinery, Patrick's net award would still result in his receipt of at least one-third of the marital property. Further, the court's division was fair and reasonable. Pamela was given custody of the minor children. The parties agreed it would be in the best interests of the children to be able to remain in the marital home with whichever parent was given custody. As a practical matter, the district court awarded the marital home to Pamela and the farm property, machinery, and equipment to Patrick. The marital home is the only significant property awarded to Pamela and is not an income-producing asset. Pamela earns approximately $731 per month. It would be unreasonable to require Pamela to offset any perceived difference in the property distribution by taking out a loan that she can ill afford to service. Accordingly, we find no error in the property distribution.

Attorney Fees

[15] Finally, Patrick contends that the trial court erred in ordering him to pay $10,000 of Pamela's attorney fees and all fees and costs for representation of the minor children. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[16] The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005). This action involved a 7-day court trial over a 3-month period. The custody of the four children was a primary issue, and the

court appointed an attorney to represent their interests. Neither party contests the reasonableness of the fees. The court awarded Patrick the only income-producing marital property that existed and opined that Patrick's income capacity will be substantial compared to Pamela's "for a number of years, if not for [the] duration of her lifetime." See *Gangwish v. Gangwish, supra* (ordering husband to pay wife's attorney fees because he was awarded marital property which enabled him to continue to reap substantial income stream). Even so, Patrick was ordered to pay only about one-third of Pamela's attorney fees in addition to the fees for the children's court-appointed counsel. We conclude that the district court did not abuse its discretion in ordering Patrick to pay attorney fees.

CONCLUSION

We affirm the district court's order awarding sole custody of the minor children to Pamela. We also affirm the court's property division and award of attorney fees. We conclude that the court erred in its calculation of Patrick's monthly income for purposes of child support under paragraph D of the Nebraska Child Support Guidelines. We therefore reverse the court's determination and remand the matter for an appropriate calculation and reasoned child support order. We also remand the matter of alimony for determination following the child support determination.

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

WRIGHT, J., participating on briefs.

IN RE GUARDIANSHIP OF SOPHIA M., A MINOR. JULIUS M. AND MIRIAM M., APPELLEES, V. NAOMI M., APPELLANT.

710 N.W.2d 312

Filed March 3, 2006. No. S-05-154.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **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.
5. **Actions: Statutes: Words and Phrases.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.
6. **Actions: Guardians and Conservators.** Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2610 (Reissue 1995), to appoint a guardian, are special proceedings.
7. **Pretrial Procedure: Final Orders: Appeal and Error.** Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final. However, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.
8. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
9. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
10. **Juvenile Courts: Parental Rights: Final Orders.** The question whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
11. **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.

Appeal from the County Court for Lancaster County: JACK B. LINDNER, Judge. Appeal dismissed.

Robert Wm. Chapin, Jr., of Chapin Law Offices, P.C., L.L.O., for appellant.

Kent E. Endacott, of Woods & Aitken, L.L.P., for appellees.

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

GERRARD, J.

NATURE OF CASE

Julius M. and Miriam M. (the grandparents) filed a petition on June 22, 2004, to be appointed coguardians of their granddaughter, Sophia M., alleging that Naomi M., the grandparents' daughter and Sophia's mother, was in protective custody at a mental health crisis center. The grandparents were appointed temporary coguardians of Sophia on June 22. A final guardianship hearing was scheduled for late January 2005. Prior to the final hearing, the county court, on January 7, 2005, granted the grandparents' request for a mental examination of Naomi and, on the same date, denied Naomi's request for immediate visitation. Naomi appeals from both orders.

FACTUAL AND PROCEDURAL BACKGROUND

The grandparents filed a petition to be appointed coguardians of Sophia, for the reason that Naomi was in protective custody at a mental health crisis center. The court entered an order appointing the grandparents as temporary coguardians of Sophia, and on June 22, 2004, the grandparents signed an acceptance of the appointment.

Subsequently, the grandparents, as temporary guardians, filed a motion on December 27, 2004, pursuant to Neb. Ct. R. of Discovery 35 (rev. 2001), requesting that the court order Naomi to submit to a mental examination. Naomi filed a motion on December 30, 2004, for immediate visitation. After a hearing on both motions, the court entered an order sustaining the grandparents' motion regarding a mental examination of Naomi. The court also entered an order denying Naomi's request for immediate visitation. The court reasoned:

> The matter relating to visitation has been before the Court on several occasions during the past few months, and at one time during the later part of October significant efforts were made to accomplish weekend visitation by using a qualified professional to monitor the same. Those efforts proved to be unsuccessful and we are now about three

> weeks from the final hearing in the case. Having gone this far without visitation the court finds there is very little to be gained by starting the search for another professionally monitored visitation arrangement as we can have this issue and others resolved in three or four weeks.

Naomi filed the present appeal, challenging the court's disposition of both motions.

ASSIGNMENTS OF ERROR

Naomi assigns, summarized and restated, that the county court erred in (1) ordering a rule 35 mental examination and instructing that the scope of the examination include any recommendation for treatment by the examining physician, (2) denying Naomi's request for visitation, (3) receiving into evidence an initial assessment for abuse or neglect worksheet at the hearing on the rule 35 and visitation motions, and (4) continuing to exercise jurisdiction over the case during the pending appeal.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

ANALYSIS

Orders Compelling Mental Examination and Denying Visitation Were Not Final, Appealable Orders.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). 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. *Id.* The orders on appeal in this case did not determine the action and prevent a judgment, nor were they made on summary application in an action after judgment was rendered. Thus, we consider whether the orders were made during a special proceeding and affected a substantial right. See *In re Trust of Rosenberg, supra.*

[5,6] Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. *In re Guardianship & Conservatorship of Larson, supra.* We have described an action as any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. *Id.* Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. *Id.* Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2610 (Reissue 1995), to appoint a guardian, are special proceedings. See *In re Guardianship & Conservatorship of Larson, supra.* In this case, the proceeding during which the court heard the rule 35 and visitation motions was initiated pursuant to the grandparents' request to be appointed coguardians of Sophia and, thus, constitutes a special proceeding.

Having determined that this was a special proceeding, we next consider whether a substantial right was affected. Naomi asserts that "[t]he [m]otions in question clearly affect a substantial right as they require [Naomi] to take an examination, an infringement upon her First Amendment right to liberty, and deny her visitation with her child, an infringement upon her First Amendment right to liberty." Brief for appellant at 9. We note that Naomi offers neither authority nor analysis identifying the "First Amendment right to liberty" she believes to have been affected. The grandparents assert that the rule 35 order concerns discovery matters and, thus, is not appealable. In addition, the grandparents argue that the denial of visitation order was not a final, appealable order because it was merely a temporary order designed to maintain the status quo until the final guardianship hearing was scheduled to occur in late January 2005.

[7] Discovery orders, such as the rule 35 order in this case, are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000). However, pursuant to our final order jurisprudence, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.

[8,9] A substantial right is an essential legal right, not a mere technical right. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

In this case, the rule 35 order did not affect a substantial right and, therefore, is not a final, appealable order. The court's order requiring Naomi to submit to a mental examination does not diminish her power to contest any unfavorable results of the examination or defend her capacity to have custody of Sophia in the guardianship proceeding. In fact, at the hearing, Naomi presented her own report of a psychological evaluation completed by a clinical psychologist at the request of Naomi's attorney. The rule 35 order giving the grandparents the opportunity to produce a separate mental evaluation does not prevent Naomi from offering her report in support of her case for custody of Sophia.

In addition, an appeal of the rule 35 order after final judgment provides an adequate remedy to Naomi. Although a mental examination, once ordered and performed, cannot be undone, we are not convinced that any harm caused by waiting to appeal the order until after final judgment is sufficient to warrant an interlocutory appeal. In contrast, allowing an interlocutory appeal in this case promotes significant delay in the guardianship proceedings and the ultimate resolution of Sophia's custody.

Rule 35 offers protection in the form of standards that must be met before an order for a mental examination may be issued. To obtain an order for mental examination, rule 35 requires that the mental condition of a party be in controversy and that the moving party show good cause for ordering the examination. Finally, if warranted, an egregious error made by the court in ordering a

mental examination could be challenged by the aggrieved party in a mandamus action. See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999). Thus, we conclude that a rule 35 order does not affect a substantial right and, therefore, is not a final, appealable order.

[10] The visitation order is also not a final, appealable order. In the context of juvenile matters, this court has stated:

> "[T]he question . . . whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed."

In re Interest of Borius H. et al., 251 Neb. 397, 401, 558 N.W.2d 31, 34 (1997), quoting *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Accord, *In re Interest of Daniel W.*, 3 Neb. App. 630, 636, 529 N.W.2d 548, 553-54 (1995), *reversed on other grounds* 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 526 N.W.2d 233 (1994). Although this case is a guardianship proceeding, the visitation order concerned the relationship between Naomi and her daughter; thus, we look to juvenile cases for guidance in determining if the denial of visitation in this case affects a substantial right.

Here, the visitation order denied visitation pending the final guardianship hearing, which was scheduled to occur approximately 3 weeks later. The court explained that prior efforts to provide visitation had been unsuccessful and that, with only 3 weeks until the final guardianship hearing and a final resolution of the issue, very little would be gained by attempting to construct another visitation arrangement. Further, since the order effectively denied visitation only until the final guardianship hearing, the length of time that Naomi's relationship with Sophia was to be disturbed was brief, and the order was not a permanent disposition. The fact that Naomi's appeal of the visitation order has delayed the final disposition of the guardianship proceeding is unfortunate but irrelevant in our determination whether the order, when issued, affected a substantial right. The visitation order did not affect a substantial right and is not a final, appealable order.

Actions Taken by County Court During Pendency of Appeal Are Not Void.

[11] Naomi argues that any further action on behalf of the county court in this case pending the outcome of this appeal is in error and that any such proceedings are void. The record fails to show that any further action has been taken by the county court. However, to the extent that the county court has acted during the pendency of this appeal, those actions are not void. 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

Remaining Assignments of Error Need Not Be Resolved.

Having determined that the orders on appeal are not final, appealable orders, this court lacks jurisdiction to consider this appeal and, thus, declines to address Naomi's remaining assignments of error.

CONCLUSION

Based on the foregoing reasons, we dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
DANNY L. BALL, APPELLANT.
710 N.W.2d 592

Filed March 3, 2006. No. S-05-175.

1. **Motions to Suppress: Search and Seizure: Appeal and Error.** In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether the search was illegal. If so, the court must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search.
2. **Motions to Suppress: Appeal and Error.** An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are

clearly erroneous. In making this determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers the trial court observed the witnesses testifying in regard to such motions.

3. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
4. **Criminal Law: Confessions: Appeal and Error.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, an appellate court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in so doing, will look to the totality of the circumstances.
5. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.
6. **Constitutional Law: Search and Seizure.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures.
7. **Search and Seizure: Police Officers and Sheriffs: Evidence: Proof.** If the State shows by a preponderance of the evidence that the police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible under the inevitable discovery doctrine.
8. **Constitutional Law: Criminal Law: Confessions: Arrests.** Under the Fourth Amendment, a confession obtained by exploitation of an illegal arrest is inadmissible against a criminal defendant unless the confession was an act of free will sufficient to purge the primary taint of the unlawful invasion.
9. **Police Officers and Sheriffs: Arrests: Probable Cause.** A warrantless arrest is valid when the arresting officers have probable cause to arrest the suspect at the moment of the arrest.
10. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
11. **Police Officers and Sheriffs: Probable Cause: Words and Phrases.** Probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false.
12. **Police Officers and Sheriffs: Probable Cause.** Probable cause is evaluated by the collective information of the police engaged in a common investigation.
13. **Police Officers and Sheriffs: Arrests: Probable Cause.** The validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists.

14. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
15. **Constitutional Law: Criminal Law: Right to Counsel.** The Fifth Amendment does not explicitly afford a right to counsel; it provides that no person shall be compelled in any criminal case to be a witness against himself.
16. **Miranda Rights: Right to Counsel.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), provides the right to have counsel present during custodial interrogation.
17. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates that its agents used procedural safeguards that are effective to secure the privilege against self-incrimination.
18. **Miranda Rights: Words and Phrases.** Under the *Miranda* rule, custodial interrogation takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.
19. **Miranda Rights.** The dispositive factor in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances.
20. **Miranda Rights: Right to Counsel: Waiver: Police Officers and Sheriffs.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. But once a suspect asserts the *Miranda* right to counsel, interrogation must cease and police may not approach the suspect for further interrogation until counsel is made available.
21. **Confessions: Miranda Rights: Waiver: Police Officers and Sheriffs: Presumptions.** If the police initiate contact with a suspect who has invoked his *Miranda* rights, the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.
22. **Miranda Rights: Right to Counsel.** A suspect cannot invoke *Miranda* rights anticipatorily, before or outside the context of custodial interrogation.
23. **Confessions: Miranda Rights: Waiver: Police Officers and Sheriffs.** When an accused initiates further communication with the police, is informed of his *Miranda* rights, and waives them before further interrogation, the court must determine whether the waiver was knowing and intelligent under the totality of the circumstances.
24. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.
25. ____: ____: ____. The Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed.

Robert P. Lindemeier, of Ruff, Lindemeier, Gillett & Wadewitz, and Gary J. Krajewski, of Krajewski Law Office, for appellant.

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

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

CONNOLLY, J.

A jury convicted Danny L. Ball of first degree murder and use of a weapon to commit a felony. Law enforcement officers searched his truck and mobile home; detained him for questioning; and despite his asking for a court-appointed lawyer, interrogated him twice without counsel. Ball ultimately confessed to the crime. Ball moved to suppress his statements and the evidence obtained from searching his truck and mobile home. The trial court admitted everything but his first statement at trial. Ball argues several interrelated issues: (1) Police illegally searched and seized his truck, (2) police arrested him without probable cause, (3) police obtained his confession illegally, and (4) search warrant affidavits for his truck and mobile home relied on illegally obtained evidence.

I. BACKGROUND

About 1:30 a.m. on October 7, 2003, while in his mobile home, Randy Tomjack was stabbed 59 times. Dying, he called the 911 emergency dispatch service without giving his name or a specific address. A dispatcher sent an ambulance to the subdivision where Tomjack's home was located. The emergency responders, however, had difficulty finding the caller and asked several local residents for help.

Meanwhile, the dispatcher sent Darrick Arndt, a deputy with the Keith County sheriff's office, to the scene. From the dispatcher's information, Arndt thought Tomjack might be the caller. Arndt met the emergency response team and some subdivision residents and guided them to Tomjack's home. Shortly thereafter, Ball arrived in his truck. Before following the emergency team, a resident told Ball that they were on their way to Tomjack's home.

On arriving at the home, Arndt and Earl Schenck, the Keith County sheriff, found Tomjack dead, slumped on the couch and covered in blood. Shortly after the emergency team arrived, Ball joined the crowd at Tomjack's home. While approaching the home, he asked an emergency medical technician if Tomjack was all right. Ball next asked Arndt and Schenck what had happened and asked if he could see Tomjack because he wanted to get cigarettes from him. Schenck told him to leave the scene and if he did not leave, he would be charged with obstructing justice.

When it became apparent Tomjack was dead, Ball became distraught. Because Ball was visibly drunk, Renee Lucero, a resident of the subdivision, offered to drive Ball home in his truck. Lucero testified that Ball was crying and upset, saying he had lost his friend. On the way to his home, Ball suddenly reached over and turned off the truck's ignition. Frustrated, Lucero then pulled over, and she began walking toward the nearby restaurant where Ball worked. Ball passed out in the ditch near the truck, and later his employer picked him up and drove him to the restaurant.

After leaving Tomjack's home, Arndt and Schenck went to the restaurant to speak with Ball. Arndt noticed that Ball had recently showered and had no physical injuries. Ball explained that he showered after he got off work around 10:30 p.m. Also, Schenck testified that while sitting with Ball, Ball said: "[Tomjack] made me so mad because he was lying about all the hours he was getting in this new job, and he bragged about it, and he made me so mad about that. . . . But I didn't want him to die." Schenck also heard Ball sobbing loudly at the restaurant.

Arndt then checked out Ball's truck and mobile home. Arndt said that it was dark and he could not see anything in the truck, but that there was a red liquid substance on the door handle of Ball's home. But testimony about the red liquid on the door handle differed. Arndt testified that he did not think the substance on the mobile home was blood; Gary Eng, a Nebraska State Patrol investigator, stated he could not locate the substance; and Schenck said he never looked at it. But Ball's employer testified without objection that the officers told him that night that they saw blood on the door of Ball's home, and then told him, "Well, we think we have got our suspect."

Between 6 and 6:20 a.m., Tim Arnold, a Nebraska State Patrol investigator, examined the truck for evidence. Arnold stated he saw nothing suspicious from the outside of the truck. After entering the truck, he conducted a warrantless "cursory inspection" to determine whether there were valuables present needing protection. He admitted, however, that he did not follow the State Patrol's inventory policy and that one reason for examining the truck was to look for evidence. He further admitted that once he arrived on the scene, he would not have released the truck to Ball.

While examining the truck, Arnold found what appeared to be blood on the steering wheel cover, on the gearshift knob, near and in the ignition device, and on the driver's-side lap seatbelt. Despite Arnold's testimony on direct examination that he saw nothing suspicious from outside the truck, on redirect, he said that the blood was visible from outside the truck. Arnold then had the truck towed to the State Patrol office in Ogallala, Nebraska, and applied for a search warrant.

Meanwhile, around 6:50 a.m. on October 7, 2003, when Ball tried to leave the restaurant, Arndt detained him by handcuffing him and driving him to the Keith County sheriff's station to await the arrival of Bill Redinger, a Nebraska State Patrol investigator. Despite admitting Ball was in custody, the officers claimed he was not under arrest because they lacked probable cause to arrest him.

Ball and Arndt arrived at the jail at 7:27 a.m. While waiting for Redinger, Ball became impatient and wanted to leave. Despite his demands to leave the station, Ball was "detained" in a small locked room called the "attorneys' room," and all officers who testified agreed he was not "free to leave." Angry about his detention, Ball punched holes in the ceiling tiles of the attorneys' room and had to be moved to a holding cell.

At 7:47 a.m., while waiting for Redinger, Ball told Arndt he wanted a court-appointed attorney. Arndt informed his superior, who called Redinger to pass along that information. Arndt's superior told him that Redinger would interview Ball. Arndt then told Ball that he would have the opportunity for counsel when Redinger arrived. No one informed Ball of his *Miranda* rights, nor did anyone question him while waiting for Redinger.

Redinger testified that he did not recall being told that Ball wanted a court-appointed attorney.

Redinger arrived between 8:10 and 9:15 a.m. Redinger advised Ball of his *Miranda* rights and determined that he was not impaired by alcohol or drugs. After Ball waived his rights, Redinger questioned him about the murder. Redinger tried to get him to admit he was in Tomjack's home that night and that he had stabbed him, but Ball accused Redinger of "making up stories." When Ball invoked his right to counsel, Redinger had him placed in a holding cell and told him he was being held because the officers suspected he had murdered Tomjack.

After 35 to 40 minutes, Ball told the jailer he wanted to speak with Redinger again. Redinger confirmed that Ball asked to speak to him, advised him again of his *Miranda* rights, and then interviewed him again. During the second interview, Ball dictated a confession, Redinger wrote it down, and Ball signed it. Both interviews were videotaped and the videotapes were admitted into evidence. The signed confession was also admitted into evidence.

During the second interview, Ball admitted that he went to Tomjack's mobile home that night wearing a mask, slipped in the back door, and stabbed Tomjack. He said that he left when Tomjack uttered his name. He stated that he then burned his clothes, his shoes, the mask, and the knife in his fireplace. After showering, he went back to Tomjack's to see what kind of damage he had caused. It was then that he ran into the emergency team. Ball was formally booked around 3 p.m. that day, October 7, 2003.

1. Issuance of Search Warrants

Eng, the lead investigator, applied for the warrants. He stated that after Redinger's second interview, he believed enough evidence existed to justify arresting Ball. He opined, however, that before the second interview, there was not probable cause to arrest. Using Ball's interview statements, he drafted search warrant affidavits for Ball's truck and home. Arnold executed the search warrant for the truck at 4 p.m. that afternoon. He photographed the red stains and swabbed them; the stains later tested positive for blood.

Eng executed the search warrant for Ball's home around 2:30 p.m. He found the blade of a large knife in the ashes of the stove. He also seized some pipes from the shower drain of Ball's home. The State Patrol crime laboratory analyzed the items seized, finding blood on the knife and the pipes. But because the samples were small, the laboratory could only match Tomjack's DNA to the blood on Ball's steering wheel cover and the door of Tomjack's home.

2. Suppression Hearing

Before trial, Ball moved to suppress his two statements and the evidence collected from his truck and home. He alleged that the officers violated his Fourth, Fifth, and Sixth Amendment rights. When ruling on the motion to suppress, the trial court found that Ball was in custody "from and after 6:50 a.m. when he was handcuffed and taken by . . . Arndt to the Keith County Sheriff's Office for questioning." The court also found that "as a matter of law," the officers had probable cause to take Ball into custody from and after 6 a.m.—about the time that Arnold found the blood in Ball's truck. The trial court detailed the following facts in its order:

> A. Randy Tomjack had been stabbed and killed in a rural area on the north side of Lake McConaughy in Keith County, Nebraska, just before 1:34 a.m. on October 7, 2003.
>
> B. Albee's Subdivision where the 911 call came from, is a resort area comprised of cabins and mobile homes which are generally unoccupied after the summer vacation season.
>
> C. While investigating the homicide, Sheriff Earl Schenck and Investigator [Darrick] Arndt observed [Danny L. Ball] between 2:30 a.m. and 3:00 a.m. come to [Tomjack's] mobile home asking about the condition of . . . Tomjack and wanting to borrow cigarettes. [Ball] was unusually persistent and inquisitory about Tomjack, and had to be threatened with arrest by the Keith County Sheriff when the Defendant would not leave the premises.
>
> D. [Ball] had recently showered. Although [Ball] states that there is a neutral explanation for this fact, it is a suspicious and unusual behavior during the hours immediately preceding or following midnight.

> E. Sheriff Schenck had been advised by Ball that Ball had not seen Tomjack for two days prior to October 7, 2003, but Ball later advised the sheriff that Tomjack had been to [Ball's] residence at approximately 11:00 p.m. on October 6, 2003. [Ball] had not answered the door. Sheriff Schenck further overheard Ball crying in the bathroom of [the restaurant where he worked] stating "I didn't want him to die, Tomjack always lies, but I didn't want him to die."
>
> F. At 6:00 a.m. on October 7, 2003, [Ball's] vehicle was inspected on the grass shoulder of Highway 92 and suspected drops of blood were observed on the steering wheel cover, gear shift knob and seatbelt. [Tomjack] had been repeatedly stabbed. Copious amounts of blood [were] observed surrounding his body. It was reasonable to assume that the assailant would have had blood on him or his clothing following the incident.

The court found that even if it was "incorrect on the issue of probable cause to arrest," Ball's second confession was an act of free will sufficient to purge the taint of unlawful detention under the Fourth Amendment. Similarly, the court found that under Fifth and Sixth Amendment precedent, Ball waived his right to counsel by initiating the conversation with Redinger. Thus, the court suppressed Ball's first statement, but admitted the second.

Regarding the warrantless search of the truck, the court found that the evidence of bloodstains was admissible under the plain view doctrine *and* that the evidence inside the truck would inevitably have been discovered later that day by the State Patrol when they inventoried the truck. Because the trial court excluded only the first statement, it concluded that the search warrants contained sufficient probable cause.

3. Rulings on Renewed Motion to Suppress

At trial, the court overruled Ball's continuing objections to admitting the confession, the sight of blood in his truck, and the evidence obtained using that evidence. When overruling Ball's renewed motion to suppress, the court stated that the evidence at trial was stronger than the evidence at the suppression hearing because of the testimony of Ball's employer. The court accepted the employer's recollection that the officers who secured

Ball's home believed the red substance on the door was blood, and the court concluded that this strengthened probable cause to arrest Ball.

The jury convicted Ball of first degree murder and use of a weapon to commit a felony. The court sentenced him consecutively to life imprisonment without the possibility of parole for the murder and 5 to 10 years' imprisonment for the weapon charge. Before sentencing, Ball moved for a new trial, primarily renewing his suppression argument. The court reiterated that it believed the evidence adduced at trial was more compelling than that from the suppression hearing and overruled the motion for new trial.

II. ASSIGNMENTS OF ERROR

Ball assigns, consolidated and rephrased, that the trial court erred by overruling his motion to suppress and by admitting at trial his confession and evidence obtained from searching his truck and home. He specifically contends that (1) Arnold lacked probable cause to search and seize Ball's truck; (2) Arndt arrested Ball without probable cause; (3) Redinger ignored Ball's request for counsel; and (4) the search warrants relied on evidence obtained by violating the Fourth, Fifth, and Sixth Amendments, along with their Nebraska counterparts.

III. STANDARD OF REVIEW

[1] In considering a trial court's ruling on a motion to suppress evidence obtained by a search, we first determine whether the search was illegal. If so, we must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search. See *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

[2] We will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider the trial court observed the witnesses testifying in regard to such motions. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991).

[3] In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo

and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. See *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[4] In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, we will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and, in so doing, we will look to the totality of the circumstances. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

[5] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider it observed the witnesses. See *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

IV. ANALYSIS

Relying on violations of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, Ball seeks to suppress evidence from three distinct sources: (1) Arnold's cursory inspection of Ball's truck, (2) Ball's statements to Redinger, and (3) the evidence seized from Ball's truck and home under the search warrants. Ball's multilayered arguments are cumulative and interrelated because each piece of evidence was later used to obtain more evidence.

Specifically, officers used the sight of blood in Ball's truck to support probable cause for his arrest. While under arrest at the station, he confessed to murdering Tomjack, and both the confession and the sight of blood in Ball's truck contributed to the probable cause justifying the search warrants for his truck and home. Consequently, if the blood and confession evidence evaporates, then the affidavits lack probable cause.

1. Blood in Truck

Ball contends that Arnold's testimony that he saw bloodstains inside Ball's truck should have been suppressed because Arnold

illegally searched and seized the truck the morning of the murder. Arnold testified that his supervising officers sent him to Ball's truck around 6 a.m. to look for evidence and to secure the truck. After walking around the truck, he found nothing unusual. He then opened the truck's door and conducted a "cursory inspection" of the truck's interior. He claimed to be inventorying the truck for valuables, but admitted he did not follow State Patrol protocol for inventory searches until later in the investigation.

Five to ten minutes after arriving, Arnold noticed what appeared to be blood. He then told his fellow officers what he found and stayed with the truck until 8:30 a.m., when it was towed to an impound lot. Arnold admitted that once he arrived on the scene, he would not have released the truck to Ball.

The trial court justified admitting this evidence under three alternate rationales: (1) plain view, (2) inventory, and (3) inevitable discovery. In its suppression order, the court found that the observation of the bloodstains in Ball's truck was admissible under both the plain view and the inevitable discovery doctrines. Moreover, when ruling on Ball's renewed suppression motion and on his new trial motion, the court found that it would also be admissible as an inventory search. Because we find the evidence admissible under the inevitable discovery doctrine, we need not address the other findings.

[6,7] Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. But if the State shows by a preponderance of the evidence that the police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct, then such evidence is admissible under the "inevitable discovery" doctrine. See *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Ball argues that the State failed to meet its burden of establishing that the evidence would inevitably have been discovered by lawful means. In its suppression order, the trial court held that the evidence in the truck would have been discovered later that day when the State Patrol inventoried the truck. Ball, however, disputes this, arguing that there was no independent investigation into the truck and no legal source for a later inventory.

To overcome its burden, the State must demonstrate that some lawful means of discovery would have produced the evidence in question; that is, such evidence inevitably would have been discovered without the police misconduct. *Id.* Moreover, courts have recognized that evidence which would have been discovered in the course of a lawful inventory search can be admissible under the inevitable discovery doctrine. See, e.g., *U.S. v. Alvarez-Gonzalez*, 319 F.3d 1070 (8th Cir. 2003); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). See, also, Annot., 81 A.L.R. Fed. 331 (1987 & Supp. 2005) (collecting cases).

Here, the record shows that the State Patrol knew Ball left his truck sitting by the side of the road. It also shows that the State Patrol has an inventory policy for abandoned vehicles which would have allowed Arnold to impound Ball's truck and inventory its contents if Ball did not move it within 24 hours. Ball was arrested around 6:50 a.m.; he could not move his truck while in custody. Later that day, Arnold inventoried the truck according to the State Patrol's policy. Although Arnold impounded the truck prematurely after identifying the bloodstains, if he had not noticed the blood, the truck would have remained by the side of the road until the 24 hours had passed. At that point, Arnold would have lawfully entered the truck, inventoried it, and discovered the bloodstains just as he did earlier that day. Thus, even if the truck was illegally searched and seized, sufficient evidence exists that the blood would have been identified during a proper inventory search 24 hours later.

2. Confessions

Ball seeks to suppress the evidence obtained during his interviews with Redinger, claiming that Redinger violated his Fourth, Fifth, and Sixth Amendment rights and that thus, the fruits of those violations are inadmissible.

(a) Fourth Amendment

Ball argues that Arndt arrested him without probable cause and that *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003), mandates suppressing the fruits of his illegal arrest. In *Kaupp*, the U.S. Supreme Court vacated the defendant's murder conviction, holding that when a state seeks to use a confession obtained following an illegal arrest, it must demonstrate that

the confession was an act of free will sufficient to purge the taint of the unlawful arrest.

[8] The Court relied on "the Fourth Amendment rule that a confession 'obtained by exploitation of an illegal arrest' may not be used against a criminal defendant." *Kaupp v. Texas*, 538 U.S. at 627. The Court found that the officers arrested the defendant without probable cause and that thus, "well-established precedent" required suppressing the confession unless the confession was " 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion.' " 538 U.S. at 632 (quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

Thus under *Kaupp v. Texas, supra*, suppression is necessary only when (1) the defendant was illegally arrested *and* (2) the State fails to demonstrate that the taint of unlawful arrest has dissipated. Ball argues that, like the defendant in *Kaupp*, he was arrested without probable cause. The trial court agreed that he was in custody from 6:50 a.m. when Arndt handcuffed him and transported him to the station, but found as a matter of law that Arndt had probable cause to do so. The State also concedes that Ball was in custody at this time. Thus, the crucial question is whether the officers had probable cause to arrest Ball.

[9-12] Whether Ball's arrest was valid depends on whether the officers had probable cause to arrest him at the moment they did so. See *Beck v. State of Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). See, also, Neb. Rev. Stat. § 29-404.02 (Reissue 1995). Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). Also, probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). See, also, *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949). Moreover, probable cause is evaluated by the collective information of the police engaged in

a common investigation. *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). See, also, *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[13] Ball first argues that none of the officers involved believed they had probable cause to arrest him until after he confessed. But the validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists. See, *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). As the Seventh Circuit explained:

> Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest.

Williams v. Jaglowski, 269 F.3d 778, 783 (7th Cir. 2001). Thus, we focus on the facts known to the officers, not the conclusions the officers drew from those facts.

Ball also argues that the record fails to support the trial court's conclusion that probable cause existed. We disagree. The trial court enumerated multiple factors supporting its conclusion: (1) Ball arrived at Tomjack's home late at night; (2) Ball had recently showered; (3) Ball persistently asked to see Tomjack; (4) Schenck heard Ball crying and saying that Tomjack lies, but he did not want him to die; and (5) Ball's truck contained what appeared to be blood. At trial, the court further found that (6) Schenck and Eng also believed the red substance on the door of Ball's home appeared to be blood.

[14] Although the record shows contradictory evidence about the red substance on the door of Ball's home, the trial court accepted the testimony of Ball's employer and found that the officers believed the substance was blood. The trial court's factual findings are not clearly erroneous. See *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). Moreover, when a motion to suppress is denied pretrial and again during trial on renewed objection, we consider all the evidence, both from trial and from the hearings on the motion to suppress. See *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967). Thus, we

consider all of the facts on which the trial court relied. But we pause to note that if the blood in Ball's truck had been discovered through a proper inventory search, the officers would have been unaware of its existence when they arrested Ball. We need not consider the bloodstains in Ball's truck in our probable cause analysis, because the other facts provide sufficient probable cause.

The trial court found the officers knew of at least five incriminating factors when Arndt arrested Ball. Although several of these, taken alone, are insufficient, the totality supports probable cause. Ball came to Tomjack's home late at night freshly showered and changed, claiming he wanted to borrow cigarettes. When he saw the crowd, he repeatedly inquired about Tomjack. It is true that these facts could have innocent explanations. Yet, we cannot ignore that Ball told Schenck: "[Tomjack] made me so mad because he was lying about all the hours he was getting in this new job, and he bragged about it, and he made me so mad about that. . . . But I didn't want him to die." Nor can we ignore the testimony of Ball's employer that the officers told him they saw blood on the door of Ball's home. See, e.g., *Butler v. State*, 217 So. 2d 3 (Miss. 1968) (finding probable cause when officers found large puddle of blood at crime scene and after identifying possible suspect, found blood on door of suspect's home).

Knowing that the murder scene was bloody and that the assailant, when leaving, had smeared blood on the door of Tomjack's home, the officers could reasonably infer that the assailant would have blood on his or her clothes or person. This would explain the apparent blood on the door of Ball's home and explain why he had recently showered. Ball, however, argues that his presence at Tomjack's home was not unusual because, like many of the others at the scene, he was a local resident. But the other residents came to help locate the 911 emergency caller, whereas Ball claimed to be interested in borrowing cigarettes.

"In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949). A reasonable and prudent person could believe that

Ball committed the murder; therefore, the officers had probable cause to arrest Ball. Because we find no Fourth Amendment violation, there is no taint to purge under *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003).

(b) Fifth Amendment

[15,16] Ball argues that both of his statements to Redinger should have been suppressed because Redinger violated his Fifth Amendment rights by ignoring his request for counsel. The Fifth Amendment does not explicitly afford a right to counsel; it provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. But the U.S. Supreme Court recognized the " 'inherently compelling pressures' " of custodial interrogation and established "prophylactic rights" designed to counteract those pressures; one such right is the right to have counsel present during custodial interrogation. *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (citing and quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

[17-19] *Miranda* prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates that its agents used procedural safeguards that are effective to secure the privilege against self-incrimination. See, *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The dispositive factor in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances. *State v. Dallmann, supra.*

Here, the trial court found, and the State concedes, that Ball was in custody once Arndt handcuffed him and drove him to the station. Further, no one disputes that Redinger questioned Ball twice at the station. Because Redinger subjected Ball to custodial interrogation during those interviews, *Miranda* warnings were necessary before each interview. Here, Redinger informed

Ball of his *Miranda* rights before questioning him each time, and each time Ball waived them, signing his name at the end of the form.

[20,21] *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. See *McNeil v. Wisconsin, supra.* But once a suspect asserts the *Miranda* right to counsel, interrogation must cease and police may not approach the suspect for further interrogation until counsel is made available. *McNeil v. Wisconsin, supra* (citing *Miranda v. Arizona, supra*).

> If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

McNeil v. Wisconsin, 501 U.S. at 177 (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). See, also, *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

[22] But a suspect cannot invoke *Miranda* rights anticipatorily, that is, before or outside the context of custodial interrogation. See, *McNeil v. Wisconsin, supra*; *State v. Mata, supra.* "It is clear . . . that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Despite this, Ball argues that by asking Arndt for court-appointed counsel at the jail, he asserted his *Miranda* rights, which the police must strictly respect. Although the State concedes Ball was in custody when he invoked his right to counsel, we note that he was *awaiting* interrogation when he made the request. Nonetheless, we need not decide whether his invocation was anticipatory because the State implicitly concedes that Ball effectively invoked his *Miranda* rights. See brief for appellee at 19 (conceding that Ball's first statement to Redinger was "properly suppressed").

[23] Assuming that Ball effectively invoked his *Miranda* rights, what effect did the invocation have on the admissibility of his statements? Under *Edwards v. Arizona*, once a defendant

invokes his right to counsel, any subsequent questioning without counsel should be suppressed even if the suspect waives his *Miranda* rights. But when the accused "*initiates* further communication, exchanges, or conversations with the police," is informed of his *Miranda* rights, and waives them before further interrogation, we must determine whether the waiver was knowing and intelligent under the totality of the circumstances. (Emphasis supplied.) *Edwards v. Arizona*, 451 U.S. at 485. See, also, *State v. Smith*, 242 Neb. 296, 494 N.W.2d 558 (1993). As this court recognized in *Smith*, this determination depends on the particular facts and circumstances, including the background, experience, and conduct of the accused.

Ball does not dispute that he initiated further communication; instead, he contends that his request to speak with Redinger was not a willing choice to waive counsel because he had not slept, he had been kept from his home and truck, and he was interrogated without counsel. Although the record shows that Ball was intoxicated the night before the interrogation, neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005). Moreover, the trial court found that the State sustained its burden of showing that Ball's verbal and written statements during the second interview were made "voluntarily as an act of free will, and without coercion or intimidation."

A trial court's preliminary determination that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). Because the trial court's ruling was not clearly wrong, we defer to the trial court's findings that Ball waived the right voluntarily.

Although the trial court found the waiver voluntary, it made no explicit findings whether Ball waived his rights knowingly. Despite this, the record demonstrates that Ball knowingly waived his rights. Redinger advised him of his *Miranda* rights before he gave each statement. Moreover, Ball nodded his head when Redinger read him the waiver form. And most important, he asserted his right to counsel to end the first interview, which demonstrates that he understood the effect that exercising his rights would have. See *State v. Garza, supra*. See, also, *State v. Smith, supra*.

In summary, Ball's appeal to the Fifth Amendment as support for suppressing his confession is unavailing. We conclude that Ball knowingly and intelligently waived his *Miranda* rights after initiating the second interview with Redinger.

(c) Sixth Amendment

[24,25] Ball argues that Redinger violated his Sixth Amendment right to counsel and that his statements should be suppressed. We disagree. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The U.S. Supreme Court has clarified that the Sixth Amendment right to counsel is triggered " 'at or after the time that judicial proceedings have been initiated . . . "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' " *Fellers v. United States*, 540 U.S. 519, 523, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). Accord *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

Here, Ball requested an attorney before he was formally charged. Thus, his Sixth Amendment right to counsel had not attached. However, Ball relies on *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), which suggested that a suspect's Sixth Amendment rights are implicated when an investigation begins to focus on a particular suspect.

Ball argues that once the State turns its prosecutorial focus on a defendant, the Sixth Amendment right to counsel attaches. But as this court recognized in *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986), the U.S. Supreme Court has gradually abandoned *Escobedo*, concluding that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. Because Ball was not formally charged until after he confessed, his Sixth Amendment right to counsel had not attached, and thus, his assignments of error lack merit.

3. Search Warrant Affidavits

A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, we do not reweigh the

evidence or resolve conflicts in the evidence, but, rather, we recognize the trial court as the finder of fact and we consider it observed the witnesses. See *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

The court properly upheld the search warrant affidavits because both the evidence of bloodstains from Ball's truck and his confession were properly admitted at trial.

V. CONCLUSION

The evidence of bloodstains in Ball's truck was properly admitted under the inevitable discovery doctrine because Arnold testified that the stains were readily visible from inside the truck's cab, the State Patrol's policy was to inventory abandoned vehicles after 24 hours, and Ball could not claim the truck because he was under arrest for murdering Tomjack.

Furthermore, Ball's confession was properly admitted because he cannot rely on the Fourth, Fifth, or Sixth Amendment to justify suppressing it. His arrest was justified by probable cause and need not be suppressed under *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003). Assuming Ball invoked his Fifth Amendment rights in a timely manner, he knowingly and intelligently waived them after initiating the second interview, when he confessed to the murder. Moreover, his Sixth Amendment rights had not attached because the State had not formally charged him with the murder when he invoked his right to counsel. Finally, the court properly upheld the search warrant affidavits because both the evidence of bloodstains from his truck and his confession were properly admitted.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
SAMSON ALDACO, APPELLANT.
710 N.W.2d 101

Filed March 3, 2006. No. S-05-587.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
2. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.

3. **Right to Counsel: Conflict of Interest: Appeal and Error.** Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. **Constitutional Law: Conflict of Interest: Effectiveness of Counsel: Words and Phrases.** An "actual conflict of interest," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.
6. **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.
7. ____: ____: ____: ____. 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.
8. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
9. **Homicide: Intent.** Under Neb. Rev. Stat. § 28-303 (Reissue 1995), a specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question.
10. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
11. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
12. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
13. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
14. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the

offense, nature of the offense, and the amount of violence involved in the commission of the crime.

15. **Speedy Trial.** If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged.
16. **Final Orders: Speedy Trial: Notice: Appeal and Error.** Where a motion for discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

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

Mark A. Weber and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jon Bruning, Attorney General, Don Kleine, and Michael W. Jensen for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Samson Aldaco was convicted of first degree murder, use of a deadly weapon to commit a felony, possession of a deadly weapon by a felon, and possession of a controlled substance for his actions on December 7, 2001. Aldaco was sentenced to life imprisonment for murder in the first degree, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. We are presented with Aldaco's appeal of his convictions and sentences.

BACKGROUND

Testimony adduced at trial established that in December 2001, Aldaco contacted Enrique Ramirez, Paul Hernandez, Jacinto Martinez, and Ray Lara to accompany him from Garden City, Kansas, to Omaha, Nebraska, to collect money owed to him from

his illegal drug business. Aldaco paid Hernandez, Martinez, and Lara each $200 for helping him.

On December 7, 2001, Ramirez, Hernandez, Martinez, and Lara met Aldaco at a hotel in Omaha, where Aldaco had reserved a room. Thereafter, the men drove to the residence of Dale Herman to collect money Herman owed Aldaco. Pursuant to Aldaco's instructions, each man carried either his own gun or a gun provided to him by Aldaco. Ramirez testified at trial that the men carried guns in an attempt to scare the individuals in the residence and take money from them. According to Aldaco's plan, Ramirez and Martinez entered the basement of the residence where Herman was staying, which was accessible only by a separate outside entrance, to see if Herman was there, and Aldaco and Hernandez entered the upstairs of the residence. Lara was supposed to be located outside the residence as a lookout.

Ramirez and Martinez both entered the basement brandishing their weapons. In the basement were six occupants, including Herman. Ramirez located Herman and, at gunpoint, took him upstairs to where Hernandez and Aldaco were located. Upon entering the upstairs of the residence, Herman was forced to the floor and a gun was held to his head. While he was lying on the floor, Herman was threatened and questioned regarding the money he owed Aldaco. Herman was also told that he "had until 2:00 the next day" to pay Aldaco $2,000.

While Ramirez was upstairs with Herman and Aldaco, Hernandez went to the basement where he brandished his weapon and ordered the remaining occupants to get on the floor face down. While the individuals were on the floor, Hernandez demanded their wallets, money, and drugs. Hernandez then took the wallets from the individuals, while Martinez provided coverage by pointing his and Hernandez' guns at the individuals.

At some point after the wallets were taken, Ramirez returned to the basement and found the occupants lying face down on the floor. After Ramirez returned to the basement, Hernandez left and Lara entered shortly thereafter. Upon entering the basement, Lara began yelling at the individuals on the floor, demanded their wallets, and kicked and pistol-whipped them as he patted them down. Stace Straw, one of the victims on the floor who was

being patted down, began to struggle with Lara. During this altercation, Lara fatally shot Straw in the head.

After Lara shot Straw, the men left the residence and eventually met at a casino in Iowa, pursuant to Aldaco's instructions. After meeting in a hotel room reserved by Aldaco, Aldaco, Ramirez, and Hernandez left in Aldaco's vehicle to collect Aldaco's luggage from another hotel. On the way, Aldaco was pulled over by Omaha police for driving without his headlights illuminated. The officer was subsequently advised that the vehicle and occupants matched the description of the vehicle and individuals involved in an earlier shooting. After assistance arrived, officers conducted a high-risk felony stop and all three men in the vehicle were arrested. Upon searching the vehicle, officers found a Ruger 9-mm handgun, a Beretta .40-caliber handgun, and a Taurus 9-mm handgun. Officers also found a baggie containing a white, powdery substance which tested positive for 17.2 grams of methamphetamine and dimethyl sulfone.

PROCEDURAL HISTORY

The State filed an information charging Aldaco with murder in the first degree. Aldaco's attorney filed a motion to suppress. On the date the matter came on for hearing, Aldaco's attorney was granted leave to withdraw as counsel due to a conflict. Another attorney was then appointed to represent Aldaco, and the hearing on the motion to suppress was continued until further notice. Aldaco's new attorney filed motions to suppress the evidence obtained as a result of the stop and search of Aldaco's vehicle. Evidentiary hearings on the motions were concluded on March 21, 2003. At the conclusion of the proceedings, the parties were given the opportunity to submit briefs to the trial court and a trial date was set for June 2.

On April 18, 2003, Aldaco filed a pro se motion for discovery. On Aldaco's motion, the trial was continued until September 29. On August 21, the trial court entered an order overruling the motions to suppress. Aldaco filed a pro se notice of appeal of the denial of his motions to suppress. The trial court conducted a "status hearing," at which hearing it determined that since Aldaco had filed an appeal of the denial of his motions, the trial court was without jurisdiction to proceed to trial on the date

scheduled. The Nebraska Court of Appeals dismissed Aldaco's appeal. See *State v. Aldaco*, 12 Neb. App. lvi (No. A-03-1028, Oct. 1, 2003).

After the matter was remanded back to the trial court, a new trial date was set for January 5, 2004. During the pretrial conference, the trial court addressed the question of whether the requirement of a speedy trial had been conformed with and found that, for good cause, January 5 was the earliest the matter could be set for trial.

On January 2, 2004, Aldaco filed a motion to discharge on the ground that his right to a speedy trial had been violated. Aldaco's trial commenced on January 5. On that date, the court orally overruled Aldaco's motion to discharge, but did not enter a written order to that effect. The matter was then tried before a jury. During the cross-examination of a witness, Aldaco sought leave of the court to question a witness on his own. Aldaco was advised by the court that his attorney would decide what questions should be asked, and Aldaco then indicated to the court that he did not want to represent himself. At that point, Aldaco expressed for the first time his concern that his attorney had a conflict of interest as a result of his prior representation of the victim Straw's brother. Aldaco's attorney explained to the court that he had represented Straw's brother in connection with driving under suspension in a different matter which had been resolved and that he was not Straw's brother's attorney. Aldaco's attorney also explained that he had never had any dealings with Straw. Following a brief discussion on the matter, the trial court found that Aldaco had failed to show a conflict of interest.

The jury found Aldaco guilty of all charges. Aldaco filed a motion for new trial, and while the motion for new trial was still pending, Aldaco filed a pro se notice of appeal regarding the denial of his motion to discharge. This appeal was dismissed by the Court of Appeals for lack of a file-stamped order overruling the motion to discharge. See *State v. Aldaco*, 12 Neb. App. lxxix (No. A-04-155, Mar. 18, 2004). Thereafter, the trial court entered an order dated April 28, 2004, overruling Aldaco's motion to discharge. Aldaco then filed an appeal of the trial court's April 28 order, which this court summarily affirmed. See *State v. Aldaco*, 269 Neb. xxi (No. S-04-645, Jan. 12, 2005). On

April 12, 2005, Aldaco's sentencing hearing was held. At that time, the trial court orally overruled Aldaco's pending motion for new trial. The court then sentenced Aldaco to life imprisonment for murder in the first degree, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. Counts I, III, and IV were ordered to be served concurrently, and count II was ordered to be served consecutively. Aldaco was given credit for 1,221 days previously served. On May 6, Aldaco filed the present appeal, and on May 11, the trial court entered an order overruling Aldaco's motion for new trial.

ASSIGNMENTS OF ERROR

Aldaco assigns the following errors: (1) Aldaco was denied effective assistance of counsel, (2) Aldaco's conviction is not supported by the evidence, (3) the trial court erred in imposing excessive sentences, and (4) the trial court erred in overruling Aldaco's motion to discharge on speedy trial grounds.

STANDARD OF REVIEW

The instant case presents four distinct issues with different standards of review. We, therefore, set forth the appropriate standard of review in the individual sections of our analysis.

ANALYSIS

Ineffective Assistance of Counsel

[1-3] In his first assignment of error, Aldaco claims the trial court erred in finding that Aldaco's defense counsel competently represented him at trial. Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision. See, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); *U.S. v. Infante*, 404 F.3d 376 (5th Cir. 2005). See, also, *State v. Smith, supra.*

[4] Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington, supra*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). "As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), quoting *Strickland v. Washington, supra.*

But there is an exception to this general rule. The probable effect on the outcome of the proceeding is assumed where assistance of counsel has been denied entirely, or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Mickens v. Taylor, supra.* But only in circumstances of that magnitude do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. See *id.*

Circumstances of that magnitude may arise when the defendant's attorney actively represented conflicting interests. *Id.* Where defense counsel is forced to represent codefendants over counsel's timely objection, reversal is required, unless the trial court has determined that there is no conflict. See *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). In the absence of an objection, the court has a duty to inquire into a potential conflict of interest only when the trial court knows or reasonably should know that a particular conflict exists—which is not to be confused with a situation in which the trial court is aware of a vague, unspecified conflict of interest, such as that which inures in almost every instance of multiple representation. See, *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). But even where the trial court fails to inquire into a potential conflict, prejudice will be presumed only if the conflict has significantly affected counsel's performance,

thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown. *Mickens v. Taylor, supra.* See, also, *Cuyler v. Sullivan, supra.*

Here, Aldaco contends that defense counsel was ineffective in that the attorney had a conflict of interest due to the attorney's prior representation of Straw's brother in an unrelated matter. Aldaco also contends that he was denied his right to effective assistance of counsel because the trial court failed to inquire into the alleged conflict of interest.

[5] A review of the record clearly demonstrates that the trial court inquired into the potential conflict of interest stemming from defense counsel's prior representation of Straw's brother and that the court reasonably concluded that the prior representation did not create a conflict of interest. Defense counsel represented Straw's brother in connection with an unrelated traffic matter at least more than 1 year prior to his representation of Aldaco. The record further reflects that at no time did the attorney have any dealings with Straw. An "actual conflict of interest," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor, supra.* Based upon our review of the record, we find no evidence that counsel was affected by a conflict of interest. Thus, there is no evidence that counsel's performance was deficient, nor is there any basis for a presumption of prejudice pursuant to *Cuyler v. Sullivan, supra.* Aldaco's first assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

In his second assignment of error, Aldaco claims that the evidence presented at trial was insufficient to sustain his conviction for first degree murder. Aldaco was charged with first degree murder for the death of Straw based upon either deliberate and premeditated murder or death during the perpetration or attempt to perpetrate a robbery. On appeal, Aldaco specifically contends the evidence fails to establish that a robbery was intended or that there was a plan to hurt or kill anyone.

[6-8] 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. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005). 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. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). 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. Muro, supra*; *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[9] One may commit first degree murder either by committing premeditated murder or by killing another person while in the commission of certain felonies. Neb. Rev. Stat. § 28-303 (Reissue 1995), the version in effect at the time of Straw's murder, provided in relevant part, "[a] person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ." Under § 28-303, a specific intent to kill is not required to constitute felony murder, only the intent to do the act which constitutes the felony in question. See, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Viewed in the light most favorable to the prosecution, the record reflects that Aldaco orchestrated a plan whereby Hernandez, Martinez, Ramirez, and Lara drove from Kansas to Herman's residence in Omaha in order to collect money owed to Aldaco. Pursuant to a request by Aldaco, all five men carried with them either their own gun or a gun provided by Aldaco. At trial, Ramirez testified that one of their purposes for being at the residence where Herman was staying was to take money from the individuals. In the basement, Straw and the other individuals were forced to lie face down on the floor and were ordered not

to move, or they would be killed. While these individuals were lying on the floor, money was demanded of them and their wallets were taken. Thereafter, Lara began physically assaulting the individuals and ultimately shot and killed Straw.

[10] A person commits robbery if, with the intent to steal, he or she forcibly, or by putting in fear, takes from the person or another any money or personal property of any value whatsoever. Neb. Rev. Stat. § 28-324 (Reissue 1995). "Steal" is commonly understood to mean taking without right or leave with intent to keep wrongfully. See *State v. Blotzer*, 188 Neb. 143, 195 N.W.2d 199 (1972). The law is settled that when the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Leonor, supra.*

Based on the evidence, we conclude that a rational trier of fact could have found that a robbery was committed and that the essential elements of the crime of first degree murder were proved beyond a reasonable doubt. Aldaco's second assignment of error is, therefore, without merit.

Excessiveness of Sentences

Aldaco next claims that the trial court erred when it sentenced him to life imprisonment for first degree murder, 10 years' imprisonment for use of a deadly weapon to commit a felony, 10 years' imprisonment for possession of a deadly weapon by a felon, and 1 year's imprisonment for possession of a controlled substance. First degree murder is a Class I felony punishable by death, or a Class IA felony punishable by life imprisonment. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2002) and 28-303. Use of a deadly weapon to commit a felony is a Class III felony punishable by 1 to 25 years' imprisonment, a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-1205(2)(a) (Reissue 1995). Possession of a deadly weapon by a felon is a Class III felony punishable by 1 to 25 years' imprisonment, a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-1206(3)(b) (Reissue 1995). Possession of a controlled substance is a Class IV felony punishable by a maximum of 5 years' imprisonment, a $10,000

fine, or both. § 28-105 and Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2002).

[11,12] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[13] In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

[14] Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.*

Aldaco argues that the trial court failed to consider his age, mentality, education, experience, social and cultural background, past criminal record, motivation for the offense, nature of the offense, amount of violence involved in the crime, and his character.

At sentencing, the trial court stated:

> The Court has reviewed your record. As I mentioned, I'm quite familiar with the circumstances of what happened. You may have not pulled the trigger in this matter, but you were as guilty if not more guilty than the one who pulled the trigger. You were the leader of this group. You were the one that brought these people up here to Nebraska to collect your drug debt or whatever it was. You put the ball in motion which eventually cost the victim his life.

The crimes involved in the instant case involved a violent, senseless incident which resulted in the death of an individual. As noted by the trial court, while Aldaco may not have pulled the trigger, it was he that "put the ball in motion" which led to Straw's death. The trial court, which reviewed the record and

was familiar with the circumstances of the case, imposed sentences which are within the statutory limitations. Considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion in imposing the sentences.

SPEEDY TRIAL

In his final assignment of error, Aldaco contends he was denied his right to a speedy trial.

[15] Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged. Neb. Rev. Stat. § 29-1208 (Reissue 1995); *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). See *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005).

On January 5, 2004, the trial court orally overruled Aldaco's motion to discharge, and the matter then proceeded to trial. On February 2, Aldaco filed a pro se notice of appeal of the trial court's decision to overrule Aldaco's motion to discharge. This appeal was dismissed by the Court of Appeals for lack of jurisdiction because a file-stamped order dismissing the motion to discharge had not been entered by the trial court. See *State v. Aldaco*, 12 Neb. App. lxxix (No. A-04-155, Mar. 18, 2004). Aldaco did not seek further review of the Court of Appeals' ruling. The trial court entered a written order dated April 28, 2004, overruling Aldaco's motion to discharge. Aldaco appealed that order on May 21.

[16] In *State v. Ward*, 257 Neb. 377, 384, 597 N.W.2d 614, 619 (1999), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004), we stated:

> [W]here a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

Pursuant to *State v. Ward, supra*, the trial court's decision overruling Aldaco's motion to discharge was appealable on January 5, 2004, after the court verbally overruled the motion and proceeded to trial. Thereafter, Aldaco had 30 days in which to file an appeal. Although Aldaco filed a pro se notice of appeal on February 2, within the 30-day period, that appeal was dismissed, and Aldaco did not seek further review of that decision with this court. Regardless of whether Aldaco's February 2 appeal should have been dismissed, both his May 21, 2004, and his May 6, 2005, appeals are untimely challenges of the denial of his motion to discharge.

CONCLUSION

For the reasons discussed herein, we affirm Aldaco's convictions and sentences.

AFFIRMED.

PONY LAKE SCHOOL DISTRICT 30, ROCK COUNTY, BASSETT, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS, V. STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS ET AL., APPELLANTS AND CROSS-APPELLEES.

710 N.W.2d 609

Filed March 3, 2006. No. S-05-1438.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, and the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Constitutional Law: Supreme Court: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted unless the right to an injunction is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Constitutional Law: Legislature: Statutes: Injunction.** When a party seeks to enjoin the invocation or implementation of a legislative enactment, the judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law.

6. **Constitutional Law: Statutes.** It is not the province of the court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains.
7. ____: ____. In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on a constitutionally protected right or whether the statute creates a suspect classification.
8. **Constitutional Law: Statutes: Proof.** The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision.
9. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority except as limited by the state and federal Constitutions.
10. ____: ____. The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution.
11. **Constitutional Law: Statutes.** The rule invalidating legislation that hampers or renders ineffective the power reserved to the people is applicable only to "facilitating" statutes under article III, § 4, of the Nebraska Constitution.
12. ____: ____. Neb. Const. art. III, § 3, specifically reserves to the people the power of referendum and clearly defines the scope of that right and its limitations.
13. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed.
14. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary.
15. **Statutes: Initiative and Referendum.** Referendum sponsors must secure the signatures of at least 10 percent of the state's registered voters to suspend an act from taking effect prior to a referendum election.
16. **Constitutional Law: Courts: Intent.** It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.
17. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
18. **Constitutional Law: Voting.** All qualified voters have a constitutionally protected right to vote, in state as well as in federal elections.
19. **Voting.** The fundamental right to vote is the right to participate in representative government.
20. **Constitutional Law: Initiative and Referendum.** In contrast to the right to participate in representative government, the people's reservation in a state constitution of the right of referendum is a means for direct political participation.
21. ____: ____. The federal Constitution does not prohibit, but neither does it guarantee, the right of direct democracy.
22. **Constitutional Law: Voting.** Neb. Const. art. I, § 22, does not extend to issues outside of the right to participate in representative government.
23. **Constitutional Law: Statutes: Voting.** To the extent citizens have a right to directly vote on legislative enactments, that right is limited to what has been reserved to the people by the Nebraska Constitution.

24. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
25. **Constitutional Law: Initiative and Referendum.** If a state has conferred the right of initiative and referendum, it is obligated to do so in a manner consistent with the Constitution.
26. ____: ____. State restrictions on initiative and referendum rights violate the First Amendment's free speech guarantee when they significantly inhibit communication with voters about proposed political change and are not warranted by the state interests alleged to justify those restrictions.
27. **Statutes: Initiative and Referendum.** A legislative enactment rejected by the voters at a referendum election stands repealed.
28. **Legislature: Statutes: Initiative and Referendum.** When the people invoke the right to a referendum, they are exercising their coequal legislative power to expressly approve or repeal the enactments of the Legislature.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and injunction dissolved.

Jon Bruning, Attorney General, Dale A. Comer, Lynn A. Melson, and Leslie S. Donley for appellants.

Donald B. Stenberg, of Erickson & Sederstrom, P.C., and John F. Recknor, of Recknor, Williams & Wertz, for appellees.

Mark D. McGuire, of McGuire & Norby, for amicus curiae Nebraska State Education Association.

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

HENDRY, C.J.

I. NATURE OF CASE

This is an appeal from an order of the district court for Lancaster County permanently enjoining the State Committee for the Reorganization of School Districts (the State Committee) from "issuing, enforcing or implementing any orders to dissolve and/or attach the territories of the Class I school districts in the State of Nebraska pursuant to LB 126" until after the results of a referendum election regarding 2005 Neb. Laws, L.B. 126, are certified from the next general election to be held on November 7, 2006.

The district court's judgment was based on its determination that the June 15, 2006, effective date of the State Committee's dissolution and attachment orders impermissibly impedes the

ability of the people of Nebraska to exercise their referendum rights in a meaningful way. Implicit in this ruling is the district court's determination that the effective date of L.B. 126 is unconstitutional under the referendum provisions of the Nebraska Constitution. Both parties agree that this was the basis of the court's permanent injunction order.

II. BACKGROUND

L.B. 126 was passed—over the Governor's veto on June 3, 2005. The act requires the reorganization of school districts so that all Nebraska school districts offer education in grades kindergarten through 12. See Neb. Rev. Stat. § 79-401(1) (Supp. 2005). Specifically, the act required the State Committee to dissolve Class I school districts and to attach their territory to one or more Class II, III, IV, and VI school districts with which the Class I district was previously associated with or a part of by December 1, 2005. Neb. Rev. Stat. §§ 79-4,113(1) and 79-4,114(1) (Supp. 2005). These orders are not effective until June 15, 2006. See §§ 79-4,113(4) and 79-4,114(7).

In response to the passage of L.B. 126, a group of Nebraska citizens identified as the "Nebraskans for Local Schools Committee" sponsored a referendum petition to refer L.B. 126 to the voters for their approval or rejection. See Neb. Const. art. III, § 3. On September 1, 2005, the sponsors timely filed their petition with the Secretary of State. On October 24, the Secretary of State found that of the 1,128,694 registered voters in Nebraska on September 1, the sponsors had collected 87,006 valid signatures statewide (a little more than 7.7 percent), and the valid signatures of 5 percent of registered voters in 67 out of 93 counties. These signatures constituted an amount and distribution sufficient to satisfy the constitutional requirements for placing the referendum measure on the ballot at the next general election to be held in November 2006. The Secretary of State also found, however, that the sponsors fell short of satisfying the requirement of obtaining the signatures of 10 percent of registered voters in order to suspend the act's operation. See Neb. Const. art. III, § 3. None of the parties contest the number of valid signatures.

On October 25, 2005, several Class I school districts, three individuals who were registered voters and patrons of the Class I

school districts, and a Class III school district (collectively plaintiffs) filed a class action suit against the State Committee and its members, seeking a preliminary and permanent injunction. Plaintiffs alleged four "causes of action."

First, plaintiffs alleged that by dissolving Class I school districts with an effective date of June 15, 2006, prior to the referendum election to be held in November 2006, the Legislature has "improperly and unconstitutionally stripped Nebraska voters of the right to vote on this question guaranteed to the voters by Article III, Sections 1, 3 and 4 of the Nebraska Constitution because the repeal of LB 126 . . . would not restore Class I school districts." Second, plaintiffs alleged that the June 15, 2006, effective date of the dissolutions violated their "fundamental right to vote" on "the question of the forced consolidation of Class I school districts" as "guaranteed by the First Amendment of the Constitution of the United States and by Article I, Section 22 of the Nebraska Constitution." Third, plaintiffs alleged L.B. 126 would render a successful repeal of the act an unauthorized advisory vote because the act's repeal would not reinstate Class I schools. Finally, plaintiffs alleged that the number of signatures they submitted was "more than ten percent of the number of votes cast for Governor at the general election in 2002" and that "therefore[,] the taking effect of LB 126 has been suspended pursuant to Article III, Section 3 of the Nebraska Constitution."

On October 27, 2005, plaintiffs filed an amended complaint, additionally requesting the court to declare unconstitutional all provisions of L.B. 126 that required the dissolution and attachment of Class I school districts before the referendum election to be held on November 7, 2006.

In a written order entered on November 14, 2005, granting plaintiffs' request for a temporary injunction, the district court recognized that the First Amendment prohibits states from impermissibly burdening the right to petition the government by initiative or referendum when the citizens of a state have reserved that right to themselves. However, the court concluded that the First Amendment protections were not violated by L.B. 126.

In addressing Nebraska's referendum provisions, the district court acknowledged that L.B. 126 was not intended or designed

to facilitate or impede the operation of the referendum process. Nonetheless, it found the act's "deadline for the dissolution and attachment of the territories of the Class I school districts impedes and hampers, or renders ineffective, the ability of the people to complete their exercise of the referendum power in a meaningful manner," because "at the time of the general election, the effects of the legislation [will] have already been accomplished." The court further found that because Class I districts would be dissolved and reorganized 5 months before the referendum election, the vote would "represent a meaningless exercise in futility. Such a result would perhaps best be described as 'a nonbinding expression of public opinion.' "

On November 18, 2005, plaintiffs filed a second amended complaint. The second amended complaint included the additional claim that unless L.B. 126 is enjoined, Nebraska voters and citizens would be denied their right to free speech. Specifically, it was alleged that because the referendum vote would be meaningless without an injunction, discussion of the referendum issues would be curtailed, the supporters of the referendum would be unable to reach a large audience, and their ability to raise money would be "all but impossible" when Class I school districts had already ceased to exist. Plaintiffs' claim for relief again requested a permanent injunction until after the November 7, 2006, election.

On November 22, 2005, the district court conducted a trial on plaintiffs' request for a permanent injunction and declaratory judgment. In a written order granting the permanent injunction, entered on November 29, the district court first determined that the suit could not be maintained as a class action. In regard to plaintiffs' request for a permanent injunction, the district court explicitly incorporated the previous findings from its temporary injunction order. The court restated its conclusion that while L.B. 126 was not intended to interfere with the people's right to exercise their power of referendum, the act nonetheless irreparably harmed the people of Nebraska because a referendum election would be rendered meaningless by the act's June 15, 2006, effective date for the State Committee's orders of dissolution and attachment of Class I schools. The court therefore granted a permanent injunction prohibiting the State Committee

from issuing those orders until the results of the referendum election were known.

The district court denied plaintiffs' request for a declaration that L.B. 126 was unconstitutional, concluding that because it had granted plaintiffs' request for a permanent injunction, there was no justiciable issue between the parties. Despite the court's denial of declaratory relief, however, the basis for the court's granting of the injunction was indisputably the purported unconstitutionality of the act's effective date.

The State Committee filed a notice of appeal on November 30, 2005. Given the questions involved, this court has expedited the appeal.

III. ASSIGNMENTS OF ERROR

The State Committee assigns the district court erred in (1) determining that L.B. 126 impedes the exercise of the referendum power in violation of Neb. Const. art. III, §§ 1, 3, and 4; (2) granting a permanent injunction when plaintiffs have no clear right to relief under these referendum provisions; and (3) determining that plaintiffs would be irreparably harmed if L.B. 126 were fully implemented before the referendum election to be held in November 2006.

On cross-appeal, plaintiffs assign, restated, that the district court erred in failing to determine that allowing the State Committee to dissolve Class I school districts before the referendum election would result in (1) a denial of the right to vote guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 22; (2) a denial of the right to free speech guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 5; and (3) "an impermissible advisory vote." Plaintiffs also assign that the district court erred in failing to declare that L.B. 126 violates these constitutional provisions. Finally, plaintiffs argue this court's decision in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994), should be overruled.

IV. STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of

the findings of the trial court. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005).

[2] The constitutionality of a statute is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

[3] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

V. ANALYSIS

The State Committee contends that because the district court's order granting a permanent injunction was based on its determination that the effective date of the dissolution orders under L.B. 126 impermissibly burdened the people's right of referendum, this court may affirm the judgment only if it concludes that L.B. 126 violates the referendum provisions of the Nebraska Constitution. The State Committee argues that L.B. 126 does not violate those provisions.

Plaintiffs contend that the Legislature's imposition of a June 15, 2006, effective date for orders dissolving Class I school districts violates Neb. Const. art. III, § 4, because it impedes and hampers the people's ability to exercise their right of referendum in a meaningful way. In their cross-appeal, plaintiffs also argue that allowing Class I school districts to be dissolved before a referendum election violates the right to vote and the right to free speech guaranteed by the Nebraska and U.S. Constitutions.

[4] An injunction is an extraordinary remedy and ordinarily should not be granted unless the right to an injunction is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). In this case, the purported unconstitutionality of L.B. 126 is the only clear right to relief which plaintiffs claim as support for the injunction. Indeed, this is the only clear right to relief plaintiffs could claim to support an injunction against the implementation of L.B. 126. See *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996) (stating that "[u]nless

restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose").

[5,6] When a party seeks to enjoin the invocation or implementation of a legislative enactment, "[t]he judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law." *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). It is not the province of the court to annul a legislative act unless it clearly contravenes the Constitution, and no other resort remains. *Id.*

[7,8] In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on a constitutionally protected right or whether the statute creates a suspect classification. See, *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995); *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992), quoting *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

Plaintiffs do not contend that L.B. 126 creates a suspect classification. Their challenge is limited to the act's imposition of a June 15, 2006, effective date for orders dissolving Class I school districts, which date they claim violates various constitutional provisions of the Nebraska and federal Constitutions. Initially, we point out that there is nothing inherently improper about the Legislature's June 15, 2006, effective date for the dissolution and attachment orders under L.B. 126.

[9,10] The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. *State ex rel. Stenberg, supra.* The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. *Id.* The only restriction on the Legislature's power to determine the effective date of its enactments comes from Neb. Const. art. III, § 27, which, in relevant part, provides:

> No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in

> case of emergency, which is expressed in the preamble or body of the act, the Legislature shall by a vote of two-thirds of all the members elected otherwise direct.

The 99th Legislature adjourned on June 3, 2005, the same day that L.B. 126 was passed—over the Governor's veto. None of the deadlines contained within the act required any action to be taken before September 10, 2005, which was more than 3 months after the Legislature adjourned. See Neb. Rev. Stat. § 79-4,112(1) (Supp. 2005). Further, there is no constitutional requirement that the Legislature delay the effective dates of its enactments until after a possible referendum election occurs. Thus, unless the effective date of the dissolution orders violates some other constitutional provision, this court may not interfere with this grant of constitutional authority. See *Read v. City of Scottsbluff*, 179 Neb. 410, 138 N.W.2d 471 (1965) (stating that courts should not interfere with legislative determination of emergency, making legislation effective upon passage and precluding suspension of act until next general election, unless act violates constitutional mandate).

With this background, we now turn to the central issue raised by the State Committee. Simply stated, that issue is whether the district court erred in concluding that the effective date of L.B. 126, for orders dissolving and reorganizing Class I school districts, violated the right of referendum reserved to the people by the Nebraska Constitution.

1. Nebraska's Referendum Provisions

(a) Neb. Const. art. III, § 4

Neb. Const. art. III, § 4, sets forth the number of votes required *to enact* a ballot petition. In addition, § 4 provides: "The provisions with respect to the initiative and referendum shall be self-executing, *but legislation may be enacted to facilitate their operation.*" (Emphasis supplied.)

In contrast, article III, § 3, sets forth the number of signatures required *to invoke* the power to place a referendum measure on the ballot and the number of signatures required to simultaneously invoke the power to suspend an act's operation until approved by the voters. The district court and plaintiffs have relied on cases previously decided by this court applying the italicized

provision of § 4 to support the determination that L.B. 126 impermissibly burdens the right of referendum. However, as further explained below, we determine these cases are not applicable to the specific issues raised in this appeal.

This court has held that "[l]egislation which hampers or renders ineffective the power reserved to the people is unconstitutional." *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 475 (1999) (holding that statute regulating initiative and referendum procedures, requiring exact match between signature information placed on initiative petitions and voter registration records, was unconstitutional because it hampered ability of public to engage in initiative process and did not act to prevent fraud). See, also, *State ex rel. Stenberg v. Beermann*, 240 Neb. 754, 757, 485 N.W.2d 151, 153 (1992) (holding, without reaching First Amendment challenge, that sections of regulating statute making it criminal offense to circulate ballot petition outside of county in which circulator is registered to vote "violate Neb. Const. art. III, § 4, by impeding the initiative and referendum process instead of facilitating the process as the Constitution requires"); *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966) (construing regulating statute as not requiring sponsors to include in referendum petition text of amendment to act they sought to repeal); *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 273, 177 N.W. 179 (1920) (refusing to interpret regulating statute to require referendum sponsors to attach full copy of act to each petition sheet because such law would be unnecessarily obstructive), *vacated on other grounds* 104 Neb. 279, 178 N.W. 822.

In each of these cases, however, at issue were regulating statutes specifically intended to facilitate the initiative and referendum procedures and enacted pursuant to article III, § 4. The language extracted from these cases and relied upon by plaintiffs and the district court simply has no application outside of regulating legislation intended to facilitate the initiative or referendum procedures.

[11] *Klosterman, supra*, a case relied upon by plaintiffs and the district court, is illustrative. The district court's quotation of language from *Klosterman* in both its November 14 and 29, 2005, orders is not a reflection of its reliance on the *Klosterman*

holding, wherein this court held that the *timing and procedural* requirements of the constitutional provisions and relevant statutes relating to the referendum had been met in that case. Rather, the district court's conclusion, as well as plaintiffs' argument, that the effective date of L.B. 126 "impedes and hampers, or renders ineffective, the ability of the people to complete their exercise of the referendum power" rests upon the language from *State, ex rel. Ayres, supra*, as quoted in *Klosterman*, 180 Neb. at 513, 143 N.W.2d at 749, which states, "'*Any* legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional.'" (Emphasis supplied.) The district court interpreted the word "any" to include even nonfacilitating statutes such as L.B. 126. The quoted language from *State, ex rel. Ayres,* however, must be read in the context in which it was written; i.e., in a case involving the constitutional validity of "facilitating" statutes as that term is used within article III, § 4. More precisely, the quoted language from *State, ex rel. Ayres,* has consistently been relied upon by this court only when considering the constitutionality of "any [*facilitating*] legislation which would hamper or render ineffective the power reserved to the people." See *State, ex rel. Ayres, v. Amsberry*, 104 Neb. at 276-77, 177 N.W. at 180. That was so in *Klosterman* as it was in all other cases relied upon by plaintiffs and the district court. The "*Ayres* test" is, therefore, applied to facilitating statutes, not all acts of the Legislature.

L.B. 126 does not present the same legal issue that concerned this court in *Klosterman, supra*, and *State, ex rel. Ayres, supra*, or the additional cases relied upon by plaintiffs and the district court. There is simply no provision within L.B. 126 intended to regulate the referendum process. Because neither the "facilitating" provision nor the enactment provisions of article III, § 4, are at issue, we determine this case is controlled by article III, § 3. We therefore turn our attention to that section.

(b) Neb. Const. art. III, § 3

[12] Neb. Const. art. III, § 3, specifically reserves to the people the power of referendum and clearly defines the scope of that right and its limitations. See *Klosterman v. Marsh*, 180 Neb. 506, 509, 143 N.W.2d 744, 747 (1966) ("[a]rticle III, section 3,

of the Constitution of Nebraska, specifically applies to the referendum").

[13,14] In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed. *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999). Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). Neb. Const. art. III, § 3, provides, in relevant part:

> The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. . . . When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition.
>
> When the referendum is invoked as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health, or safety, *by petition signed by not less than ten percent of the registered voters of the state* distributed as aforesaid, it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state.

(Emphasis supplied.)

The parties stipulated that at the time the referendum petitions were required to be filed with the Secretary of State, September 1, 2005, there were 1,128,694 registered voters in Nebraska and that the local schools committee had timely submitted 87,006

valid signatures to the Secretary of State with their referendum petition. Thus, the number of petition signatures was equal to a little more than 7.7 percent of the registered voters. Under the plain language of article III, § 3, this amount was sufficient to refer L.B. 126 to the voters at the next general election, but insufficient to suspend the operation of the act. Nonetheless, plaintiffs argue that the referendum provisions should be liberally construed to mean that "the ten percent method is not the exclusive means to prevent a statute from going into effect prior to a referendum election." Brief for appellee at 10.

This court has held that Nebraska's "[c]onstitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed *to make effective the powers reserved.*" (Emphasis supplied.) *Klosterman v. Marsh*, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966).

[15] In this circumstance, article III, § 3, imposes a specific requirement to suspend the operation of an act. Referendum sponsors must secure more votes to suspend an act from taking effect prior to a referendum election than required to place a referendum on the ballot at the next general election. Section 3 plainly states that in order to suspend an act's operation until it is approved by the voters, the referendum petition must include the signatures of 10 percent of the State's registered voters.

[16] A rule of construction cannot authorize this court to expand the right of referendum beyond what has been reserved or to ignore its plain limitations. "It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto." *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). Because article III, § 3, specifically contemplates under what circumstances an act will be suspended pending a referendum election, this court must respect and give effect to that limitation.

As noted, plaintiffs' primary claim to a clear right to an injunction is their argument that the effective date of L.B. 126 will deny them the right of referendum. However, because plaintiffs have failed to obtain the necessary number of signatures that would suspend the operation of L.B. 126 pending a referendum election, they have received exactly the right reserved to them in

article III, § 3, which is the right to have L.B. 126 referred to the voters for approval or rejection at the next general election. Plaintiffs have not shown they are entitled to have the act suspended in the interim. The referendum provisions of the Nebraska Constitution are not violated by this result; to the contrary, they demand it.

The history of article III, § 3, is consistent with our determination. The initiative and referendum amendments to article III were originally adopted in 1912. At that time, what is now § 3 required referendum sponsors to obtain the signatures of 10 percent of the legal voters to place a referendum measure on the ballot: "It may be ordered by a petition of ten per cent of the legal voters of the state, distributed as required for initiative petitions." Neb. Const. art. III, § 1B (adopted 1912, 1911 Neb. Laws, ch. 223, § 2, p. 672). If the sponsors obtained this percentage of signatures, then the operation of any referred, nonemergency act would be suspended until approved by the voters. *Id.*

This provision was amended by the Constitutional Convention of 1919-1920. The amendment lowered the percent of signatures needed to place a referendum on the ballot from 10 percent to 5 percent, but *retained* the 10-percent requirement to suspend the operation of a nonemergency act until approved in a referendum election.

This history clearly demonstrates the people's decision to make the referendum process more attainable by requiring only 5 percent of the registered voters to invoke the power of referendum. It just as clearly demonstrates the people's desire to retain the higher threshold to suspend an act of the Legislature pending the referendum vote.

[17] A constitution represents the supreme written will of the people regarding the framework for their government. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). When the language of the state Constitution is clear, unambiguous, and does not violate the U.S. Constitution, it is not for this court to read into it that which is not there. In the circumstance presently before the court, the state Constitution unambiguously sets forth the procedure the people of Nebraska have determined to follow in the event less than 10 percent of the registered voters have signed a referendum petition. It is not for this court to

apply article III, § 3, otherwise. We conclude that L.B. 126 does not violate Nebraska's referendum provisions.

Plaintiffs, however, contend that L.B. 126 violates other constitutional provisions. These questions comprise the substance of plaintiffs' claims in their cross-appeal, and it is to those claims that we now turn our attention.

2. Cross-Appeal Challenges

In their cross-appeal, plaintiffs primarily argue that allowing Class I school districts to be dissolved before a referendum election violates the right to vote and the right to free speech guaranteed by the Nebraska and U.S. Constitutions.

(a) Right to Vote

[18,19] Plaintiffs assert that dissolving Class I school districts before the referendum election violates their right to vote on the forced consolidation of Class I school districts. We disagree. The U.S. Supreme Court has stated that the right to vote is a fundamental political right under the federal Constitution because it preserves all other rights. *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). The Court in *Reynolds* explicitly held that "all qualified voters have a constitutionally protected right to vote . . . in state as well as in federal elections." *Reynolds*, 377 U.S. at 554. However, the fundamental right to vote in this country is the right to participate in representative government. See, *Kramer v. Union School District*, 395 U.S. 621, 626, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969) ("[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government"); *Reynolds*, 377 U.S. at 559-60 (" 'our Constitution's plain objective' was that 'of making equal representation for equal numbers of people the fundamental goal . . .' "); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ("[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live").

[20] In contrast to the right to participate in representative government, the people's reservation in a state constitution of

the right of referendum "is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

[21] The federal Constitution does not prohibit direct democracy, see *Eastlake*, 426 U.S. at 679 ("[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause"), but neither does it confer or guarantee such rights. See *Meyer v. Grant*, 486 U.S. 414, 416, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) (stating that "Colorado is one of several States that *permits* its citizens to place propositions on the ballot through an initiative process" (emphasis supplied)).

[22] Neither has this court interpreted the right to vote under Neb. Const. art. I, § 22, to extend beyond issues involving the right to participate in representative government. See, e.g., *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966); *Baker v. Moorhead*, 103 Neb. 811, 174 N.W. 430 (1919); *State, ex rel. Harte, v. Moorhead*, 99 Neb. 527, 156 N.W. 1067 (1916); *Morrissey v. Wait*, 92 Neb. 271, 138 N.W. 186 (1912).

Because the rights of initiative or referendum are a means of direct democracy, federal courts have concluded that the partial reservation or total absence of the right of initiative or referendum in a state constitution does not violate a fundamental right to vote. See, e.g., *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10th Cir. 2002); *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036 (M.D. Ga. 1985). Compare *Stone v. City of Prescott*, 173 F.3d 1172 (9th Cir. 1999).

[23] The reasoning of these courts is applicable to this appeal. Under both Neb. Const. art. I, § 22, and the federal Constitution, the constitutionally protected right to vote is limited to the right to participate in representative government. Because the right to participate in representative government is not implicated by a referendum proceeding, plaintiffs' constitutional right to vote has not been violated by the state constitution's limitations on their right to refer L.B. 126 to the voters. Thus, to the extent plaintiffs

have a right to directly vote on the issue of Class I school consolidations, that right is limited to what has been reserved to the people by the Nebraska Constitution. See *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S. Ct. 3, 36 L. Ed. 869 (1892) ("sovereignty of the people [comprising the political community of a state] is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed").

We conclude plaintiffs' claim that L.B. 126 violates their constitutional right to vote is without merit.

(b) Right to Free Speech

[24] Plaintiffs also assign that dissolving Class I school districts prior to the November 7, 2006, referendum election results in a denial of the right of free speech guaranteed by the First Amendment to the U.S. Constitution and Neb. Const. art. I, § 5. Again, we disagree. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

[25] "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . . ." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). But if a state has conferred the right of initiative and referendum, it is "obligated to do so in a manner consistent with the Constitution." See *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

[26] State restrictions on initiative and referendum rights violate the First Amendment's free speech guarantee when they "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Buckley*, 525 U.S. at 192 (holding that Colorado's requirements that circulators be registered voters and wear identification badges violated free speech guarantee). Direct restrictions on initiative and referendum procedures that curtail political expression are subject to "exacting scrutiny." *Meyer*, 486 U.S. at 420 (affirming court of appeals' decision that prohibition against paid circulators violated First

Amendment protections of free speech). Accord *State v. Radcliffe*, 228 Neb. 868, 424 N.W.2d 608 (1988).

Although plaintiffs primarily rely on *Meyer* and *Buckley* to support their position, neither case is applicable to initiative or referendum processes that do not restrict political communication or association. See, *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997); *Stone v. City of Prescott*, 173 F.3d 1172 (9th Cir. 1999); *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). Neither do they apply to legislation which is not intended to regulate these procedures.

L.B. 126 does not impose any restrictions or conditions on plaintiffs' right to communicate with voters about the political change they seek. Compare *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000) (holding that state restriction on timing and amount of independent expenditures by political groups supporting candidates was unconstitutional regulation of elections and impermissibly burdened right to engage in political speech). Nor does L.B. 126 attempt to regulate the circulation of initiative or referendum petitions. Compare *Radcliffe, supra*. Rather, plaintiffs' assertion that their right to free speech has been diminished is based entirely upon their claim that unless L.B. 126 is suspended until the referendum vote, the ability of those opposed to L.B. 126 to persuade voters to reject it will be more difficult. Plaintiffs' claim is not based upon any actual restrictions on their right to communicate with voters.

Given the conditions the people of Nebraska have imposed on their power to suspend an act's operation pending a referendum election, the "difficulty," as described by plaintiffs, can be avoided only by this court's expanding the scope of the referendum power itself. As discussed, the U.S. Constitution does not guarantee a right of referendum, and to expand this right would be to ignore the clear and unambiguous procedure set out by the people in article III, § 3, of the state Constitution. This we shall not do. See *Biddulph*, 89 F.3d at 1500 (" '[t]he state, having created such a procedure, retains the authority to interpret its scope and availability' ").

We conclude that plaintiffs' claim that L.B. 126 violates their constitutional right to free speech, based on the fact that Nebraska's referendum provisions make it difficult for them to

repeal the act and even more difficult to suspend its operation, is without merit.

(c) Impermissible Advisory Vote

Plaintiffs also contend the district court erred in failing to determine that dissolving Class I school districts before the referendum election would result in an impermissible advisory vote. The only case cited by plaintiffs in support of this argument is *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984). In *State ex rel. Brant*, this court refused to issue a writ of mandamus requiring the Secretary of State to place an initiative measure on the ballot. If passed, the initiative would have stated that the people of Nebraska favored a nuclear freeze and would have required the Governor to forward this statement of position to officials in the U.S. and Soviet Union governments. Because the proposed initiative was without the force of law, this court determined the measure was not a proper subject for initiative.

[27] *State ex rel. Brant* is not applicable to these facts. The power of referendum is the people's reservation of "power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature." Neb. Const. art. III, § 1. If the voters reject L.B. 126 at the referendum election, the act will stand repealed. See *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966) (stating that through power of referendum, people may repeal enactments of Legislature). To repeal is to rescind or abrogate an existing law. See Black's Law Dictionary 1325 (8th Ed. 2004).

[28] When the people invoke the right to a referendum, they are exercising their coequal legislative power to expressly approve or repeal the enactments of the Legislature. See, *Klosterman, supra*; *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 210-11, 602 N.W.2d 465, 474 (1999) (stating that "the Legislature and the electorate are concurrently equal in rank as sources of legislation" through power of initiative). In no sense can such an act be considered advisory to the Legislature or without the force of law. This assignment of error is without merit.

(d) *Duggan v. Beermann*

Plaintiffs argue that this court should overrule its decision in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994)

(holding that 1988 amendment of article III, §§ 2 and 3, to require percentage of signatures from "registered voters" instead of "electors" on ballot petitions, had repealed by implication requirement in article III, § 4, that requisite percentage of signatures be based on number of votes cast in preceding gubernatorial election). Plaintiffs contend the reversal of *Duggan* would result in a sufficient number of signatures on the referendum petition to suspend the operation of L.B. 126.

Although not cited by plaintiffs, this issue is controlled by this court's decision in *State ex rel. Stenberg v. Moore*, 251 Neb. 598, 558 N.W.2d 794 (1997) (concluding that voters' rejection of 1996 initiative, which was intended to return state Constitution to pre-1988 requirement that percentage of signatures needed for ballot petitions be tied to number of votes cast for Governor in preceding election, defeated attorney general's argument that voters did not understand effect of voting for 1988 initiative to amend constitution). This court could not overrule *Duggan* except by ignoring the voters' clear rejection in 1996 of the construction of article III that plaintiffs now urge this court to adopt. See *Moore*, 251 Neb. at 606, 558 N.W.2d at 799 ("[t]o now ignore the results of the vote [on the 1996 initiative] would be to deny such voters the same rights that the Attorney General seeks to protect"). We find nothing in plaintiffs' argument to persuade us that *Duggan, supra*, was wrongly decided, and we decline plaintiffs' invitation to revisit that determination.

(e) Declaratory Judgment

Finally, plaintiffs contend the district court erred by concluding there was no justiciable issue upon which it could declare L.B. 126 unconstitutional in light of its permanent injunction order. Having determined that plaintiffs have failed to show that L.B. 126 violates any of their constitutional rights, this court has no need to reach this assignment of error.

VI. CONCLUSION

Plaintiffs have failed to show that they have a clear right to relief which would support a permanent injunction against a legislative enactment. Absent a showing that L.B. 126 violates some provision of the state or federal Constitution, this court is not free to enjoin or strike down laws enacted by the Legislature.

The people of Nebraska have unambiguously set forth in article III, § 3, of the state Constitution that an act of the Legislature shall be suspended *only* in the event that a referendum petition is signed by "not less than ten percent of the registered voters." In this case, there is no dispute that plaintiffs collected the signatures of only a little more than 7.7 percent of the registered voters in Nebraska. Under such circumstance, to suspend "the taking effect" of L.B. 126 pending the referendum vote would require this court to ignore the will of the people as clearly expressed in the state Constitution. This we will not do.

To the extent plaintiffs argue that the effective date of L.B. 126 illustrates a need to change the referendum process, such is for the people of Nebraska to address and decide, not this court. Our responsibility, absent an ambiguity or a constitutional impediment, is to apply the people's constitution as written. That is what we do today.

The judgment of the district court is reversed, and the injunction is dissolved.

REVERSED AND INJUNCTION DISSOLVED.

WRIGHT, J., not participating.

PENNY SHIPLER, APPELLEE AND CROSS-APPELLANT, V. GENERAL MOTORS CORPORATION, A FOREIGN CORPORATION, APPELLEE AND CROSS-APPELLANT, AND KENNETH LONG, APPELLANT AND CROSS-APPELLEE.

710 N.W.2d 807

Filed March 10, 2006. No. S-03-1472.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

4. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
5. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. ____: ____: ____. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
8. **Courts: Jury Instructions.** A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.
9. **Judgments.** A general finding that a judgment should be for a certain party warrants the conclusion that the finder of fact found in favor of that party on all triable issues.
10. **Actions: Negligence.** Nebraska's comparative negligence law applies only to civil actions in which contributory negligence is a defense.
11. **Products Liability: Negligence: Statutes.** Whether contributory negligence is a defense to an action based upon strict liability is a matter of statutory interpretation.
12. **Statutes.** Statutory interpretation presents a question of law.
13. ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.
15. **Statutes: Legislature: Intent.** The last expression of legislative will is the law.
16. ____: ____: ____. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
17. ____: ____: ____. The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
18. **Statutes: Legislature: Presumptions: Intent.** The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
19. **Statutes.** Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision.
20. **Statutes: Legislature: Intent.** A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.
21. **Products Liability: Evidence: Notice.** Relevant evidence of other similar accidents or occurrences is admissible to show that a defendant had notice and actual knowledge of a defective condition, provided that the accidents or occurrences were substantially similar; i.e., the prior accidents or occurrences happened under

substantially the same circumstances and were caused by the same or similar defects and dangers.

22. **Evidence.** Where an individual fails to adequately demonstrate how prior occurrences are substantially similar, evidence of prior occurrences is irrelevant and, thus, inadmissible.
23. **Products Liability: Proof.** A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff.
24. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
25. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
26. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
27. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
28. **Trial: Appeal and Error.** Where the grounds specified for an objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review.
29. **Damages: Evidence: Proof.** A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
30. ____: ____: ____. Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural.
31. **Damages: Evidence.** The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact.
32. **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.
33. **Trial: Evidence: Tort-feasors: Liability: Damages.** The underlying theory of the collateral source rule is designed to prevent a tort-feasor from escaping liability based on the actions of a third party, even if it is possible that the plaintiff may be compensated twice.
34. **Damages: New Trial: Appeal and Error.** In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.

35. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
36. **Pretrial Procedure.** The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial.
37. **Negligence: Tort-feasors: Liability: Damages.** Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.
38. **Negligence: Liability.** Where two causes produce a single indivisible injury, joint and several liability attaches.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Gail S. Perry and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jeanelle R. Lust and William Sutter, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., and Frank M. Hinman, David M. Heilbron, Marc R. Bruner, Lee G. Sullivan, May Y. Lee, and Rianne E. Nolan, of Bingham & McCutchen, L.L.P., and Fred J. Fresard and Andrea L. Laginess, of Bowman & Brooke, and Frank Nizio, of McGuire & Woods, L.L.P., for appellee General Motors Corporation.

Dan L. McCord, of McCord & Burns Law Firm, and Michael J. Piuze for appellee Penny Shipler.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

Gregory D. Barton, of Harding, Schultz & Downs, and Mark S. Olson, of Oppenheimer, Wolff & Donnelly, L.L.P., and, of Counsel, Hugh F. Young, Jr., for amicus curiae Product Liability Advisory Council, Inc.

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

WRIGHT, J.

I. NATURE OF CASE

Penny Shipler brought this action against General Motors Corporation (GM) and Kenneth Long after she was injured in a motor vehicle rollover that rendered her a quadriplegic. GM and Long filed separate notices of appeal from a final judgment of

$18,583,900 entered following a jury trial in Lancaster County District Court. Shipler has cross-appealed.

II. SCOPE OF REVIEW

[1] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[2] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

III. FACTS

On September 11, 1997, Long lost control of his 1996 Chevrolet S-10 Blazer, and the Blazer rolled at least four times. Shipler, who was riding in the front passenger seat, was rendered a quadriplegic as a result of the rollover.

Shipler sued GM and Long, claiming that the roof of the Blazer was defective and had crushed inward, causing her injury. She alleged that GM, the manufacturer of the Blazer, was negligent in failing to use reasonable care in designing the Blazer's roof and in failing to adequately warn her of the dangers associated with the roof. Her second theory, based upon strict liability, alleged that the roof structure of the Blazer was defective at the time it left GM's possession. Shipler alleged that the defect made the Blazer unreasonably dangerous for its intended use and created a risk of harm beyond that which would be contemplated by the ordinary foreseeable user.

GM asserted that Long was a proximate cause of the rollover. It denied any negligence and denied that the Blazer was designed with an unreasonably weak roof structure over the front passenger seat compartment or that there were any defects in the passenger restraint system. GM denied any knowledge that the design of the Blazer exposed passengers to an unreasonable risk of injury which was foreseeable by GM. It denied that the Blazer's roof design or restraint system created a risk of harm to a passenger or made the vehicle unreasonably dangerous for its

intended use as a passenger vehicle. Prior to trial, Long admitted that his negligence was the cause of the accident.

At trial, GM sought to present evidence of Shipler's alleged contributory negligence and Long's comparative fault. In an offer of proof, testimony was offered that Shipler and Long had been drinking before the accident. The trial court excluded evidence regarding alcohol consumption by Shipler and Long, concluding that such evidence was not relevant in a crashworthiness case.

When the accident occurred, Shipler's infant son was sitting in her lap, and the passenger seatbelt was fastened over both of them. The infant was ejected in the rollover, and GM offered to prove that the infant's presence under the seatbelt created slack and therefore enhanced Shipler's injury. In her initial petition, she alleged that she was restrained with both a lap belt and a shoulder belt. The trial court excluded evidence of Shipler's use of the seatbelt in this manner but reduced her damages by 5 percent under Nebraska's seatbelt law, Neb. Rev. Stat. § 60-6,273 (Reissue 2004).

The issues presented for trial were whether GM was negligent in the design of the Blazer's roof, whether GM was strictly liable for a defect in the design of the roof, whether the negligence or defect in design caused Shipler's injury, and the nature and extent of Shipler's damages.

Following a 6-week trial, the jury returned a verdict for Shipler and against GM and Long, and awarded her damages of $19,562,000. The trial court entered an amended judgment of $18,583,900, based on the court's determination that Shipler agreed to eliminate the issue of whether the seatbelt was faulty in exchange for a 5-percent reduction in the judgment amount as provided by statute. GM's motion for new trial was overruled. On January 14, 2004, the trial court entered an order finding that Shipler was entitled to prejudgment interest on the portion of the judgment that exceeded $5 million from February 21, 2001, at the rate of 7.052 percent per annum. GM and Long filed separate notices of appeal, and Shipler cross-appealed.

IV. ASSIGNMENTS OF ERROR

GM claims, summarized and restated, that the trial court erred (1) in improperly instructing the jury, in refusing to provide a

defense verdict form, in giving oral instructions, and in giving a coercive *Allen* (*Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896)), or "dynamite," instruction to the deadlocked jury; (2) in barring GM's contributory negligence defense and in refusing to permit the jury to allocate liability for noneconomic damages in proportion to percentage of fault; (3) in excluding evidence of Shipler's seatbelt misuse; (4) in admitting evidence of dissimilar incidents; and (5) in allowing prejudicial testimony and giving improper instructions on the federal Motor Vehicle Safety Standard 216 (hereinafter FMVSS 216), the federal roof strength standard. GM also assigns as error that the verdict was excessive.

Long claims the trial court erred (1) in giving a limitation in the jury instructions that narrowed Shipler's injuries to quadriplegia only and in refusing to permit the jury to allocate damages between GM and Long based on which injuries were caused by the conduct of each; (2) in denying Long's multiple motions to dismiss because no issues were preserved against Long in the pretrial order; (3) in erroneously instructing the jury as to the possible verdicts that could be rendered and in failing to provide the jury with a defense verdict form allowing the jury to find in favor of GM and Long; (4) in failing to strike the award for future wage loss because such claim was supported by speculative and insufficient expert testimony; (5) in giving a detailed limiting instruction regarding Shipler's collateral source benefits that incited the jury's sympathy; and (6) in upholding the jury's excessive verdict, which was the result of passion and prejudice.

Shipler cross-appeals that the trial court erred in reducing the jury's damage award by 5 percent.

V. ANALYSIS

1. Erroneous Jury Instructions and *Allen* Charge

GM asserts that the trial court erred in its instructions on liability; erred in refusing to provide a defense verdict form; erred in instructing orally, outside court and without notice; and erred in giving a second coercive *Allen* charge.

(a) Jury Instructions

GM argues the trial court erroneously instructed the jury that if Long was not found liable, GM must be held liable. It claims

such instructions amounted to granting a directed verdict for Shipler.

The trial court instructed the jury that it could reach one of three possible verdicts: (1) that only GM and not Long proximately caused Shipler's quadriplegia, (2) that only Long and not GM proximately caused Shipler's quadriplegia, or (3) that GM and Long each proximately caused Shipler's quadriplegia. It is GM's position that such instructions were legally incorrect and unfair because GM's liability depended upon Shipler's proof of negligence or defective design as the cause of her injury and the instructions told the jury to hold liable either Long or GM, or both. GM claims the jury should have been given a form allowing it to find both defendants not liable, which GM argues the court incorrectly concluded was not an option. Thus, GM claims the court erroneously directed the jury to find that GM was liable if Long was not, regardless of whether Shipler had proved her case against GM.

The trial court directed the jury that before Shipler could recover against GM, she must prove either negligence or strict liability. The court instructed that in order to prove negligence, Shipler must show by the greater weight of the evidence that GM breached its duty to her by failing to use reasonable care in the design of the Blazer's roof in view of the foreseeable risk of injury and that the negligence was a proximate cause of Shipler's damages.

The jury was instructed that to prove strict liability, Shipler must demonstrate that GM placed the Blazer on the market; that at the time the Blazer left GM's possession, it was defective in the way claimed by Shipler; that this defect made the Blazer unreasonably dangerous for its intended use or for any use GM could reasonably have foreseen; and that the defect was a proximate cause of Shipler's damages. The jury was instructed that if Shipler did not meet her burden of proof on either theory, the verdict must be for GM. If Shipler met the burden of proof on either of the theories against GM, the verdict must be for Shipler.

The jury was instructed as to Long that Shipler was required to prove his negligence was a proximate cause of her damages. If she did not meet the burden of proof against Long, then the verdict must be for Long. If she met the burden of proof, then the

verdict must be in favor of Shipler. If Shipler met her burden of proof as to both defendants, then a single verdict should be returned against both defendants without a determination of the amount that an individual defendant was obligated to pay.

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

GM proposed an instruction stating if Shipler did not prove that GM failed to use reasonable care in the design of the roof structure of the Blazer and that such failure proximately caused her injury, then the verdict must be for GM. GM's proposed instruction concerning strict liability stated Shipler must prove that GM placed the Blazer on the market; that at the time it left GM's possession, the Blazer was defective in one or more of the ways claimed by Shipler; that the defect made the Blazer unreasonably dangerous for its intended use or for any use GM could reasonably have foreseen; and that the defect was a proximate cause of damage to Shipler.

[4-6] Both the proposed instructions and the instructions given by the trial court were similar to the Nebraska Jury Instructions. The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id.* A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

The jury was instructed as to the negligence and strict liability theories presented by the parties. The instructions given

correctly stated the law and adequately covered the issues to be submitted to the jury. GM has not shown that the instructions were prejudicial or otherwise adversely affected a substantial right of GM. It has not demonstrated any prejudice from the jury instructions given.

(b) Additional Verdict Form

GM claims that it should be granted a new trial because of an alleged oral communication between the trial court and the jury concerning an additional verdict form that would have allowed the jury to find for the defendants. At the hearing on its motion for new trial, GM offered a juror affidavit stating the foreperson had asked the bailiff about an additional verdict form that would allow the jury to find for the defendants. The juror asserted that the bailiff checked with the court and that the bailiff told the jury that it had "all possibilities before [it]." GM argues that the court's statement implied at least one of the defendants was liable and that this implication was by itself prejudicial error.

The trial court sustained Shipler's objection to the affidavit when it was offered at the hearing on the motion for new trial. GM has not assigned as error the trial court's ruling to exclude the affidavit. See *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005) (errors must be specifically assigned and argued to be considered by appellate court). Therefore, whether the court properly refused to admit the affidavit into evidence is not before us. Without the affidavit, there is no evidence that the jury requested an alternative verdict form or that the trial court communicated with the jury concerning the issue.

Even if the jury was told that it had all the necessary verdict forms, we conclude that the defendants were not prejudiced by the trial court's statement. In overruling the motion for new trial, the court concluded it would not have been proper to present a fourth verdict form to the jury. The court noted that Long had originally admitted that he negligently caused the rollover accident, but denied causing injury to Shipler. Long admitted later that he negligently caused the rollover accident and that he caused some injury to Shipler. The court stated that it had contemplated the possibility of a fourth verdict form, but when Long changed his position, a fourth verdict form was no longer

available. Long's defense was that had it not been for GM's design of the Blazer's roof, Shipler would not have sustained the paralyzing injury even though Long caused the accident and other injuries. The court said: "If the jury had found that GM was not negligent and had not placed an unreasonably dangerous product on the market, then Long was responsible for the paralyzing injury. There was simply no other alternative, given Long's admissions."

We conclude there were only three verdict forms that the jury could properly consider. Long admitted liability, and the parties stipulated that his operation of the Blazer caused the accident. The remaining issues were whether Long's negligence was the sole cause of the injury, whether the Blazer's roof was the sole cause of the injury, or whether both GM and Long proximately caused the injury.

[7,8] The jury may be instructed upon only those theories of the case which are supported by competent evidence. See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). The trial court correctly determined the jury could not be instructed that it could find in favor of both defendants. The verdict forms did not relieve Shipler of her burden of proof as to both defendants. The question was whether Long, GM, or both were liable for Shipler's quadriplegia.

(c) Oral Communication to Continue Deliberations

GM complains that the trial court improperly communicated with the jury through the bailiff and without notice to counsel, directing the jury to continue deliberations when it was deadlocked. On Tuesday, September 23, 2003, the court made a record that at some time after 4 p.m. on Monday, September 22, the presiding juror communicated by telephone with the bailiff that the jury was deadlocked. At that time, the court instructed the bailiff to tell the jury that it should continue deliberations for the remainder of the afternoon and that if the jury's status was the

same on Tuesday morning, the jury should inform the court. During a hearing outside the presence of the jury at 4 p.m. on Tuesday, the court stated that it had not received any further communication from the jury until 3:43 p.m. that day when the jury again stated that it was deadlocked.

Not every oral ex parte communication by the court to the jury is improper and requires a new trial. See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The communication must be prejudicial. Here, no prejudice occurred. The jury was told that it should continue deliberating to the end of the day, which was less than an hour. We conclude that the communication was harmless because it had no tendency to influence the verdict. See *State v. Thomas, supra.*

(d) *Allen* Charge

GM claims that a formal supplemental instruction given by the trial court was an impermissible *Allen* instruction (directive from court to deadlocked jury to continue deliberating). See *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

The jury began deliberations at 4:56 p.m. on Thursday, September 18, 2003. At 4:30 p.m. on Tuesday, September 23, the trial court met with counsel for all parties outside the presence of the jury. The court stated that it had received a note that afternoon from the jury foreperson again stating that the jury was deadlocked. The court stated that it had conferred with counsel and planned to bring the jury in and, without asking as to the division of the jury, give a supplemental instruction, if appropriate. GM's counsel proposed its own instruction for use with a deadlocked jury, claiming that the court's proposed instruction was coercive and would cause jurors to go with a majority and give up their conscientious scruples.

At 4:42 p.m., on September 23, 2003, the jury returned to the courtroom, and all counsel were present. The foreperson told the trial court that the jury was deadlocked after 3 days of deliberation. The court then gave the jury a supplemental instruction stating that if the jury was not able to reach a verdict within a reasonable time, the court would declare the jury deadlocked or hung, the jury would be discharged, and a mistrial would be declared. The court informed the jury of the meaning of a mistrial

and offered some suggestions to consider as it resumed its deliberations, including rearranging seats, taking turns telling other jurors the weaknesses of their position, and avoiding interruption or comment until each had time to talk. The court explained that it was not seeking to force agreement or to make the jury think that it would be forced to deliberate until it agreed. Given this supplemental instruction, the jury continued to deliberate for another 3 days before it reached a verdict.

GM objects to the trial court's communication with the jury in part based on Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995). These statutes prohibit oral instructions and relate to further explanation of instructions previously given or to explanation of the facts or the law of the case. In the present case, the complained-of communication was given in court after consultation with counsel for all parties, and counsel were present when the instruction was given. The instruction was recorded.

In *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), this court was asked to find that the defendant was prejudiced by an *Allen* charge. We noted that an *Allen* charge to the jury given orally without notice to the parties or their counsel violates §§ 25-1115 and 25-1116 and is improper. "If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict." *State v. Thomas*, 262 Neb. at 1001, 637 N.W.2d at 651. In *Thomas*, we found that the record indicated that the trial court only directed the jury to continue its deliberations and that the direction did not have a tendency to influence the verdict.

In *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664 (1970), the trial court admonished the jury after being informed that it was deadlocked by a vote of 11 to 1. The court told the jury that although it had deliberated for more than 15 hours, the court could not be convinced that there was no possibility of agreement. A guilty verdict was arrived at 45 minutes later. This court noted that a factor to consider in reviewing this type of instruction is whether it tended to coerce a dissenting juror or jurors. See *Potard v. State*, 140 Neb. 116, 299 N.W. 362 (1941) (court

rejected *Allen*-type instruction; only purpose for instruction was to peremptorily direct agreement, which invaded province of jury). In *Garza*, this court referred to the ABA Standards Relating to Trial by Jury § 5.4 (Approved Draft 1968), which states that the court may require the jury to continue its deliberations, but that the court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

In order to obtain relief concerning the alleged oral instructions or the *Allen* charge, GM must demonstrate that it was prejudiced by the trial court's actions. An instruction directing the jury to continue its deliberations does not require reversal if it cannot be shown that it tended to coerce the jury. In this case, the supplemental instruction was given on Tuesday, September 23, 2003, after the jury had deliberated for 3 days. The jury verdict was not returned until 1:15 p.m. on Friday, September 26. The record does not support a finding that the jury was coerced by the supplemental instruction given in the presence of counsel.

GM has not demonstrated that it was prejudiced by any of the trial court's instructions, by the failure to provide a fourth verdict form, by the court's communicating with the jury outside the presence of counsel, or by the court's giving a supplemental instruction to continue deliberations. This assignment of error has no merit.

2. Contributory Negligence and Apportionment of Damages

GM argues that the trial court erred in barring its contributory negligence defense. Both GM and Long claim the court erred in refusing to permit the jury to allocate liability for noneconomic damages in proportion to a percentage of fault.

GM claims that Long's driving while under the influence of alcohol, his negligent control of the Blazer, and Shipler's knowing decision to drink alcohol and ride in the vehicle with Long were evidence of contributory negligence which the jury should have been entitled to consider. GM asserts that under Nebraska law, contributory negligence is a defense which would diminish proportionately the amount awarded as damages for any injury attributable to Long's negligence or Shipler's contributory

negligence. GM points out that in civil cases not involving a common enterprise or plan, where contributory negligence is a defense and multiple defendants are involved, noneconomic damages must be allocated in proportion to each defendant's percentage of negligence. See Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). It argues that the trial court erred in concluding that contributory negligence did not apply to a crashworthiness case.

The trial court did not determine whether contributory negligence is a defense to a cause of action based upon strict liability. Instead, the court concluded:

> The particular theory under which [Shipler] seeks recovery in this case is what has been termed a crashworthiness theory of recovery. Contributory negligence is not a defense that has been recognized either by statute or by the courts as applying to a crashworthiness theory of recovery. It is arguable, and this court does not determine, whether or not § 25-21,185.09 recognizes contributory negligence as a defense in a strict liability action. . . .
>
> The inherent nature of the crashworthiness or enhanced injury theory of liability disallows the submission of issues of contributory negligence to a jury. A conceptual problem is created when one tries to apply concepts of contributory negligence under a crashworthiness theory of recovery that is unique to this theory as compared to other theories of strict liability. In crashworthiness cases, two distinct events are alleged by the Plaintiff: the initial accident and the subsequent "second collision" for which the Plaintiff seeks recovery from the defendant manufacturer. The crashworthiness theory, by its terms, assumes that manufacturers know accidents involving their vehicles will occur and that "[a]ny participation by the plaintiff in bringing the accident about is quite beside the point. . . . Any negligence by [the] driver [of the vehicle], or even by [the plaintiff] himself, in connection with the original crash cannot be used by the manufacturer in defending against [the plaintiff's] enhancement claim."

The trial court concluded that because Shipler had alleged that her quadriplegia was due entirely to GM's defective design, which caused a "second collision," and because Long had admitted

liability for the initial collision, evidence of alcohol consumption was inadmissible evidence not relevant to any disputed fact.

(a) Negligence Claim

GM argues that because Shipler conceded that contributory negligence was a defense to a cause of action for negligence in a crashworthiness case, Long's comparative negligence was an issue as to that claim. It asserts that both Shipler's and Long's negligence must be compared to GM's liability and that Shipler's noneconomic damages should be apportioned accordingly. See § 25-21,185.10. We will address this argument before proceeding further.

[9] A general finding that a judgment should be for a certain party warrants the conclusion that the finder of fact found in favor of that party on all triable issues. *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998). Because the jury returned a verdict under both theories of negligence and strict liability, we conclude that the jury found in favor of Shipler on both theories of recovery. Therefore, in order to establish prejudicial error that would require a new trial, GM must establish in the strict liability action that it was entitled to present evidence of Long's negligence and Shipler's alleged contributory negligence. We need not address whether the trial court should have permitted evidence of Long's and Shipler's negligence in the cause of action based upon GM's alleged negligence. See *id.*

In *Foiles*, the plaintiff alleged three theories of recovery: fraudulent misrepresentation, implied bailment, and negligence. The court entered a general verdict, finding in favor of the plaintiff, and we therefore presumed that the plaintiff prevailed on each theory. In order to succeed on appeal, the defendants were required to establish that the court was clearly wrong as to each theory of recovery. In the case at bar, GM must establish that Long's negligence and Shipler's alleged contributory negligence were defenses to Shipler's cause of action based upon strict liability in tort.

(b) Strict Liability Claim

In 1992, the Nebraska Legislature amended the comparative negligence scheme in which the contributory negligence of the claimant diminishes proportionately the amount awarded as

damages (as long as the claimant's negligence is less than 50 percent; otherwise, he or she is barred from recovery). See 1992 Neb. Laws, L.B. 262. GM argues that contributory negligence remains a defense to strict liability in tort and that had the Legislature wanted to eliminate the contributory negligence defense in strict liability claims, it would have explicitly done so. GM argues that the revised law provides a broader framework in which a plaintiff's negligence may be considered in any action where contributory negligence may be, pursuant to law, a defense, regardless of the theory of liability.

[10] On the other hand, Shipler argues that the 1992 amendment specifically removed all language extending the defense of contributory or comparative negligence to an action based upon strict liability. Shipler contends that Neb. Rev. Stat. § 25-21,185.07 (Reissue 1995) has limited application and applies only to civil actions to which contributory negligence may be, pursuant to law, a defense. Shipler points out that contributory negligence does not apply to all civil actions regardless of the theory of liability. For example, contributory negligence does not apply to intentional torts. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). It does not apply when a patient's conduct provides the occasion for medical action which later is the subject of a medical malpractice claim. See *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). Nebraska's comparative negligence law applies only to civil actions in which contributory negligence is a defense. *Brandon v. County of Richardson, supra.* See *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983).

The question presented is whether Nebraska law permits contributory negligence to be asserted as a defense in an action based upon strict liability.

(i) Background

Nebraska adopted the doctrine of strict liability in product liability cases in *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961). In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), we held a manufacturer was strictly liable in tort when an article he placed on the market, knowing that it was to be used without inspection for defects,

proved to have a defect which caused an injury to a person rightfully using that product. In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983), the court stated: "It is clear that traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are."

Historically, the application of contributory negligence in strict liability cases has varied with legislative enactments. At the time of our decision in *Hawkins Constr. Co.*, the law addressed contributory negligence in actions based upon the negligence of another.

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison . . . .

See Neb. Rev. Stat. § 25-1151 (Reissue 1975).

In *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976), the federal appellate court had its first opportunity to examine our contributory negligence statute in an action based upon strict liability. The federal district court had instructed the jury that the defense of negligence or contributory negligence on the part of the plaintiff's decedent was not available to the defendant in an action based on product liability in the manufacture of a chattel. On appeal, the U.S. Court of Appeals for the Eighth Circuit stated that

> the application of the Nebraska comparative negligence statute would, under the language of the statute, be extremely confusing and inappropriate in a strict liability case. Under Nebraska law in order for the comparative negligence statute to be invoked the plaintiff's negligence must be slight and the defendant's negligence gross in comparison thereto. [Citations omitted.] In strict liability cases proof of negligence or degree of fault is not required.

Id. at 802.

Subsequently, the Nebraska Legislature amended § 25-1151 to permit consideration of the plaintiff's negligence in strict liability tort actions. The statute provided:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence *or act or omission giving rise to strict liability in tort* of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence *or act or omission giving rise to strict liability in tort* of the defendant was gross in comparison . . . .

(Emphasis supplied.) See § 25-1151 (Reissue 1979). Therefore, by amendment, the Legislature expressly made contributory negligence applicable to strict liability in tort.

In 1992, the Legislature again amended the law regarding contributory and comparative negligence. Prior to the revised comparative negligence scheme implemented by the 1992 amendments, this court had not fully addressed whether contributory or comparative negligence applied in strict liability actions. In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), we stated that contributory negligence defenses in strict liability actions which consisted of merely a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence were not available defenses in actions based on strict liability for defective and unreasonably dangerous products. See, also, *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). We did not address whether contributory or comparative negligence generally applied in strict liability tort actions.

The 1992 amendment removed all references to strict liability from the comparative negligence statutes.

> In all actions *accruing before February 8, 1992*, brought to recover damages for injuries to a person or to property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the

> plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison . . . .

(Emphasis supplied.) Neb. Rev. Stat. § 25-21,185 (Reissue 1995). Section 25-21,185.07 provides in part:

> Sections 25-21,185.07 to 25-21,185.12 shall apply to all civil actions to which contributory negligence may be, pursuant to law, a defense that accrue on or after February 8, 1992, for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability. Actions accruing prior to February 8, 1992, shall be governed by the laws in effect immediately prior to such date.

Since the 1992 amendment, this court has not entertained the question of whether evidence of contributory negligence is relevant in a product liability case based on strict liability. The case of *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002), involved the improper use of a strut spring compressor. We concluded that the defendant's allegation of improper use was in substance the affirmative defense of misuse, not contributory negligence.

Some states have revised their systems of comparative negligence and have replaced the term "negligence" with the term "fault." Although the terms may be used interchangeably, when a distinction is made, fault is generally regarded as a broader term "encompassing a wider range of culpable behavior or responsibility for injury than that covered by the term 'negligence.'" 3 American Law of Products Liability 3d § 40:10 at 40-17 (John D. Hodson & Richard E. Kaye eds., 2003). "Comparative fault" schemes generally provide that a plaintiff's recovery in a strict liability action may be reduced proportionately by the plaintiff's negligence. See, e.g., Wash. Rev. Code Ann. §§ 4.22.005 and 4.22.015 (West 2005); *Lundberg v. All-Pure Chemical Co.*, 55 Wash. App. 181, 186, 777 P.2d 15, 19 (1989) (commenting that "the Legislature has determined that the comparative fault doctrine shall apply to all actions based on 'fault,' including strict liability and product liability claims").

States that preclude the defense of contributory negligence in strict product liability actions reason that "[s]ince strict liability is based on a product defect rather than the negligence

of the manufacturer or seller, it is inappropriate and confusing to inject negligence principles into a strict liability action." 3 American Law of Products Liability 3d, *supra*, § 40:43 at 40-71 to 40-72. Other states holding that comparative fault principles are not applicable in strict product liability actions have based their rulings, at least in part, on the fact that their comparative negligence statutes are limited to negligence actions. See, *Young's Machine Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984) (holding that comparative negligence statute cannot be interpreted to include strict product liability in "that class of actions in which contributory negligence may be asserted as a defense"); *Kirkland v. General Motors Corporation*, 521 P.2d 1353, 1367 (Okla. 1974) (stating that statutory comparative negligence scheme has "no application to manufacturers' products liability, for its application is specifically limited to *negligence actions*"); *Staymates v. ITT Holub Industries*, 364 Pa. Super. 37, 47, 527 A.2d 140, 145 (1987) (holding that comparative negligence is inapplicable in strict product liability actions and commenting that "Pennsylvania's Comparative Negligence Act . . . by its own terms, is applicable only to 'actions brought to recover damages for negligence' "); *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 588 (Wyo. 1992) (comparative negligence statute does not " 'permit strict liability . . . to be considered and weighed in the same manner as negligence in determining each actor's "percentage of fault" for the plaintiff's injuries' ").

Other states have expressly excluded the defense of contributory negligence in strict product liability actions either by statute, see Ariz. Rev. Stat. Ann. § 12-2509B (West 2003), or by judicial fiat where strict product liability is part of common law, see *Smith v. Smith*, 278 N.W.2d 155, 160-61 (S.D. 1979) (holding that "the plaintiff's or the defendant's negligence is irrelevant and contributory negligence is not a defense in strict liability").

Schneider Nat., Inc. went to the Wyoming Supreme Court on certified questions from the U.S. Court of Appeals for the 10th Circuit. One of the questions to be answered was as follows:

> "Does Wyoming's current comparative negligence statute, W.S. § 1-1-109 (1988), which requires that damages in an action 'to recover damages for negligence' be allocated

> according to the 'percentage of fault attributable to each actor,' permit strict liability and breach of warranty to be considered and weighed in the same manner as negligence in determining each actor's 'percentage of fault' for the plaintiff's injuries and their corresponding liability for the plaintiff's damages?"

Schneider Nat., Inc. v. Holland Hitch Co., 843 P.2d at 563.

In that case, the defendants sought indemnity against the third-party defendants and advanced the following three theories of recovery: strict liability for defective design and manufacture of a hitch that was unreasonably dangerous at the time it was sold; breach of an express and implied warranty; and negligent design manufacturing, testing, and inspection.

At the time, Wyoming's comparative negligence statute provided in relevant part:

> "Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence of the said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering. . . ."

Id. at 566.

Whether comparative negligence and comparative fault principles applied to theories of recovery based on strict liability or breach of warranty was controlled by the court's decision in *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991). The *Phillips* court had held that the specific language of Wyoming's comparative negligence statute limited its operation by referring to " 'a recovery in an action . . . to recover damages for negligence.' " 806 P.2d at 835.

The *Schneider Nat., Inc.* court stated that a cause of action premised on a theory of strict liability or breach of warranty was therefore unaffected by the principles of comparative negligence or comparative fault as stated in Wyoming's comparative negligence statute.

In *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979), an employee whose fingers and thumb were amputated by the blade of a

bandsaw brought a product liability claim against the manufacturer and distributor of the saw and a negligence claim against the employer who owned the saw. On appeal, the South Dakota Supreme Court held that submission of the issue of contributory negligence on strict liability claims against the manufacturer and distributor was prejudicial error requiring reversal.

The *Smith* court stated that with rare exceptions, courts that have adopted the doctrine of strict liability (whether in the precise language of the Restatement (Second) of Torts § 402A (1965) or otherwise) have held that it is substantive. These courts hold that strict liability is not a negligence action with the elements of proof changed, but, rather, it is a wholly different tort action.

> Strict liability is an abandonment of the fault concept in product liability cases. No longer are damages to be borne by one who is culpable; rather they are borne by one who markets the defective product. The question of whether the manufacturer or seller is negligent is meaningless under such a concept; liability is imposed irrespective of his negligence or freedom from it. Even though the manufacturer or seller is able to prove beyond all doubt that the defect was not the result of his negligence, it would avail him nothing. We believe it is inconsistent to hold that the user's negligence is material when the seller's is not.

Smith v. Smith, 278 N.W.2d at 160.

(ii) Statutory Interpretation

[11-15] Whether contributory negligence is a defense to an action based upon strict liability is a matter of statutory interpretation. Statutory interpretation presents a question of law. *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003). A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *Galaxy Telecom v. J.P. Thiesen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003). The last expression of legislative will is the law. *Alegent*

Health Bergan Mercy Med. Ctr. v. Haworth, 260 Neb. 63, 615 N.W.2d 460 (2000).

[16,17] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998).

With the 1992 amendment, the Legislature removed the term "strict liability" from the contributory negligence scheme. We therefore presume that the Legislature was aware that prior to such amendment, the "slight-gross" system applied to strict liability, see § 25-21,185, and that the Legislature purposely removed "strict liability" from the revised statutory scheme. The revised comparative negligence scheme speaks in terms of "negligence." See Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 1995). Nowhere in the revised scheme has the Legislature employed the term "strict liability." See *id.*

The 1992 amendment created a cutoff point of February 8, 1992, regarding the application of contributory negligence to actions giving rise to strict liability in tort. The Legislature is presumed to have intended a change in the existing law. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). Had the Legislature intended to permit consideration of the plaintiff's contributory negligence in actions involving strict liability in tort, there would have been no reason to establish a cutoff date for which actions prior to February 8, 1992, would be governed by the laws in effect immediately prior to that date. See § 25-21,185.07. Had the Legislature intended to permit contributory negligence as a defense in all civil actions, it would not have needed to carve out actions accruing prior to February 8, 1992. For actions after that date, the statute refers

to civil actions to which contributory negligence "may be" a defense. See *id.*

[18] The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003). We conclude that the Legislature intended to exclude the defense of contributory negligence in strict liability actions.

In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 438, 412 N.W.2d 56, 67-68 (1987), we pointed out the significant distinction between negligence and strict liability in the context of product liability actions:

> In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.

[19] Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The language of § 25-21,185.09 allows a jury to compare a plaintiff's contributory negligence to the negligence of a defendant or defendants. It does not provide that the plaintiff's negligence may be applied in the plaintiff's cause of action based upon strict liability in tort. Section 25-21,185.10 allows the jury to compare the negligent conduct of codefendants, mandating that "[e]ach defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence . . . ." Section 25-21,185.10 does not provide that one defendant's negligence may be compared to another in a cause of action for strict liability in tort.

When the Legislature enacted the 1992 amendment, it provided that the contributory negligence of the plaintiff was to be compared to the negligence of other persons against whom

recovery was sought. It did not provide for a comparison of negligence in an action for strict liability in tort.

(iii) Legislative History

GM claims that the language in § 25-21,185.07, "regardless of the theory of liability," means that contributory negligence may be asserted in a cause of action based upon strict liability. To the extent that such language could be considered ambiguous, the legislative history of the statute supports our interpretation of the law.

[20] We may look to the legislative history to determine intent. Legislative purpose and intent are the focus of our inquiry. A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

GM argues that the Legislature intended for contributory negligence to apply in strict liability claims. It points to language by an introducer of one of the comparative negligence bills, who stated: "[T]his standard of liability that we are adopting in LB 88 . . . applies to all cases." See Floor Debate, L.B. 88, 92d Leg., 1st Sess. 850 (Feb. 13, 1991). Our review of that statement indicates that it was not made with regard to theories of liability (e.g., negligence or strict liability), but was made in the context of debate over whether the comparative negligence scheme "should be applied to municipalities and counties as well as to normal cases that don't involve municipalities and counties." *Id.* at 849. The comments were later clarified by the following statement: "[H]istorically . . . negligence, the standard of liability[,] applied to political subdivisions as applied to everybody across the board." *Id.* at 854. The political subdivision issue evoked contentious debate and was eventually decided in a subsequent act (replacing 1991 Neb. Laws, L.B. 88) which provided that tort actions against the state or political subdivisions were to be governed by the State Tort Claims Act, and the Political Subdivisions Tort Claims Act, respectively. See 1992 Neb. Laws, L.B. 262, §§ 7, 8, and 11 (amending Neb. Rev. Stat. §§ 13-902 and 13-910 (Reissue 1991) and 81-8,219 (Cum. Supp. 1990)).

Another introducer of the comparative negligence legislation proposed an amendment (later adopted) which provided that the

law would "apply to actions to which contributory negligence is a defense." See Floor Debate, L.B. 88, 92d Leg., 1st Sess. 831 (Feb. 12, 1991). The introducer explained that "legally what this means is that it won't apply to strict liability and some of those other areas of law." *Id.* No opposition arose, and no counterargument was offered, to this assertion. No other reference was made to strict liability actions throughout the remainder of the debate on the bills that became the comparative negligence statutes.

After considering statutory language and legislative history, we conclude that the Legislature did not intend for the comparative negligence scheme to apply in actions based on strict liability after February 8, 1992. As a result, we determine that the trial court did not err in refusing to admit evidence of Long's and Shipler's negligence in Shipler's action based on strict liability.

3. Exclusion of Seatbelt Misuse Evidence

GM argues that the trial court erred in excluding evidence of Shipler's seatbelt misuse and its effect on her movement during the rollover accident.

Initially, Shipler alleged that GM was negligent in its failure to use reasonable care in the design and manufacture of the passenger restraint system. Before trial, Shipler moved to prohibit any evidence of or reference to the use or misuse of seatbelts at or prior to the time of the accident. Shipler asserted that the issue was irrelevant to the action and that any effort to bring the seatbelt issue before the jury would be an attempt to create unfair prejudice against Shipler and Long. The motion asserted that GM's expert had testified that Shipler would have sustained the same injuries regardless of her use or misuse of the seatbelt. Shipler stated that if the trial court overruled the motion in limine, she would request leave to dismiss the allegations concerning the seatbelt and would stipulate to a 5-percent reduction in damages as provided in § 60-6,273, which states:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

GM responded that it had evidence that Shipler had her 9-month-old son under the seatbelt in her lap at the time of the accident. It claimed that it had a seatbelt expert who would testify as to the impact of the child on the amount of slack in the seatbelt. GM claimed the manner in which Shipler moved around during the accident was crucial to how she sustained her injury.

The trial court first overruled Shipler's motion because she had placed the occupant restraint system at issue and because the court found that the prohibition of § 60-6,273 did not apply. Shipler then amended her petition, dismissing the allegations concerning the occupant restraint system.

In a later ruling on the motion in limine, the trial court found all parties had agreed that Shipler was wearing a three-point seatbelt. It found that neither Shipler's nor GM's expert testified that the seatbelt had had any effect on Shipler's movement within the vehicle. GM's expert had opined that Shipler was firmly fastened and that there was no indication of any slack in the belt. GM's expert stated that to some degree in this type of accident, in which the roof collapses, the use of the seatbelt actually enhances the injury by holding the passenger in place.

The trial court found Shipler's expert had stated that no seatbelt could fully restrain an occupant and that Shipler's seatbelt had some slight loosening when she was upside down as the roof was crushing in. The court found that neither expert identified any injury that was either created or enhanced by the way in which Shipler used the belt. It therefore excluded evidence of the seatbelt because it was not relevant to the issues presented to the jury.

GM made two offers of proof related to seatbelt use. GM sought to elicit testimony that Shipler's son was sitting in the front seat, that he was not in a car seat, that he was belted in between Shipler's legs and the seatbelt, and that the lap belt went over both Shipler and her son. GM also sought to question Richard Stalnaker, Ph.D., GM's biomechanics expert, concerning the effect of placing an infant underneath a lap belt. GM said Stalnaker would have testified that the infant's ejection created additional slack in the seatbelt which made Shipler's "impact into the ground . . . more severe." The trial court sustained the objections to this evidence.

Shipler was wearing a seatbelt, but GM claims that it was not worn properly, i.e., in conjunction with her infant, who was ejected, thereby creating slack in the seatbelt. In overruling the defendants' motions for new trial, the trial court found no error in its previous rulings on the seatbelt issue. The court noted that the Legislature had addressed the role of seatbelt misuse by passing a law that damages should be reduced by up to 5 percent if the seatbelt was not in use. The court found that Shipler stipulated before trial to a 5-percent reduction in the judgment when she dropped her claim that the seatbelt was faulty and that the judgment had been reduced in accord with the stipulation. The court stated: "The defendants have received the full benefit that could be accorded them even if the seatbelt [was] not used at all."

The evidence of seatbelt misuse was not admissible in regard to the issue of liability or proximate cause. This is true whether the seatbelt was misused or not used at all. The trial court's reduction of the jury's award by 5 percent represented the full mitigation of damages available. The defendants were not prejudiced by the court's refusal to admit evidence of alleged seatbelt misuse. The defendants have received the maximum benefit that § 60-6,273 allowed.

4. Admission of Evidence of Other Similar Incidents

GM asserts that the trial court erred in admitting four exhibits which described 40 other rollover accidents. GM argues that it was prejudicial to admit the evidence because the accidents involved secondary collisions, unbelted victims, partial ejections, and different vehicle models, and because many occurred after the Blazer was manufactured.

GM filed a motion in limine to bar evidence of dissimilar incidents. It argued that the designs of other GM vehicles and other manufacturers' vehicles were not substantially similar to the design of the 1996 Chevrolet S-10 Blazer and were therefore irrelevant and should be excluded.

At a pretrial hearing, one of Shipler's experts, Donald Friedman, testified regarding the elements which he claimed made the incidents similar to the case at bar. All the accidents depicted involved S-10 Chevrolet vehicles and were rollovers.

The accidents demonstrated roof crush that caused severe head or neck injury.

At one of the hearings concerning the admissibility of evidence of other similar incidents, GM made specific objections to each of 39 other similar incidents and to 16 other similar incidents that it claimed occurred after the crash in which Shipler was injured. It argued that other similar incidents were relevant only as to notice to GM of the defect. Shipler argued that evidence of other similar incidents provided proof that there was a defect in the design of the 1996 Chevrolet S-10 Blazer.

The trial court found the incidents were substantially similar because of the nature of the accident (i.e., rollover); there was more than a single revolution of the vehicle; the injury to the victim involved a head or neck injury sustained as a result of contact with the roof of the vehicle, which resulted in severe injury or death; the victim was seated in the same position as Shipler (i.e., in the front seat and on the side of the vehicle that was the second to have contact with the ground); and the vehicle was in the same family of GM vehicles (i.e., 1984 to 1999 Chevrolet S-10 pickup, S-10 extended-cab pickup, or two- or four-door Blazer).

The trial court instructed the jury that the evidence was presented for two purposes: first, in support of Shipler's allegation that the Blazer's roof structure design was defective and, second, to support Shipler's allegation that GM knew of the alleged roof design defect prior to the accident. The jury was directed that it could not use that evidence for any other purpose.

[21,22] Relevant evidence of other similar accidents or occurrences is admissible to show that a defendant had notice and actual knowledge of a defective condition, provided that the accidents or occurrences were substantially similar; i.e., the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers. *General Motors Corp. v. Lupica*, 237 Va. 516, 379 S.E.2d 311 (1989). "[W]here an individual fails to adequately demonstrate how prior occurrences are substantially similar, evidence of prior occurrences is irrelevant and, thus, inadmissible." *Holden v. Wal-Mart Stores*, 259 Neb. 78, 85, 608 N.W.2d 187, 193 (2000).

[23] A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff. *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. Super. 2005). The proponent of the evidence bears the burden to establish the similarity between the other accidents and the accident at issue before the evidence is admitted. *Id.* The proffered evidence must satisfy the substantial similarity test for it to be properly admitted into evidence, whether to prove defect, causation, or knowledge/notice. *Id.*

[24-26] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. See *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., supra.* A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

The trial court in the case at bar conducted an extensive hearing to consider the admissibility of evidence of other similar incidents. The expert witness, Friedman, explained the similarities in the accidents cited in his exhibits. All of them involved Chevrolet S-10 vehicles or the equivalent, all were rollover accidents, and all demonstrated roof crush that caused severe head or neck injury.

The trial court gave a limiting instruction, telling the jury that the evidence of other similar incidents was presented for two purposes: to support Shipler's allegation that the design of the Blazer's roof structure was defective and to support her allegation that GM knew of the alleged roof design defect prior to Shipler's accident. The court stated: "You may not use that evidence for any other purpose."

The similar incidents were reviewed and found to be substantially similar to the facts of Shipler's case. The trial court found that substantial similarity in this case related to the nature of the accident, the number of revolutions of the vehicle, the head or neck injury sustained as a result of contact with the roof, the victim's position in the vehicle, and the type of vehicle.

Our review of the incidents combined with the limiting instruction demonstrates that the trial court did not abuse its discretion in admitting the evidence of other similar incidents.

5. Testimony and Instructions Concerning FMVSS 216

GM asserts that the trial court erred in admitting "baseless and unconstitutional 'opinions' of a self-described 'advocate'" about GM's "supposed intent to undermine" FMVSS 216, the federal roof strength standard. GM also argues that the court erred in giving an improper and misleading jury instruction that FMVSS 216 is a federal regulation, without explaining that compliance with it is required by law.

(a) Background

Clarence Ditlow, executive director of the Center for Auto Safety, a nonprofit consumer organization, testified concerning federal government standards for automobile safety. It first conducts research on automobile safety and then determines areas of concern. If a standard is needed, the government issues a notice of proposed rulemaking and seeks comments from the public on the adequacy of the standard. The government then issues a final standard.

Ditlow testified that FMVSS 216, which governs roof strength in automobiles, was published in the Federal Register on December 8, 1971, with an effective date of August 15, 1973. The notice stated that the purpose of the standard was to set minimum strength requirements for a passenger car roof to reduce the likelihood of roof collapse in a rollover accident. The standard has been codified at 49 C.F.R. § 571.216 (1998).

GM submitted comments on the proposed standard on April 5, 1971, and these comments were received into evidence. In the document, GM recommended a test procedure if the government deemed it necessary to have a standard on roof strength. GM said

it could comply with an effective date of 24 months after issuance of the standard, assuming that the effective date coincided with the introduction of a new model year. In its comments, GM also recommended deletion of the requirement that the test be repeated so that both front corners of the roof were tested.

(b) Expert Testimony on FMVSS 216

GM argues that the trial court erred in permitting Shipler's expert, Ditlow, to testify regarding the history of FMVSS 216 and its effect on automobile safety.

At the time of trial, Ditlow had been the executive director of the Center for Auto Safety for more than 30 years. The center is an organization founded in 1970, and its mission is to improve the safety, reliability, and efficiency of vehicles. It analyzes 50,000 consumer complaints related to automobile safety every year. Ditlow has testified before Congress on more than 30 occasions. GM did not object at trial to Ditlow's qualification as an expert on government regulation of the automobile industry.

Ditlow explained that manufacturers participate in rulemaking by stating their position on the proposed standard. Ditlow said GM's position concerning a proposed rule on roof intrusion was that roof crush did not relate to injury. Ditlow said that if the rule had been implemented as GM proposed, GM would have been able to meet the standard without changing the structure of its vehicles. He asserted: "The standard is to improve safety, but if you amend the standard as General Motors later proposed, they wouldn't have to modify the vehicles, they wouldn't have to strengthen the roofs." GM objected when Ditlow was asked: "So rather than making the cars strong enough to pass the test, they made the test weak enough so the cars would pass?" The objection was overruled, and Ditlow responded, "Yes."

In a sidebar, GM objected that Shipler was attempting to elicit testimony about GM's "exercise of its Constitutional rights to petition the federal government." If the trial court allowed the testimony, GM asked for an instruction stating that corporations have a right to petition the government. The court overruled the objection, stating that GM was "putting forward [FMVSS] 216 as a reasonable standard by which to measure its conduct" and

that Shipler had the right to attack it. The court declined to give a limiting instruction.

Later, Ditlow was asked if FMVSS 216 ensured safety of motorists in rollover accidents, and GM objected on the ground that the answer from this expert would invade the province of the court and the jury. The objection was overruled, and Ditlow said that the standard did not ensure motorists' safety and that there was no federal motor vehicle safety standard that reduced the likelihood of a rollover. Ditlow opined the roof strength standard was not stringent enough to ensure adequate roofs. In a "real world crash where there is a first side impact followed by a second side impact the roof will crush inward and you will see the levels of roof intrusion that . . . caus[e] deaths and serious injuries in vehicles on the road." Ditlow opined that stronger roofs would prevent that type of injury and death.

[27] On appeal, GM objects to Ditlow's testifying as an expert on government regulation of the automobile industry as it relates to safety because he was a "self-proclaimed consumer advocate lawyer," and not an expert. See brief for cross-appellant GM at 43. GM did not object when Ditlow referred to himself as an expert on automobile safety or when he explained his background in the automobile safety area. It did not move to strike the testimony on the basis that Ditlow was an advocate rather than an expert. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

The two objections made during Ditlow's testimony do not support GM's argument that he gave improper opinions. Ditlow was asked during direct examination about the timeframe of GM's general technical committee meetings. The first meeting was held prior to the date that the proposed roof crush standard was issued. Shipler's counsel asked if the second meeting was held after the proposed standard had been issued and after an internal report showed that five of six GM cars "flunked" the proposed tests, and Ditlow responded, "Yes." GM objected to the "argumentative use of the word 'flunk' " and to foundation, because it was not known if Ditlow knew about GM's internal information system. The objection was overruled as to foundation, and the trial court found that the word "flunked" had

previously been used in relation to the document. The other objection occurred when Ditlow said FMVSS 216 did not ensure the safety of motorists in rollover accidents. The objection was asserted on the ground that the answer would invade the province of the court and the jury. The objection was overruled.

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. A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). We conclude there was no abuse of discretion in the trial court's rulings on these objections.

[28] GM argues that Ditlow had no special knowledge, skill, experience, training, or education to qualify him as an expert on the subject of GM's motivation in commenting on the proposed safety standard, but it did not object to Ditlow's testifying as an expert witness or when Ditlow stated that he was an expert on government regulation of automobile safety. Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

GM also argues that Ditlow's speculation about GM's participation in the regulatory process was constitutionally out of bounds, because corporations, like any other citizen, have a constitutional right to petition the government and cannot be subject to liability for exercising that right. During Ditlow's testimony, GM objected that his testimony implied that GM was attempting to petition the government and that his testimony somehow violated GM's constitutional rights. The trial court overruled GM's objection and declined to give a limiting instruction informing the jury that GM had the right to petition the government. The court noted GM's position implied that its conduct should be measured by FMVSS 216.

GM points out that its "central defense" was its compliance with FMVSS 216, which it claimed was sufficient in and of itself to produce vehicles that were crashworthy in rollover accidents.

See brief for cross-appellant GM at 42. In its opening statement, GM told the jury that GM not only complied with FMVSS 216, but that GM exceeded it by a significant margin. In closing arguments, GM asserted that its standard exceeded that set by the government.

GM has not shown that it was unfairly prejudiced by Ditlow's testimony. The trial court did not abuse its discretion in allowing Ditlow to testify.

(c) Jury Instruction

GM also complains that the trial court gave an improper jury instruction regarding FMVSS 216. On the fourth day of deliberations, the jury sent a request to the court asking the following question: "Is FMVSS 216 a Federal Law . . . or is it a standard for the automotive industry?" The court told the parties that it planned to tell the jury that FMVSS 216 is a federal regulation. GM objected and asked the court to use one of the following alternatives as an instruction: (1) Compliance with FMVSS 216 is required by federal law, (2) federal law requires compliance with FMVSS 216, (3) FMVSS 216 is a mandatory requirement to federal law, or (4) FMVSS 216 is a federal regulation required by federal law. GM claimed that the court's proposed response did not answer the question. The court gave the following instruction: "FMVSS 216 is a federal regulation."

GM now argues that the instruction as given was ambiguous because it did not explain whether the law or industry set the standard. Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). The instruction as given was a correct statement of the law. FMVSS 216 is codified in the Code of Federal Regulations. Thus, it is a federal regulation. The jury

did not request an explanation of the distinction between a law and a regulation. Rather, it asked whether FMVSS 216 was a law or an industry standard.

The trial court's instruction did not differ in meaning from the instruction proposed by GM. In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). GM has not demonstrated any prejudice from the instruction.

6. Errors Related to Verdict

GM makes three assignments of error related to the verdict. It argues that the trial court erred in failing to strike the award for future wage loss; that the court erred in giving a detailed limiting instruction regarding Shipler's collateral source benefits; and that the court erred in upholding the jury's verdict, which resulted from passion and prejudice.

(a) Future Wage Loss

GM claims the award of future wages was based upon improper speculation and, therefore, was not proved to a reasonable certainty. It argues that one of Shipler's experts, Charles Linke, who holds a doctor of business administration degree, did not opine to a reasonable degree of economic certainty regarding her loss of earning capacity. It claims that Linke had inadequate information to be able to express an opinion to a reasonable degree of certainty and therefore looked to the jury to fill in the blanks and that the only evidence that Shipler cited to support her future earnings was 2 years of prior earnings.

At trial, Linke testified that Shipler's worklife expectancy was 19.5 years. He explained variables, including the growth rate of compensation and the interest or discount rate. He provided examples of the application of his formula and explained the use of the calculation to determine Shipler's future loss of wages based upon the findings of earning capacity. He testified to Shipler's total earnings in 1996 and 1997 based upon her income tax returns and testified that the earnings of an average female

worker who had a high school education and was 35 to 39 years of age, like Shipler, was $25,811 in 2001.

Because Linke was unable to state Shipler's earning capacity precisely, GM moved for a directed verdict on the future wage-loss issue. It claimed that no witness had quantified such loss with any certainty. The motion was overruled.

Leonard Matheson, Ph.D., an occupational rehabilitation expert, testified about Shipler's goals for the future, stating that Shipler would never work again. He testified that Shipler had been earning $6.50 per hour for a 40-hour week plus tips as a bartender prior to the accident.

Shipler argues that neither GM nor Long objected to Linke's testimony as being speculative, nor did they present any evidence to contradict it. Shipler claims that the evidence provided the jury with a range of possible earning capacity.

[29,30] A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). "The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss." *Id.* at 226-27, 665 N.W.2d at 572. Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural. See *id.* The proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness. See *id.*

[31] The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact. *Id.* The trial court must first determine whether the evidence of damages provides a basis for determining damages with reasonable certainty, i.e., is not speculative or conjectural. *Id.* If such a basis is provided, the issue of damages can be submitted to the jury. The jury is instructed that the plaintiff must prove the nature and extent of the damages by the greater weight of the evidence, not whether the evidence of damages is reasonably certain. See *id.* The jury is to award such

damages only where the evidence shows that the future earnings or pain and suffering for which recovery are sought are reasonably certain to occur. See *id.*

> When the plaintiff seeks prospective damages, the contingent nature of the damages claimed inherently requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of trial. In such instances, the jury should be instructed, when the evidence warrants, that the plaintiff may recover damages for injuries "reasonably certain" to be incurred in the future.

Id. at 229, 665 N.W.2d at 574.

[32] The fact that Shipler would incur damages in the future was reasonably certain. The question for the jury was the amount of her damages. The jury was given sufficient evidence from which it could determine a range of damages for Shipler's future loss of wages. 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. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

We also note that the jury returned a general verdict that did not delineate the type and amount of damages included therein. We are unable to determine the specific amounts it awarded for medical expenses, future loss of wages, and pain and suffering. The trial court instructed the jury that if it decided Shipler was entitled to recover damages for any future losses, it must determine the present cash value of those losses. We conclude the evidence supports the jury's verdict and is reasonably related to the elements of the damages proved.

(b) Collateral Source Instruction

Shipler testified that the federal and state governments paid her medical expenses and living costs. GM objects to what it terms the trial court's "limiting instruction" concerning evidence of government benefits paid to Shipler. It asserts that the instruction violated the collateral source rule, which provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish

the damages otherwise recoverable from the wrongdoer. See *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). GM argues that Shipler's testimony regarding government payments improperly informed the jury of her limited financial means and thus induced the jury through sympathy to find for her and, at the least, to increase its award based upon its perception of her financial status. We conclude that this argument is without merit.

[33] The underlying theory of the collateral source rule is designed to prevent a tort-feasor from escaping liability based on the actions of a third party, even if it is possible that the plaintiff may be compensated twice. *Id.* Shipler testified that her medical bills were paid by Medicaid, her rent and household expenses were paid by disability and Social Security benefits, she received aid for dependent children benefits for her son, and all her medical care and living expenses were provided by either the state or the federal government. GM did not object to the testimony. The jury was instructed that if it found one or both of the defendants liable, it could not reduce the damages by the amount paid by these other sources because if Shipler recovered, she might be required to reimburse the funds paid by the other sources. The law prevents a wrongdoer from escaping paying damages because of the actions of these other sources. We conclude that this instruction was not erroneous and was not prejudicial.

(c) Excessive Verdict

[34] GM argues the verdict was excessive and the result of passion and prejudice. One of the bases for a new trial is excessive damages appearing to have been given under the influence of passion or prejudice. See Neb. Rev. Stat. § 25-1142(4) (Cum. Supp. 2004). In order for an award to be so excessive as to warrant a new trial, it must be so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. See *Mahoney v. Nebraska Methodist Hosp., supra.*

In the case at bar, the trial court overruled the defendants' motion for remittitur, noting that the past and future medical

expenses had a present value of between $9 and $10 million and that neither of the defendants had contested this evidence. The evidence established that Shipler is unemployable and will incur an ongoing loss of income for the rest of her projected life expectancy of 45 years from the time of trial, which she will live as a quadriplegic.

The jury awarded Shipler $19,562,000. The trial court later amended the judgment by reducing it by 5 percent based upon the court's conclusion that Shipler had agreed to a 5-percent reduction in mitigation as to whether the seatbelt was misused. Judgment was then entered in the amount of $18,583,900. In overruling the defendants' motion for remittitur, the court found no evidence that the damages were excessive or that they were awarded in the heat of passion or under any other undue influence.

The jury was instructed as to the items it could consider in determining the amount of damages. The list included the reasonable value of medical care and supplies actually provided and reasonably certain to be needed in the future, lost wages, the reasonable value of the earning capacity Shipler was reasonably certain to lose in the future, the reasonable monetary value of the physical pain and mental suffering she had experienced and was reasonably probable to experience in the future, the reasonable monetary value of the inconvenience she had experienced and was reasonably probable to experience in the future, and the reasonable monetary value of her loss of enjoyment in the past and which she is reasonably probable to experience in the future.

[35] As noted previously, 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 damage to be proved. On appeal, the fact finder's determination of damages is given great deference. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). Since the jury returned a general verdict, there is no way for the court to determine the specific amounts it awarded for medical expenses, future wage loss, or pain and suffering. A jury verdict will not be set aside unless clearly

wrong. See *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). We conclude the verdict was not excessive or clearly wrong.

7. Long's Motions to Dismiss

Long appealed from the judgment and assigned a number of errors which have been addressed by our discussion above. Long also asserts that the trial court erred in denying his motions to dismiss, because no issues were preserved involving him in the pretrial order.

One of the pretrial issues was the nature and extent of Shipler's injury and damages. In the pretrial order, the parties stipulated and agreed that Long's negligent operation of the 1996 Chevrolet S-10 Blazer proximately caused the accident. Following the pretrial order, which was entered on June 24, 2003, Shipler filed an amended petition in which she asserted that Long lost control of the Blazer and that the proximate cause of the rollover was Long's negligence. She sought judgment against GM and Long on the negligence cause of action. Long claims that Shipler should have sought a modification of the pretrial order after she filed the amended petition. Long does not offer any authority to support this contention, and we conclude it is without merit.

[36] The purpose of a pretrial conference is to "simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial." *Cotton v. Ostroski*, 250 Neb. 911, 917-18, 554 N.W.2d 130, 135 (1996). After the pretrial order was entered, Shipler requested leave to file an amended petition. Long made no objection. When asked by the trial court if he would offer the same answer as that filed prior to the pretrial conference, Long responded in the affirmative. He did not file any objection to the amended petition. We conclude the trial court did not err in denying Long's motions to dismiss. Long admitted negligence, and the allocation of damages was an issue to be determined at trial.

8. Long's Argument Regarding Narrowing of Injury

Long also argues that the trial court erred in giving a limitation in the jury instructions that narrowed Shipler's injuries to quadriplegia only and in refusing to permit the jury to allocate

damages between GM and Long based on which injuries were caused by the conduct of each.

Shipler alleged in her amended petition that the negligence of the defendants proximately caused her "personal injuries including a complete spinal cord injury at about C-6 resulting in permanent quadriplegia." In the statement of the case presented in the jury instructions, the court stated: "Shipler received injuries resulting in quadriplegia."

At the jury instruction conference, Shipler sought leave to amend her petition "to conform with the evidence and, in particular, with respect to the spinal cord injury as being the only claim for damages [she] is making in this case." The trial court overruled Shipler's motion as unnecessary. The court stated: "Well, as I understand, and [GM's attorney] has read it to us a number of times, that the allegation is only for the spinal cord injury in the current petition; is that right?" GM responded: "That's true, Your Honor." The court went on to declare: "It does seem to me that the existing petition is consistent with the evidence that's been submitted and how the case has proceeded, so I'll overrule that motion."

Long construes Shipler's allegation concerning injury to mean she suffered " 'injuries' which 'included' quadriplegia." See brief for appellant at 30. He does so in order to argue that the case involved other unenhanced injuries (i.e., bumps, bruises, lacerations, and possible broken clavicle sustained in the initial crash), as well as an enhanced injury (i.e., quadriplegia) sustained in the "second collision" resulting from the roof crush. Such distinction is made in crashworthiness cases. See, e.g., *Kudlacek v. Fiat, S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Limited evidence was presented regarding other injuries, including bumps, bruises, lacerations to the face and head, a laceration to the arm, and a possible broken clavicle. During testimony by Anthony Sances, Ph.D., a retired professor of biomedical engineering and biomechanics who testified on behalf of Shipler, a computer model of a drawing of a human body was offered into evidence. The drawing indicates "bruises, bumps to extremities - location not specified"; "several face lacerations"; and a laceration on the right arm. Sances testified that the information on the exhibit was drawn from medical

records. No evidence was presented that Sances personally examined Shipler. Nor was evidence offered from any physician who treated Shipler. GM's expert, Stalnaker, a biomedical engineer, also testified concerning Shipler's lacerations and possible fracture of the clavicle based upon a review of her medical records. Shipler testified that she did not notice the bumps, abrasions, and cuts at the time of the accident and that she did not remember them later because they were overshadowed by the spinal injury.

The record does not show that either Long or GM distinguished these other injuries to the jury as arising from the "first collision" as opposed to the "second collision." The trial court stated nothing in the record indicated that Shipler was trying "to secure recovery for any injury other than the broken neck, so we just have a single injury." Thus, the court denied a request to instruct the jury on apportionment of damages, because Shipler was "only requesting recovery for a single injury, that being quadriplegia." The court continued: "[T]here is no ability to divide that so far as I can see, and it's not divisible, and I'll not give that instruction."

Shipler was required to show that GM's negligence and defective design were substantial factors in causing her injuries. See *Kudlacek v. Fiat S.p.A., supra.* The jury found that she met her burden of proof against both GM and Long. She was not required to prove which injuries she would have received in the absence of the alleged defect or which injuries would have occurred if an alternative design had been used. See *id.* Since Shipler established "substantial factor" causation, the burden was on GM and Long to show apportionment of damages. See *id.* Having failed to do so, GM and Long could be held jointly and severally liable for the entire damage. See *id.*

At the jury instruction conference, Long's attorney objected to the statement of the case because it set forth Shipler's injury as "injuries resulting in quadriplegia." Long's attorney complained that "this goes into spinal cord injury only." Counsel asserted that "the evidence in this case included minor injuries . . . in addition to the . . . spinal cord injury," and counsel sought an "opportunity to argue a small recovery for the minor injuries." The court overruled Long's objection, reasoning:

> The pleadings themselves . . . on which this case went forward do limit the request for recovery to the quadriplegia.
>
> And at least as I read Nebraska law, unless there is some evidence of divisibility of the injury, there is no option available for the jury to say one defendant is responsible for X . . . amount of dollars and the other defendant is . . . responsible for Y amount of dollars.
>
> And, therefore, it seems to me . . . the options before the jury are that . . . Long is fully responsible for the . . . quadriplegia, GM is fully responsible for the quadriplegia[,] or the two of them are responsible for the quadriplegia. I take the quadriplegia to be a single injury in my . . . analysis.

[37,38] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). Where two causes produce a single indivisible injury, joint and several liability attaches. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Accordingly, the trial court did not err in instructing the jury as to Shipler's injury. The record demonstrates that Shipler's injury (i.e., quadriplegia) was not divisible, and the court did not err in refusing to permit the jury to allocate damages based on whether separate injuries were caused by each defendant.

9. Shipler's Cross-Appeal

On cross-appeal, Shipler assigns as error the trial court's reduction of the jury's damage award. The jury returned a verdict of $19,562,000 in favor of Shipler against GM and Long, and the trial court entered judgment in that amount. The court later entered an amended judgment on its own motion reducing the jury's award by 5 percent to $18,583,900. The court noted that Shipler had been given leave to file an amended petition eliminating the issue of whether the seatbelt was faulty and

agreed to a 5-percent reduction in the judgment as provided by statute. The court had accepted the agreement and granted leave to file an amended petition.

Shipler now argues that the reduced judgment was error because she never agreed to the reduction. The record shows that during a pretrial hearing, Shipler stated she would stipulate that any verdict obtained by her could automatically be reduced by 5 percent by the court so that GM would not be required to introduce evidence of mitigation of damages.

In response, GM argued that the seatbelt use was still important to the case because it related to Shipler's movement within the vehicle. GM asked that it be allowed to present evidence as to the manner in which Shipler was using the seatbelt, even if Shipler stipulated to the 5-percent reduction. GM was not allowed to present evidence of the misuse of the seatbelt.

Shipler now argues that GM declined the offer of the stipulation and that, therefore, there was no agreement, demonstrating that the trial court erred in reducing Shipler's damages. In its order overruling the motion for new trial, the trial court concluded that Shipler had stipulated to the reduction of damages. This court has previously stated:

> "[S]tipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. . . .
>
> "Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances."

(Citation omitted.) *In re Estate of Mithofer*, 243 Neb. 722, 726-27, 502 N.W.2d 454, 457-58 (1993).

The trial court did not err in concluding that Shipler had stipulated in open court to a reduction of the award by 5 percent regarding the seatbelt issue. The record shows that she offered to

accept the reduction in exchange for dismissing the allegations that the passenger restraint system was defective. Shipler was bound by the stipulation, and we find no exceptional circumstances to warrant relief from it. There is no merit to Shipler's cross-appeal, and it is dismissed.

VI. CONCLUSION

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RYAN E. LYKENS, APPELLANT.
710 N.W.2d 844

Filed March 10, 2006. No. S-04-844.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.
4. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Dodge County, JOHN E. SAMSON, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Avis R. Andrews for appellant.

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.

NATURE OF CASE

Following a jury trial, Ryan E. Lykens was convicted of robbery and was sentenced to imprisonment for a term of 2 to 5 years. The district court for Dodge County denied Lykens' motions for new trial. On appeal, the Nebraska Court of Appeals determined that the trial court had abused its discretion by denying Lykens' supplemental motion for new trial. The Court of Appeals reversed Lykens' conviction and remanded the cause for a new trial. *State v. Lykens*, 13 Neb. App. 849, 703 N.W.2d 159 (2005).

The State petitioned for further review, asserting that the Court of Appeals erred in finding that the prosecution had withheld evidence from Lykens and in applying the wrong standard to determine whether such nondisclosure required a new trial. We granted the State's petition for further review. We reverse, and remand to the Court of Appeals for further proceedings.

STATEMENT OF FACTS

In its opinion, the Court of Appeals described the facts of this case as follows:

> On November 1, 2003, an individual entered a convenience store in Fremont, Nebraska. The individual displayed a gun to the clerk on duty and demanded that she give him the money out of the cash register and a carton of cigarettes. The clerk gave the individual roughly $130 in cash and a carton of cigarettes. The individual then left the store and fled on foot. When police responded to the scene, the clerk described the individual as a white male, approximately 22 years of age, 5 feet 7 inches tall and 140 pounds with a line of blond facial hair. The clerk said that the individual was wearing a dark-colored, waist-length jacket.

On November 3, 2003, Lykens entered a Fremont police station. He intended to surrender himself, as he believed that there was an outstanding warrant for his arrest on an unrelated offense. Sgt. Robert Buer of the Fremont Police Department saw Lykens and believed that Lykens fit the general description of the individual who had committed the robbery at the convenience store. Sgt. Buer asked Lykens about his whereabouts during the time of the robbery, and Lykens indicated that he was en route from Ohio to Nebraska at the time of the robbery. Lykens did confirm that he was currently living with his sister in Fremont. Lykens consented to having his picture taken to be placed in a photographic lineup. After Sgt. Buer completed his questioning of Lykens, Lykens was arrested on an outstanding arrest warrant for a March 2003 offense of "driving under the influence."

Lykens was charged with the robbery by an information filed on December 9, 2003. On January 9, 2004, Lykens filed two motions to suppress; one of the motions was to suppress the statements he made to police officers on November 3, 2003, and the other motion was to suppress the physical evidence gathered by law enforcement personnel "for the reason that said evidence was obtained pursuant to an illegal search and seizure or was otherwise obtained without sufficient probable cause." On February 24, 2004, both motions to suppress were overruled. A trial was held in the instant case on May 4 through 7. On May 5, Lykens made a motion for a mistrial based on juror misconduct, and that motion was denied.

On May 7, 2004, the jury found Lykens guilty of robbery. On May 17, Lykens filed a motion for new trial, alleging that there was irregularity in the proceedings of the court, that the verdict was not sustained by sufficient evidence or was contrary to law, and that an error of law occurred at the trial. On June 16, the district court sentenced Lykens to 2 to 5 years' imprisonment for the robbery conviction. On June 21, Lykens filed a supplemental motion for new trial on the basis of "[n]ewly discovered evidence material for [Lykens] which he could not with

> reasonable diligence have discovered and produced at the trial." On July 1, the district court denied both the motion for new trial and the supplemental motion for new trial.

State v. Lykens, 13 Neb. App. 849, 851-52, 703 N.W.2d 159, 162-63 (2005).

In addition to the evidence against Lykens noted by the Court of Appeals, the record shows that the clerk who was working at the convenience store the night of the robbery identified Lykens as the robber both in a photographic lineup and in court at trial. There was also evidence that following the robbery, Lykens was in possession of cigarette packs that were of the same brand and lot number as a carton found disposed of outside the convenience store shortly after the robbery. The lot number also matched a carton still in stock at the store. Further, there was evidence that Lykens owned a jacket fitting the description of the jacket worn by the robber, that Lykens owned a BB gun, and that Lykens lived within a 5-minute walk of the convenience store.

Lykens appealed to the Court of Appeals and assigned that the district court had erred in (1) failing to grant his motion to dismiss based on insufficient evidence at the end of the State's evidence, (2) overruling his motion for mistrial due to a juror's knowledge of and relationship with a potential witness, (3) overruling his motion for new trial based on "newly discovered evidence," and (4) overruling his motions to suppress. The Court of Appeals rejected Lykens' assignment of error relating to the motions to suppress but concluded that the district court had abused its discretion in denying Lykens' supplemental motion for new trial.

With respect to Lykens' supplemental motion for new trial, the Court of Appeals noted the following:

> The supplemental motion was supported by the affidavits of Dawn Lykens, who is Lykens' mother, and Avis Andrews, who is Lykens' attorney. In Dawn's affidavit, she asserts that she "visited [Lykens] in the Dodge County Jail; that on one such visit in March, 2004, [Dawn] was in the visitation room and happened to talk to a man also in the visitation room waiting for a visit with his son, later identified as Thomas Brainard; that a third individual, . . .

also present in the visitation room, initiated a conversation with Thomas Brainard that was overheard by [Dawn]; that Thomas Brainard stated he was visiting his son, Joseph Brainard, who had been sentenced to ten days for robbery; that [Dawn] then said her son, [Lykens], was accused of robbing [the convenience store]; that Thomas Brainard then said that it was his son[, Joseph Brainard,] who had robbed [the convenience store] and that [Joseph Brainard] had done it once before too; [and that] at that point, the inmates were brought in for visitation and no further conversation among the three waiting took place."

Dawn further stated in her affidavit that she "was contacted by [detectives] regarding this conversation in April 2004; that [she] related the incident as set forth [above] to the detectives; [and] that [she] also told them that [the third individual] had heard the conversation."

Andrews also filed an affidavit. In her affidavit, Andrews asserts that "law enforcement investigated the information regarding statements made by Thomas Brainard and[,] following said investigation, the results were conveyed to [Andrews] by the [Dodge] County Attorney in a letter dated April 27, 2004." The letter notes: "Law enforcement has figured out that the person who made the comment to [Dawn] was Thomas Brainard of Hooper, Nebraska. [He] advised the police that he recalled meeting [Dawn] while visiting his son[, Joseph Brainard,] in the county jail in March, 2004. When he asked [Dawn] why her son was in jail, she said he was charged with the [convenience store] robbery. [Thomas] Brainard replied to her that [Joseph Brainard] had robbed [that convenience store] also. When the police asked him what he meant by that comment, he said he was referring to an earlier shoplifting incident when . . . Joseph Brainard had stolen some beer from the [convenience store]. . . . Apparently Thomas Brainard, Joseph [Brainard's] father, would equate the term of shoplifting and robbery or robbing, which is what he explained to the detectives when they spoke with him." The affidavit of Andrews further asserts that she "attempted to contact Thomas Brainard independently but was only able to locate

a message number for him [and] did not receive a call from [him] until after both sides had rested at the trial[,] at which time he made a statement similar" to that described in the county attorney's letter.

Andrews further asserted in her affidavit that "on June 10, 2004, [she] first became aware that Joseph Brainard was interviewed by the Fremont Police Department on April 27, 2004, upon reading the same as part of the presentence investigation report prepared by the Probation Office for use in this case." Andrews alleged that the interview with Joseph Brainard "constitutes newly discovered evidence material to this cause of action in light of the statements of Thomas Brainard, the resemblance of Joseph Brainard to the perpetrator, the statement by Joseph Brainard that he is a smoker and owns a BB gun shaped like a pistol, and his history of theft from [a similar convenience store]."

A hearing on the motion for new trial and supplemental motion for new trial was held on June 28, 2004. At the hearing, the court took judicial notice of the affidavits filed by Andrews and Dawn and accepted a transcript of the April 27 interview of Joseph Brainard conducted by officers of the Fremont Police Department into evidence. A thorough review of the transcript of the interview indicates that at the time of the interview, he was 18 years old, stood 5 feet 7 inches to 5 feet 8 inches tall, had facial hair, had a history of shoplifting, including an incident when he shoplifted from a similar convenience store, was a smoker, had access to a gun similar to the one described by the clerk in the instant case's convenience store robbery, and occasionally wore hats. The interview also indicates that the officers conducting the interview took pictures of Joseph Brainard, but the pictures were not included with the transcript.

At the hearing on the supplemental motion for new trial, Andrews asserted: "[O]ur whole defense was that . . . Lykens did not commit this crime and, therefore, someone else must have committed this — did commit this crime. And late in the progress of this case, the name

> of Joseph Brainard came up through comments made by [Thomas Brainard], as indicated in the affidavits. And, in fact, [the transcript of Joseph Brainard's interview] itself indicates a connection with [a similar convenience store], that he is basically the same age [and] height as the individual that robbed [the convenience store], that he's a smoker, that he had access to a BB gun, which was alleged to be the . . . weapon used in the robbery, all of these very similar to the identity of the traits used to identify the suspect in this particular case. That's why we feel that this additional information is important. I think it[s] importance is borne out by the fact that it was included in the [presentence investigation report] and that it would serve as a basis for a new trial." The district court took the matter under advisement at the conclusion of the hearing and subsequently denied both of Lykens' motions for new trial on July 1, 2004.

State v. Lykens, 13 Neb. App. 849, 855-57, 703 N.W.2d 159, 164-66 (2005).

In reviewing the denial of Lykens' supplemental motion for new trial, the Court of Appeals first determined that the transcript of the interview with Joseph Brainard (hereinafter Brainard) had been withheld by the State and that it constituted newly discovered evidence because it was evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. The Court of Appeals then concluded that the court should have granted the motion for new trial based on such newly discovered evidence.

In reaching its conclusion, the Court of Appeals relied on certain language in *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994), and interpreted *Atwater* "to mean that in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence *could have created* a reasonable doubt that he or she committed the alleged crime or crimes." *Lykens*, 13 Neb. App. at 861, 703 N.W.2d at 168. Using this interpretation, the Court of Appeals determined that the interview with Brainard would have allowed Lykens "to provide the jury with an alternate suspect who could have committed the crime in the instant case,"

and "reasonable doubt could have been created in the minds of the jurors." *Id.* at 862, 703 N.W.2d at 169. The Court of Appeals therefore concluded that the district court abused its discretion in denying Lykens' motion for new trial based on newly discovered evidence.

The Court of Appeals reversed Lykens' conviction and remanded the cause for a new trial. Because of its disposition of the appeal on the basis of the new trial issue, the Court of Appeals did not consider Lykens' assignments of error relating to the motion to dismiss and the motion for mistrial.

The State petitioned for further review of the Court of Appeals' decision. We granted the petition.

ASSIGNMENTS OF ERROR

The State asserts on further review that the Court of Appeals erred in determining that the evidence in question had been withheld by the State. The State further argues that even if the evidence had been withheld, the Court of Appeals applied the wrong standard to determine whether the district court erred in denying the motion for new trial based on such evidence.

STANDARD OF REVIEW

[1,2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

Lykens' Motion for New Trial Should Be Analyzed as a Brady *Issue.*

Although Lykens framed his supplemental motion for new trial as based on "[n]ewly discovered evidence," in substance, the basis on which Lykens sought a new trial was a claim that the prosecution violated its duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose material evidence favorable to the defendant. Because Lykens

framed the issue as one regarding "newly discovered evidence," the parties and the Court of Appeals analyzed the issue using a mix of principles regarding newly discovered evidence and principles relating to the prosecution's claimed failure to disclose evidence favorable to the defendant. We conclude that the Court of Appeals analyzed Lykens' supplemental motion for new trial under the wrong principles.

The substance of Lykens' allegations in support of his supplemental motion for new trial was that the State had failed to disclose the police interview of Brainard to Lykens prior to trial. Lykens claimed that such evidence was favorable to him and that therefore, the State should have disclosed the interview to him prior to trial. Although Lykens described such evidence as being "newly discovered evidence," the claims Lykens made in support of his motion for new trial are more akin to those made by the defendants in cases such as *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003); and *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999), which we analyzed under *Brady*. In *Shipps*, we described the defendant's basis for new trial as an assertion that "the State wrongfully withheld exculpatory material . . . depriving [the defendant] of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3." 265 Neb. at 352, 656 N.W.2d at 631. Our cases echo the language in *Brady*, which language states that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87.

Despite Lykens' references in the supplemental motion for new trial to "newly discovered evidence," his allegations in support of the motion were in substance an assertion that the State had wrongfully withheld exculpatory material in contravention of *Brady*, and we determine that the motion should have been analyzed as raising a *Brady* issue. Therefore, it was not necessary for the Court of Appeals to consider whether the interview was "newly discovered evidence" and instead, it was only necessary to consider whether, under the standards discussed below, the evidence was "wrongfully" withheld by the State such that Lykens was deprived of a fair trial.

The Brady *Issue Raised by Lykens' Motion for New Trial Should Be Analyzed Under the* Bagley *Standard.*

[3] We recently observed in *Shipps, supra*, that the State's duty to disclose exculpatory evidence to the defendant was recognized by the U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Shipps*, we referred to *Brady* and stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." 265 Neb. at 352, 656 N.W.2d 631. Accord *Castor, supra*. We note that although *Brady* spoke of the suppression of evidence "upon request," the Court in *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), made clear that the prosecution's duty under *Brady* to disclose evidence which is material covers "the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." See, also, *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (duty to disclose material evidence applicable even though there has been no request by accused and duty may be violated where evidence has been suppressed either willfully or inadvertently).

[4] In *Bagley*, the U.S. Supreme Court considered what evidence is material such that its nondisclosure was prejudicial to the defendant. The standard for materiality set forth in *Bagley* formed the basis for the "*Bagley* standard," which standard we have adopted and set forth in cases such as *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003), and *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). In *Shipps*, we stated:

> Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.

Shipps, 265 Neb. at 352, 656 N.W.2d at 631-32 (citing *Castor, supra*). Accord, *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420

(2005); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Lotter*, 255 Neb. 456, 586 Neb. 591 (1998); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989).

Notwithstanding our adoption and consistent application of the *Bagley* standard, the Court of Appeals focused upon incidental language in *State v. Atwater*, 245 Neb. 746, 752, 515 N.W.2d 431, 435 (1994), which referred to *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), which language stated that "when the evidence has been withheld by the prosecutor, the proper standard is that a constitutional error has been committed if the omitted evidence creates a reasonable doubt of guilt that otherwise did not exist." Utilizing this language in *Atwater*, the Court of Appeals incorrectly concluded that "in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence *could have created* a reasonable doubt that he or she committed the alleged crime or crimes." *State v. Lykens*, 13 Neb. App. 849, 861, 703 N.W.2d 159, 168 (2005).

The "reasonable doubt" standard set forth by the U.S. Supreme Court in *Agurs* and mentioned in *Atwater* was superseded in *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). We must therefore disapprove *Atwater* to the extent it can be read to indicate that the "reasonable doubt" standard of *Agurs* rather than the *Bagley* standard is the proper standard to analyze whether evidence was wrongfully withheld by the prosecution. Similarly, we disapprove of the "could have created a reasonable doubt" language in the Court of Appeals' opinion in *Lykens*, and reiterate that the *Bagley* standard is the appropriate framework under which to analyze a *Brady* issue raised in a motion for new trial.

Applying the Bagley *Standard to the* Brady *Issue—There Was No* Brady *Violation.*

In view of our discussion above, we determine that Lykens' supplemental motion for new trial should properly have been analyzed as a *Brady* issue and that the *Bagley* standard should have been used to analyze whether the Brainard interview was

material. Lykens claims that the Brainard interview could have been useful at trial to support Lykens' theory that the robbery was committed by another individual. The State responds that the nondisclosure of the interview did not deprive Lykens of a fair trial. The parties do not dispute that the interview of Brainard was evidence that the State had in its possession and did not disclose to Lykens prior to trial. This fact is sufficient to establish that the evidence was "withheld," and the question in this case is therefore properly analyzed as a *Brady* issue.

We begin by noting that the mere determination that evidence was withheld does not automatically indicate that the prosecution violated its *Brady* duty. As the U.S. Supreme Court stated in *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999),

> the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

The U.S. Supreme Court continued: "There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. at 281-82. It has been observed that "[p]rejudice in this context is interchangeable with the concept of materiality . . . ." 5 Wayne R. Lafave et al., Criminal Procedure § 24.3(b) at 232 (2d ed. Supp. 2006).

In view of the foregoing, the relevant inquiry in this case is whether the nature of the evidence at issue was such that the State's failure to disclose it to Lykens prior to trial violated Lykens' due process rights. We conclude that in this case, the evidence was not material under the *Bagley* standard and that therefore, the State's failure to disclose it did not violate Lykens' due process rights and was not a sufficiently serious nondisclosure so as to arise to a *Brady* violation. Therefore, the district court did not abuse its discretion by denying Lykens' supplemental motion

for new trial, and the Court of Appeals' conclusion to the contrary was error.

As noted above, the State has a duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose exculpatory evidence that is material, and favorable evidence is material under the *Bagley* standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Shipps*, 265 Neb. 342, 352, 656 N.W.2d 622, 631 (2003). In this regard, in *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the U.S. Supreme Court stated: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in [the absence of the nondisclosed evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

We now focus on the Brainard interview while noting that Brainard was not a witness. In the interview, Brainard provided a physical description of himself and stated that he smoked cigarettes and occasionally wore hats. Brainard stated that he had fired BB guns in the past, but he did not state that he owned one. Although Brainard admitted that he had shoplifted, he denied that he had ever robbed a convenience store using a gun, and he specifically denied that he had committed the robbery that was the subject of this prosecution. The interview evidence was not of an impeaching nature, nor did it serve directly to exculpate Lykens. We do not think that the absence of the Brainard interview denied Lykens a fair trial, and on the contrary, the guilty verdict is worthy of confidence. See *Kyles, supra*. We conclude that there is not a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. We conclude there was no *Brady* violation.

Because we determine that there was no *Brady* violation resulting from the State's nondisclosure of the evidence at issue, we conclude that the district court did not err in denying a new trial on the basis of such evidence. The Court of Appeals therefore erred in reversing the district court's denial of Lykens' supplemental motion for new trial and in remanding the cause

for a new trial, and accordingly, we reverse the ruling of the Court of Appeals.

CONCLUSION

We conclude that the Court of Appeals used an improper standard to analyze whether the nondisclosure of the Brainard interview required a new trial. We further conclude that the Court of Appeals erred in concluding that the district court had abused its discretion by denying Lykens' supplemental motion for new trial and in therefore reversing Lykens' conviction and remanding for a new trial. Accordingly, we reverse the Court of Appeals' decision.

We note that neither party sought further review of the Court of Appeals' conclusion that the district court did not err in denying Lykens' motion to suppress, and that conclusion is the law of the case. Therefore, although we reverse the Court of Appeals' decision with respect to the motion for new trial, we do not disturb the decision with respect to the motion to suppress. We further note that because of its disposition of the new trial issue, the Court of Appeals did not consider Lykens' assignments of error with respect to his motion to dismiss and his remaining motion for mistrial. We therefore reverse, and remand to the Court of Appeals to consider Lykens' remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
LESTER WAGNER, APPELLANT.
710 N.W.2d 627

Filed March 10, 2006. No. S-04-1104.

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: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Effectiveness of Counsel: Proof.** A defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant.

4. **Constitutional Law: Attorney and Client: Appeal and Error.** Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or (2) that this particular defendant reasonably demonstrated to counsel that he or she was interested in appealing.
5. **Courts: Appeal and Error.** Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** To show prejudice related to the failure to file an appeal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed.
7. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to obtain a new direct appeal as postconviction relief, a 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.

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

Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Pursuant to a plea agreement, Lester Wagner was charged by amended information with manslaughter and use of a firearm to commit a felony. Wagner entered pleas of no contest to the charges, and he was convicted and sentenced. No direct appeal was taken. Approximately 4 years after sentencing, Wagner filed a motion for postconviction relief claiming ineffective assistance of counsel because counsel failed to consult with him concerning a direct appeal. Following an evidentiary hearing, the district court denied Wagner's motion for postconviction relief.

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. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[2] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

FACTS

On July 2, 1998, Wagner was charged by information with first degree murder. The information alleged that Wagner killed Christopher Rucker in the perpetration of or attempt to perpetrate a robbery or burglary. Pursuant to a plea agreement, Wagner was charged via an amended information with manslaughter and use of a firearm to commit a felony. Wagner pleaded no contest to the amended charges and was subsequently sentenced to a term of 10 to 20 years in prison on the manslaughter conviction and a consecutive term of 7 to 12 years in prison on the use of a firearm conviction. He was given credit for 545 days served.

On September 5, 2003, Wagner filed a motion for postconviction relief, asserting (1) that he was denied effective assistance of counsel at trial because his trial counsel allowed him to enter a plea of no contest to use of a firearm in conjunction with a manslaughter charge and did not file a notice of appeal, (2) that the trial court lacked subject matter jurisdiction over the offense of use of a firearm to commit a felony and jurisdiction over Wagner, (3) that the State engaged in prosecutorial misconduct by allowing him to plead to the use of a firearm charge, and (4) that he was denied effective assistance of counsel on appeal because counsel did not inform Wagner that he had a right to appeal. Wagner claimed that trial counsel informed him that if a direct appeal was filed, the State would refile a felony murder charge against him.

The district court denied an evidentiary hearing on Wagner's claim that he could not be convicted of manslaughter, an unintentional crime, and use of a firearm to commit a felony, an intentional crime. The court noted that when the felony which

serves as the basis for a use of a firearm charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). However, the court found that the firearm charge in Wagner's case was based on the underlying felony of attempted robbery, an intentional crime. Therefore, the court concluded there was no merit to this claim.

The district court found that Wagner was entitled to an evidentiary hearing on the issue of whether his trial counsel advised him concerning his right to a direct appeal and all matters related solely to that issue. At the evidentiary hearing, Wagner testified that prior to his signing the plea agreement, and as a part of his discussions with trial counsel, he was informed that the county attorney had stated that Wagner could not file a direct appeal if he accepted the plea agreement. Wagner further testified that although he was aware he would usually have a right to a direct appeal, he believed he had "forfeited" that right by executing the plea agreement. Wagner did not broach the issue of a direct appeal with his trial counsel.

Wagner's trial counsel testified that in his opinion, because Wagner entered a plea, the only issue on appeal would have been alleged excessive sentences. He had no recollection of discussing that issue or the issue of a direct appeal with Wagner. Counsel said that if he had been asked by Wagner to appeal the sentences, he would have because he had an ethical obligation to do so. Counsel stated that he typically discussed with his clients the right to appeal and the likelihood of success. Counsel recalled advising Wagner of the penalties for the two charges that were included in the plea agreement and the parameters of the sentences for those charges. He also recalled informing Wagner that he had to be truthful in his cooperation with the State. Counsel remembered informing Wagner that if he did not take the plea agreement, the State would proceed with a felony murder charge. Immediately following sentencing, counsel asked Wagner whether he was "okay" with the sentences, and Wagner responded that he was. There was no discussion concerning a direct appeal.

At the postconviction evidentiary hearing, the plea agreement was received into evidence. The agreement provided that Wagner

would truthfully disclose all information regarding his activities and those of others related to the murder of Rucker and that he would testify against certain codefendants. In exchange for Wagner's cooperation, the State would allow him to plead guilty to manslaughter and use of a firearm to commit a felony. The agreement stated: "No promises, agreements, or conditions have been entered into other than those set forth in this letter, and none will be entered into unless in writing and signed by all parties."

The bill of exceptions from the plea hearing was also received into evidence. It indicated that Wagner was arraigned on the amended information and was informed of the possible penalties for manslaughter and use of a firearm to commit a felony. He was told that the maximum sentence he faced was a term of imprisonment of not more than 70 years, a fine of not more than $25,000, or any combination of the two, and that the minimum sentence was 2 years in prison. The trial court also told Wagner there was no maximum minimum sentence on the charges, so he could be sentenced to 20 to 20 years in prison for the manslaughter charge and 50 to 50 years in prison for the firearm charge. Wagner indicated that he did not need additional time to talk to counsel about the possible sentences.

The bill of exceptions established that the trial court asked Wagner if anyone had made any threat or used any force or held out any inducement or promise, other than a plea agreement, to get him to waive the rights explained to him and that Wagner responded, "No." Wagner said he voluntarily and freely waived the rights as explained, and his counsel stated he believed that Wagner understood the rights and the consequences of waiving them and that the waiver was freely, voluntarily, knowingly, and intelligently made. The court found beyond a reasonable doubt that Wagner waived his rights freely, voluntarily, knowingly, and intelligently, and it accepted his waiver.

Wagner also stated that he was satisfied with the job done by his trial counsel, that he believed counsel was competent, that he had sufficient time to talk to counsel, and that he did not need additional time to talk to counsel. Wagner stated that counsel had read and explained the plea agreement to him, that he understood it, and that there had been no other promises made to him in exchange for the pleas. At sentencing, Wagner stated that he had

had an opportunity to talk with counsel about the presentence investigation report and was not aware of any changes, corrections, or additions needed. He indicated that he was ready to be sentenced.

After the postconviction hearing, the district court found that Wagner did not reasonably demonstrate that he was interested in filing a direct appeal. During a discussion with trial counsel, Wagner informed counsel that he was "okay" with the sentences imposed. As a result of Wagner's telling trial counsel he was "okay" with the sentences, counsel did not discuss with Wagner his right to a direct appeal. His trial counsel did not believe the sentences were excessive. The district court found that following sentencing, Wagner did not request that his counsel file a direct appeal.

The district court found that Wagner knew he had the right to a direct appeal, that he informed his trial counsel he was satisfied with the sentences imposed, and that he did not request that a direct appeal be filed. The court concluded that it was only after Wagner was sentenced and incarcerated and had conferred with a legal aide that he began to think about the length of the sentences imposed and the issues he raised on postconviction. The court concluded that Wagner's request for postconviction relief should be denied in its entirety.

ASSIGNMENTS OF ERROR

Wagner assigns as error (1) the district court's finding that Wagner knew he had a right to a direct appeal and (2) the district court's finding that counsel did not have a constitutionally imposed duty to consult with Wagner about his right to a direct appeal and its finding that counsel's performance did not fall below an objective standard of reasonableness.

ANALYSIS

It is Wagner's burden to establish a basis for postconviction relief. 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. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

The district court found that Wagner's trial counsel was an experienced criminal defense attorney and that Wagner discussed

the contents of the plea agreement with counsel prior to its execution. The court determined that following sentencing, Wagner did not request that his trial counsel file a direct appeal. There was a discussion between Wagner and his trial counsel about the sentences imposed, and Wagner informed counsel that he was "okay" with the sentences. As a result, counsel did not discuss with Wagner his right to a direct appeal. The court found that although Wagner testified he thought he had forfeited his right to a direct appeal, he knew he had such a right. On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). Wagner has not demonstrated that the district court's findings of fact were clearly erroneous.

[3] Pursuant to *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant claiming ineffective assistance of counsel must show that counsel's representation "fell below an objective standard of reasonableness" and that counsel's deficient performance prejudiced the defendant. In the context of failure to file a direct appeal, the U.S. Supreme Court has held that the test to determine whether counsel provided ineffective assistance announced in *Strickland* applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In *Flores-Ortega*, the question concerned whether counsel was deficient for not filing a notice of appeal when the defendant had not clearly conveyed his wishes concerning an appeal. The Court rejected the bright-line rule adopted by lower courts that counsel must file a notice of appeal unless the defendant specifically instructs otherwise and that failing to file an appeal is per se deficient. *Id.* Where a defendant has not specifically given instructions concerning an appeal, the first question to be asked is whether counsel consulted with the defendant about an appeal. *Id.* If counsel has consulted, that is, advised the defendant about the advantages and disadvantages of taking an appeal, "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." 528 U.S. at 478.

[4] Although the Court agreed that the better practice is for counsel to routinely consult with the defendant regarding an appeal, it rejected a bright-line rule requiring counsel to always consult with the defendant concerning an appeal. *Id.* Instead, the Court held that

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

528 U.S. at 480.

[5] The Court stated that to make this determination, postconviction courts "must take into account all the information counsel knew or should have known." *Id.* The Court continued: "Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.*

[6] The Court concluded that to show prejudice related to the failure to file an appeal, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Whether a defendant meets his burden depends on the facts of a particular case. "[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." 528 U.S. at 485.

> To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

528 U.S. at 486.

In the case at bar, the convictions followed the entry of a plea agreement. In such a case, the court reviewing for ineffective assistance of counsel should take into consideration whether the

defendant received the sentence he bargained for as part of the plea agreement and whether any appeal rights were reserved by the agreement. Wagner was informed by the trial court as to the possible sentences he could receive for the charges to which he pleaded no contest, and the sentences imposed were within that range. The plea agreement, which was received into evidence at the evidentiary hearing, made no reference to Wagner's appeal rights or to a waiver of those rights.

The testimony offered at the evidentiary hearing supported a finding that trial counsel's performance was not deficient. See *Roe v. Flores-Ortega, supra.* The evidence here does not suggest that Wagner gave express instructions to counsel regarding an appeal.

Wagner entered pleas of no contest, and on appeal, he could have claimed the sentences were excessive. Wagner was sentenced to a term of 10 to 20 years in prison for manslaughter and a term of 7 to 12 years in prison for use of a firearm to commit a felony. Manslaughter is a Class III felony, Neb. Rev. Stat. § 28-305 (Reissue 1995), and Wagner faced a minimum sentence of 1 year in prison and a maximum sentence of 20 years in prison, a $25,000 fine, or both, see Neb. Rev. Stat. § 28-105 (Reissue 1995). Under Neb. Rev. Stat. § 28-1205 (Reissue 1995), use of a firearm to commit a felony is a Class II felony, and the sentence for such a crime is consecutive to any other sentence imposed. Wagner faced imprisonment for a term of 1 to 50 years for this conviction. See § 28-105.

[7] Wagner's sentences were within the statutory ranges. 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. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). Wagner had no nonfrivolous basis for an appeal, and thus, he has not shown that he was prejudiced by the fact that no appeal was filed. He also has not shown there was a reasonable probability that he would have timely appealed but for the fact that counsel did not specifically consult with him about an appeal.

[8] We have held that "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, 983, 637 N.W.2d 599, 605 (2002). Wagner has not demonstrated that he was denied his right to appeal due to the negligence or incompetence of counsel. The district court did not err in finding that Wagner was not entitled to postconviction relief.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

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

710 N.W.2d 646

Filed March 10, 2006. No. S-04-1173.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
3. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. **Disciplinary Proceedings.** Violation of a disciplinary rule is a ground for discipline.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
6. ____. An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Jeffrey A. Silver for respondent.

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

PER CURIAM.

The issue presented in this attorney disciplinary proceeding is what sanction should be imposed on the respondent, Thomas M. Petersen, for his serial neglect of client matters. For the reasons that follow, we impose an indefinite suspension from the practice of law with no possibility of reinstatement prior to February 1, 2008.

BACKGROUND

[1] There were no exceptions filed to the referee's report in this case. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003). We must also consider the circumstances of two prior disciplinary proceedings involving Petersen. Thus, the following facts are found in either the referee's report to this case; *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002) (*Petersen I*); or *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 672 N.W.2d 637 (2004) (*Petersen II*).

JENNIFER WEEKS (*PETERSEN I*)

Petersen was admitted to the practice of law in Nebraska on April 14, 1995. In 1998, Petersen was retained by Jennifer Weeks to represent her in a personal injury claim arising from a motor vehicle accident. On July 5, 2000, the Counsel for Discipline received the complaint from Weeks that gave rise to our opinion in *Petersen I*. Generally, Weeks complained that Petersen had negotiated a settlement on Weeks' behalf, but had retained settlement funds to which he was not entitled. Petersen was charged with violation of a disciplinary rule; conduct involving dishonesty, fraud, deceit, or misrepresentation; and knowingly making a false statement of law or fact. Although the evidence in that case showed that Petersen failed to supervise and control the activities of his employees and that his office management was sloppy, Petersen had not been charged with that conduct. Thus,

we dismissed the charges against Petersen. Our decision was entered on October 18, 2002. See *Petersen I.*

JUDITH STARK

In June 2000, Judith Stark retained Petersen to represent her in a claim arising out of a motor vehicle accident that occurred on September 8, 1998. Petersen and his associates began working on the case. In February 2001, Stark sent a letter to Petersen advising him about the state of her health, explaining that her insurance company was contacting her, and asking for advice. No one from Petersen's firm replied to Stark's letter or returned her telephone calls. In June 2001, one of Petersen's associates sent Stark a "Personal Impact Questionnaire," soliciting information from Stark to be incorporated into a demand letter. Stark completed the questionnaire. No member of Petersen's firm ever contacted the driver of the other vehicle involved in Stark's accident or the owner of the vehicle. No member of Petersen's firm contacted Stark's insurance company regarding underinsured or uninsured motorist coverage. No specific demand was ever made of the other driver's insurance company.

On February 28, 2002, Petersen claims to have sent a letter of disengagement to Stark; Stark claims not to have received it. On October 10, Petersen was contacted at his office, and he sent another letter to Stark, enclosing a copy of the letter dated February 28, 2002. Petersen advised Stark that the statute of limitations had elapsed on her claim, but that he would try to secure a $5,500 settlement offer that had been proposed earlier by the other driver's insurer. Petersen advised Stark that he was acting out of courtesy, not "re-accepting" her case.

Nonetheless, Petersen later filed suit against the insurer in the Douglas County District Court seeking to enforce the settlement offer. The insurer sent discovery requests to Petersen to which Petersen did not respond, despite the filing of motions to compel. The case was dismissed on August 11, 2003, as a sanction for failing to respond to discovery. In December, Petersen paid Stark $5,000 to resolve her claim against him and his firm. Stark believed that the funds came from the insurer, and the respondent admitted that he may have contributed to that misunderstanding, although he said he did not intend to mislead her.

MICHAEL COLE

In October 2002, Petersen was retained to represent Michael Cole in his appeal of a state court criminal conviction. Petersen had not represented Cole at trial. On October 21, 2002 (3 days after we entered our decision in *Petersen I*), Petersen perfected Cole's appeal. The initial brief was due on January 9, 2003. On January 8, Petersen requested an extension of brief date until February 10, which request was granted. On February 12, the Clerk of the Nebraska Supreme Court and Court of Appeals (Clerk's Office) sent Petersen a notice of default. On February 19, Petersen filed another motion to extend the brief date, and the brief date was extended to April 1. On April 14, the Clerk's Office sent another notice of default and advised Petersen that the appeal would be dismissed if the brief were not filed within 10 days. Petersen finally replied on April 29, with another motion to extend brief date. The brief date was extended until May 19. On June 10, the Clerk's Office sent another notice of default, and on June 27, the appeal was dismissed for failure to file briefs. The Court of Appeals' mandate issued on July 29, 2003. On August 1, Petersen filed a motion to recall the mandate, which was overruled on August 7.

Petersen had been paid $10,000 to prosecute Cole's appeal. Some of the money has been refunded.

LEONEL GARCIA-GARIBAY (*PETERSEN II*)

On April 28, 2003, the U.S. Court of Appeals for the Eighth Circuit entered an order for Petersen to show cause why he should not be disciplined for failing to file the brief of Leonel Garcia-Garibay, whom Petersen was representing on appeal in that court. The brief had been due on March 21, but had not been filed. A similar order to show cause, in the same case, was filed on May 22. Petersen filed a response on May 22, claiming that Petersen's former secretary had been "intentionally attempting to harm [him] and [his] business" and intentionally hiding mail and failing to forward messages or calendar important items. Petersen claimed that his secretary had been to blame for failing to file the brief. Petersen sought a 60-day extension of brief date. The brief date was extended to July 14. On July 25, the court entered an order relieving Petersen of his

appointment for failure to file a timely brief. On the same date, the court entered an order suspending Petersen from practice before the court for 2 years.

On August 4, 2003, Petersen filed a motion for reconsideration of his suspension. In the motion, Petersen claimed that on May 30, he had fired two of his support staff and his only associate and that since then, he had associated with other attorneys in an effort to reduce his caseload. Petersen attached a copy of a motion to extend brief date that he claimed he had filed before the brief was due but "which was apparently not received by the Court." Petersen also asserted that his "longtime friend and confidant" had been seriously ill "involving some strange injury that periodically caused paralysis of the upper extremities, confusion and strange behavior" and that Petersen had been preoccupied by concern, time for doctor's visits, and other support, to the detriment of his legal practice. The motion was overruled on August 6.

On August 8, 2003, Petersen filed a motion for a stay and expedited hearing, seeking an opportunity to apologize to the court and demonstrate that the occurrence was inadvertent. Petersen stated that he had reordered and improved his practice "to ensure nothing remotely similar happens in the future." Petersen explained that the damage from the court's suspension to him, his clients, and his employees would be irreparable. A hearing was held on September 11, and on September 17, the court granted Petersen's motion for further reconsideration and modified the suspension to a period of 30 days from the date of the order.

On January 2, 2004, we granted Counsel for Discipline's motion for reciprocal discipline and suspended Petersen for 30 days. See *Petersen II*.

Brian Lacy

On October 21, 2002 (3 days after our decision in *Petersen I*), Petersen filed a declaratory judgment action in the U.S. District Court for the District of Nebraska on behalf of Brian Lacy, arising out of Lacy's claim against his underinsured motorist coverage insurer. The insurer served discovery on Petersen in May and June 2003. On July 23, the court scheduled a scheduling conference for November 14 and notified Petersen of the conference.

On October 17, 2003 (a month *after* the Eighth Circuit granted Petersen's motion to reconsider his suspension before that court), the insurer filed a motion to compel responses to its previous discovery. Petersen did not respond to the motion to compel. On November 10, the court granted the motion to compel and entered an order to show cause why sanctions should not be entered if the discovery responses were not served by November 24. On November 18, the scheduling conference was rescheduled for December 19. Petersen did not comply with the order to show cause and did not attend the scheduling conference. Sometime thereafter, Petersen called the magistrate judge's chambers to apologize. On December 23, the insurer filed an additional motion to compel. On January 2, 2004, as previously noted, we suspended Petersen for 30 days. See *Petersen II*.

On January 7, 2004, the magistrate judge granted the insurer's motion for attorney fees resulting from the motion to compel and entered an order to show cause why Petersen should not be held in contempt for failing to attend the scheduling conference. The scheduling conference was rescheduled for January 23. Petersen filed a written notice of his suspension with the Clerk of the U.S. District Court on January 13 and did not attend the scheduling conference. The magistrate judge recommended that as sanctions for failing to comply with discovery orders or attend conferences, Petersen be ordered to pay attorney fees and the lawsuits be dismissed. Petersen's successor counsel avoided dismissal of the lawsuits; Petersen was sanctioned $891 in attorney fees, which have been paid.

Evidence of Mitigating Circumstances

Petersen testified that the "overwhelming situation" that he had was that when he graduated law school, he wanted a big firm. Petersen said that he chose some "poor people" to run his firm with him, and "it all sort of came to a head about the time that [he] started getting Bar complaints, and [he] was overwhelmed with cases, several hundred of them at the time, and [he] had some employees that [he] had to let go." Petersen said that he "tried as best [he] could to discharge many of them, but in some cases the damage had already been done." Petersen admitted that

he accepted some cases in areas of the law in which he did not have the appropriate expertise.

Petersen testified that since the complaints had come forward, he had discharged any type of case other than criminal defense and had reduced his caseload to less than 20 cases. Petersen also testified that in response to his first suspension, he suffered from depression for a while and that "there was [sic] some indications of [his] substance abuse, alcohol and so forth, and [he] was starting to drink more." Petersen testified that he had addressed those issues through Alcoholics Anonymous (AA) and the Nebraska Lawyers Assistance Program, stating: "I go to a meeting a day. I go to — I have sponsors. I have somebody that I address on a daily basis." Petersen also testified that he was seeing a counselor. Petersen stated that he had a supervising attorney through this court who assisted him when necessary and that he was also assisted by judges and lawyers he encountered through his AA meetings. Petersen admitted that he had never gone under a formal contract with the Nebraska Lawyers Assistance Program, however, because he "wasn't going to go to formal treatment."

At oral argument, Counsel for Discipline offered evidence that Petersen had been accepted into a "highly structured sober living, modified social model, alcohol and drug free program" in California. The evidence indicated that Petersen had signed a 90-day contract, but had verbally committed to a 6-month to 1-year program. Counsel for Petersen did not object to the evidence, and this court accepted it into the record. See, *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005) (proceeding to discipline attorney is trial de novo on record); *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000) (appellate court may consider agreed circumstances presented to it in brief or argument).

Referee's Recommendations

The referee found, pursuant to Petersen's admissions, that Petersen's conduct constituted violations of Canon 1, DR 1-102(A)(1) (violation of disciplinary rules) and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(3) (neglecting legal

matter entrusted to him); Canon 6, DR 6-102(A) (attempting to exonerate himself from or limit his liability to client for his personal malpractice); and Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment entered into with client for professional services), of the Code of Professional Responsibility. The referee recommended a suspension from the practice of law for 180 days. The referee disagreed with the parties' recommendation that Petersen be given credit for the period of his prior suspension. The referee further expressed concern with Petersen's failure to obtain "formal treatment" for substance abuse. The referee recommended that reinstatement to the practice of law be conditioned on proof of fitness to practice law and that Petersen be placed on probation for 2 years and be required to engage an attorney to monitor his practice during his probation.

EXCEPTIONS

As previously noted, there were no exceptions filed to the referee's report in this case. 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. Simmons*, 270 Neb. 429, 703 N.W.2d 598 (2005). Thus, the only issue in this case is the appropriate discipline to be imposed.

STANDARD OF REVIEW

[2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *Id.*

ANALYSIS

[3] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Under Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. *Id.* Accordingly, we find, on our de novo examination of the record, clear and convincing evidence that Petersen's conduct, set forth above, violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 6-102(A), and DR 7-101(A)(2).

We note that all of the conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, thus, governed by the now-superseded Code of Professional Responsibility.

[4,5] Violation of a disciplinary rule is a ground for discipline. *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004). To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

In this case, our primary concern is the protection of the public. Petersen's repeated neglect of client matters has obviously been injurious to those who have trusted him with their legal problems. While Petersen's after-the-fact explanations of his conduct have changed from instance to instance, Petersen's record shows a clear pattern of neglect. The protection of the public demands that Petersen not again abuse the trust of a client.

Nor are we persuaded that Petersen's recent revelation of a substance abuse problem is a sufficient mitigating circumstance to avoid a lengthy suspension. Petersen's testimony before the referee indicated that his problem with substance abuse began after his first suspension from the practice of law. There is no evidence in the record to indicate otherwise. But most of the instances of neglect contained in this record occurred before that suspension. In other words, based on our de novo review of this record, we cannot conclude that Petersen's substance abuse was a cause of these instances of neglect. Rather, the record indicates that Petersen has repeatedly and consistently neglected client matters for a period of years, however inconsistent he may have been in explaining his behavior.

[6] An attorney's admission of responsibility for his or her actions reflects positively upon his or her attitude and character and is to be considered in determining the appropriate discipline. *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671

N.W.2d 765 (2003). Petersen's admissions of responsibility for his conduct have come only when faced with discipline, and even when discipline has been imposed, those sanctions have not prevented further misconduct. In fact, in some cases, new misconduct has arisen only days after the resolution of a previous disciplinary proceeding. It is one thing to admit responsibility for past actions, but quite another to display that responsibility by modifying behavior. This record displays some of the former, but none of the latter. To the contrary, while Petersen claims to be addressing his substance abuse problem, the record also evidences many other instances in which Petersen has claimed to have addressed the issues leading to his misconduct, only to have new issues arise.

The other dispositive factor is Petersen's present fitness to practice law, which is not demonstrated in the record before us. Petersen has professed to have turned over new leaves before. It is the sincere hope of this court that Petersen is able to solve the problems that have afflicted him, whatever they may be. But unlike past incidents, in this case, Petersen will be required to demonstrate that he has addressed those problems before he is again placed in a position of trust. We accept the evidence that Petersen is seeking treatment, but we are unwilling to accept another of Petersen's assurances, that nothing similar will happen again, without proof to that effect.

We conclude protection of the public demands that Petersen be suspended from the practice of law for an indefinite period, with no possibility of reinstatement prior to February 1, 2008. Compare *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Upon application for reinstatement, Petersen shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 2004). In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Petersen; (2) a showing by independent third-party proof that Petersen has continued active participation in a recovery program and has maintained abstinence from the use of alcohol during the period of suspension; and (3) the submission by Petersen and approval by this court of a probation plan, to be in effect for a period of 2

years following reinstatement, whereby Petersen's recovery program, his office management, and his compliance with the Nebraska Rules of Professional Conduct would be monitored by the Nebraska Lawyers Assistance Program and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action.

We are aware that new formal charges have been filed against Petersen, based upon other allegations of serious misconduct that have not been discussed in this opinion. Those charges have not been considered in our deliberations in the instant case, and will proceed and be resolved separately.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

RUTH POHLMANN, BY AND THROUGH MERLYN POHLMANN, HER ATTORNEY IN FACT AND NEXT FRIEND, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

710 N.W.2d 639

Filed March 10, 2006. No. S-04-1327.

1. **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.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Medical Assistance: Federal Acts: States.** A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
5. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Les Seiler, Lisa D. Stava, and Adam D. Pavelka, of Seiler & Parker, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Royce N. Harper, Douglas D. Dexter, and Jerry M. Harre, Senior Certified Law Student, for appellees.

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

STEPHAN, J.

This is an appeal from an order of the district court for Lancaster County affirming an order of the Nebraska Department of Health and Human Services (DHHS) which denied Ruth Pohlmann's application for Medicaid benefits. The denial was based upon Ruth's status as a beneficiary of a testamentary trust established by her late husband, Herman Pohlmann. We reverse, based upon our conclusion that DHHS and the district court erred in determining that the trust corpus was a disqualifying asset.

FACTS

On August 10, 1982, Herman executed his last will and testament, which provided for the creation of two separate trusts following his death. A marital trust was to be established using the residue of any property that Herman owned at death and that he did not otherwise dispose of in the rest of his will. Herman's wife, Ruth, was to receive all of the net income from this trust and was entitled to disbursement of all or a part of the principal upon her written request or, should she become incapacitated, at her trustee's discretion, for her health, education, support, or maintenance. The second trust, the Herman and Ruth C. Pohlmann Family Trust (Family Trust), was to be funded with an amount of Herman's property, real or personal, "equal to the unified credit (allowable in determining the federal estate tax payable by reason of [Herman's] death, i.e. unified credit $62,800 equals $225,000 tax exempt property)." The will directed that Ruth was to receive from the Family Trust "all of the accumulative income from the individual funds and such portion of the principal as [the trustee] may, from time to time, deem appropriate for her health, education, support or maintenance." Ruth's

rights with respect to the corpus of the Family Trust were to end should she remarry, at which time she would be entitled to the income only. Herman and Ruth's children and grandchildren were beneficiaries of the remainder of the Family Trust. Herman's will appointed Ruth as personal representative of his estate or, alternatively, their two children Merlyn Pohlmann and Verona Lee Gumaer as copersonal representatives.

Following Herman's death, his will was admitted to probate, and on January 24, 2000, the copersonal representatives executed two deeds of distribution conveying four parcels of real property to the trustee of the Family Trust. The deeds of distribution were recorded in Thayer County, Nebraska, on March 2, 2002. The marital trust was never funded.

On June 6, 2003, Merlyn, as attorney in fact for Ruth, applied to DHHS for Medicaid benefits on her behalf. At that time and during the pendency of this case, Ruth was a resident of a nursing home in Deshler, Nebraska. On June 30, DHHS denied Ruth's request for Medicaid benefits after determining that she was ineligible for assistance because she had available resources exceeding the program standard of $4,000. The decision was based in part upon the balance in her bank accounts and in part upon resources which DHHS believed were available to Ruth under the testamentary trust established by Herman's will. Merlyn appealed the decision on Ruth's behalf, contending that while the income from the Family Trust was an available resource, the corpus of the trust was not. A hearing was held on October 1. At the time of the hearing, the balance in Ruth's bank accounts was less than the $4,000 disqualification limit. The hearing officer affirmed the DHHS decision, based upon her reading of the provisions concerning the marital trust and the application of 42 U.S.C. § 1396p(d)(3)(B)(i) (2000), which deems that resources of an irrevocable trust are available to an applicant if there are "any circumstances" under which payment could be made for the benefit of the applicant.

A petition for review of the DHHS decision was filed on Ruth's behalf pursuant to the Administrative Procedure Act. The district court for Lancaster County affirmed the DHHS decision. In its order, the court noted that the marital trust had never been funded and thus limited its review to the Family Trust. Applying

the "any circumstances" test of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2) (2001), to the language of the Family Trust, the district court found that Ruth "*could* receive payments from the irrevocable Family Trust to pay for her medical expenses." It held that she was therefore ineligible for Medicaid benefits. Ruth filed this timely appeal.

ASSIGNMENT OF ERROR

Ruth assigns, restated, that the district court erred in determining that the corpus of the Family Trust was an available resource for purposes of determining her eligibility for Medicaid benefits.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006); *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). 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. *McCray v. Nebraska State Patrol, supra*; *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

ANALYSIS

[4] The marital trust provided for in Herman's will was never funded. Therefore, we need only examine the decision below in the context of the Family Trust. We are presented with the question of whether the corpus of an irrevocable, discretionary testamentary trust is a resource available to the beneficiary spouse of the grantor for purposes of determining the spouse's eligibility for Medicaid benefits. Medicaid is a cooperative federal program supervised by the U.S. Department of Health and Human Services through the Health Care Financing Administration. See, 42 U.S.C. § 1396 et seq. (2000); *Bethesda Found. v.*

Nebraska Dept. of Soc. Servs., 243 Neb. 130, 498 N.W.2d 86 (1993); *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). Medicaid funds are used to provide medical assistance to persons whose resources are insufficient to meet the cost of necessary medical care. *Boruch v. Nebraska Dept. of Health & Human Servs., supra.* A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations. *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984); *Boruch v. Nebraska Dept. of Health & Human Servs., supra.* Nebraska has elected to participate in the Medicaid program by its enactment of Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), and DHHS is responsible for the administration of the Medicaid program in this state. *Bethesda Found. v. Nebraska Dept. of Soc. Servs., supra*; *Boruch v. Nebraska Dept. of Health & Human Servs., supra.*

Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. § 1396a(a)(17)(B). These standards must take into account "only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of the U.S. Department of Health and Human Services], available to the applicant or recipient." § 1396a(a)(17)(B). See, *Himes v. Shalala*, 999 F.2d 684 (2d Cir. 1993); *Martin v. Kansas Dept. of SRS*, 26 Kan. App. 2d 511, 988 P.2d 1217 (1999).

Both DHHS and the district court utilized § 1396p(d) in determining whether the Family Trust corpus was a resource available to Ruth. For purposes of that subsection,

> an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust *other than by will*:
>
> (i) The individual.
>
> (ii) The individual's spouse.
>
> (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

> (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(Emphasis supplied.) § 1396p(d)(2)(A). With respect to irrevocable trusts, the federal statute further provides that

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual.

§ 1396p(d)(3)(B)(i).

In this case, DHHS and the district court applied the "any circumstances" test of § 1396p(d)(3)(B)(i) and the corresponding provision in 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2), and concluded that because the trustee in the exercise of his discretion *could* make payments from the Family Trust to Ruth, the corpus was an available resource which disqualified her from receiving Medicaid benefits. This reasoning mirrors that of the Nebraska Court of Appeals in *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 718, 659 N.W.2d 848, 853 (2003), in which the Court of Appeals wrote that

> under the plain language of § 1396p(d), if a person establishes an irrevocable trust with his or her assets and the individual is able, under *any circumstances*, to benefit from the corpus of the trust or the income derived from the trust, the individual is considered to have formed a trust which is counted in the determination of Medicaid eligibility.

However, *Boruch* involved a self-settled inter vivos trust in which the Medicaid applicant was both the grantor and the beneficiary. Here, it is undisputed that the Family Trust was established through the will of Herman. Ruth argues that this fact precludes application of the "any circumstances" test because the "other than by will" language in § 1396p(d)(2)(A) specifically exempts testamentary trusts from the scope of § 1396p. See, also, 469 Neb. Admin. Code, ch. 2, § 009.07A5a.

We find merit in this argument. As the Court of Appeals noted in *Boruch*, § 1396p was enacted in 1993 to restrict a loophole in the Medicaid act through which self-settled trusts were used

to exclude assets from consideration for Medicaid eligibility purposes. See, also, *Skindzier v. Com'r of Social Services*, 258 Conn. 642, 784 A.2d 323 (2001). For Medicaid eligibility purposes, the corpus of a self-settled trust is an available resource under § 1396p(d)(3)(B)(i) if the "any circumstances" test is met. If the test is not met, the corpus is considered an asset disposed of by the individual for purposes of § 1396p(c). See § 1396p(d)(3)(B)(ii). However, the plain meaning of the phrase "other than by will" in § 1396p(d)(2)(A) and the corresponding Nebraska regulation make it clear that a Medicaid applicant cannot be considered to have established a trust for purposes of the restrictions imposed by § 1396p(d) if the trust was established by will. See *Skindzier v. Com'r of Social Services, supra.* The State Medicaid Manual, promulgated by the Health Care Financing Administration as a means of issuing policies and procedures to state agencies administrating Medicaid, specifically provides that for purposes of determining eligibility under § 1396p, the term trust "does not cover trusts established by will." Health Care Fin. Admin., U.S. Dept. of Health and Human Servs., Pub. No. 45, State Medicaid Manual § 3259.1(A)(1) at 3-3-109.24 (rev. 64, Nov. 1994). Because the trust at issue here was not self-settled, but, rather, was testamentary, it was not within the purview of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2). DHHS and the district court thus erred in applying the "any circumstances" test to determine the availability of the trust corpus for purposes of Ruth's Medicaid eligibility.

We acknowledge the argument made by DHHS that the statutory exemption of testamentary trusts from § 1396p seems inconsistent with the underlying purpose of Medicaid, which is to provide medical assistance to those who have no other financial means. However, we must also agree with the statement by the Supreme Court of Connecticut in *Skindzier* that "we have no authority to impose a different rule simply because, in our opinion, it would better implement the legislative policy of minimizing the fiscal risk to [Medicaid]." *Id.* at 661, 784 A.2d at 335. Instead, like the Connecticut court, we are " 'precluded from substituting [our] own ideas of what might be a wise provision

in place of a clear expression of legislative will.' " See *id.* at 661, 784 A.2d at 336.

[5] DHHS alternatively argues that by not exercising her right of election as a surviving spouse, Ruth allowed her assets to fund the Family Trust created by Herman's will, thus bringing the trust within the scope of § 1396p(d). DHHS relies upon *Miller v. SRS*, 275 Kan. 349, 64 P.3d 395 (2003), in which the Kansas Supreme Court upheld an administrative determination that a widow's decision not to claim her spousal elective share resulted in a trust established by the widow with her own funds for her own benefit, and not a trust created by will, thereby bringing the trust corpus within the scope of § 1396p(d). We do not reach this issue because neither DHHS nor the district court was asked to make a determination that Ruth created a self-settled trust by not electing her spousal share, and the record is silent on the issue. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005).

Our determination that the "any circumstances" test was erroneously applied in this case does not conclusively resolve the question of whether the Family Trust corpus was an available resource for Medicaid eligibility purposes. Nebraska regulations provide that "[t]estamentary trusts may be excluded as resources, depending on the terms of the trust." 469 Neb. Admin. Code, ch. 2, § 009.07A5g (2001). Under the Nebraska Uniform Trust Code, " '[t]erms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." Neb. Rev. Stat. § 30-3803(19) (Supp. 2005). See, also, Neb. Rev. Stat. § 30-38,110 (Cum. Supp. 2004). In analyzing the terms of a testamentary trust to determine if the corpus is "available" to a beneficiary for purposes of Medicaid eligibility, courts have looked to whether the trust is a support trust or a discretionary trust. See, *Miller v. SRS, supra*; *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d 851 (N.D. 2001). We find the following formulation by

the Supreme Court of North Dakota helpful where, as here, the beneficiary is not a cotrustee:

> The settlor's intent determines whether a trust is classified as a support or a discretionary trust, which in turn determines what portion of the trust is available to an applicant for the purpose of qualifiying for Medicaid benefits. . . . A support trust essentially provides the trustee "shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary." . . . A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, and an agency may consider the support trust as an available asset when evaluating eligibility for assistance. . . .
>
> Conversely, a discretionary trust grants the trustee "uncontrolled discretion over payment to the beneficiary" and may reference the "general welfare" of the beneficiary. . . . Because the beneficiary of a discretionary trust does not have the ability to compel distributions from the trust, only those distributions of income, principal, or both, actually made by the trustee may be considered by the agency as available assets when evaluating eligibility for assistance.

(Citations omitted.) *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d at 855-56. See, also, Restatement (Third) of Trusts § 60 (2003).

The key provision of the Family Trust stated that the trustee was to pay Ruth "all of the accumulative income from the individual funds *and such portion of the principal as it may, from time to time, deem appropriate for her health, education, support or maintenance*." (Emphasis supplied.) Although not in the context of a Medicaid eligibility determination, we have held that similar discretionary powers granted to a trustee do not create a right of the beneficiary to compel payments from the trust. See, *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). In this case, DHHS concedes that the Family Trust is discretionary with respect to distributions of corpus, and we likewise conclude. Because Ruth cannot compel a distribution

from the Family Trust corpus, it is not an available asset for purposes of determining her eligibility for Medicaid benefits.

CONCLUSION

The judgment of the district court affirming the order of DHHS does not conform to the law because it is based upon the "any circumstances" test of § 1396p(d)(3)(B)(i) and 469 Neb. Admin. Code, ch. 2, § 009.07A5b(2), both of which are inapplicable to the testamentary trust at issue in this case. We conclude as a matter of law that the Family Trust created by Herman's will is discretionary in nature, such that the beneficiary, Ruth, may not compel a distribution from its corpus and that therefore, such corpus is not an available asset for purposes of determining Ruth's eligibility for Medicaid benefits but must be excluded for this purpose under 469 Neb. Admin. Code, ch. 2, § 009.07A5g. Accordingly, we reverse the judgment of the district court and remand the cause with directions to vacate the DHHS order and remand to that agency for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
THOMAS J. SCHINZEL, APPELLEE.
710 N.W.2d 634

Filed March 10, 2006. No. S-05-679.

1. **Mental Health: Final Orders: Proof: Appeal and Error.** An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Criminal Law: Insanity: Courts.** Under Neb. Rev. Stat. § 29-3703(2) and (3) (Reissue 1995), following the annual status review of a person committed to treatment in a regional center, the court may either order the person released unconditionally, order the person to remain committed to the regional center, or order the person discharged from the regional center and placed in a less restrictive treatment program.

4. **Criminal Law: Insanity.** Under Neb. Rev. Stat. § 29-3703 (Reissue 1995), a person cannot be placed in the "joint legal custody" of two separate agencies or treatment programs.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and Samuel G. Kaplan, Special Assistant Attorney General, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, Shawn Elliott, and Allyson Mendoza, Senior Certified Law Student, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Thomas J. Schinzel was committed to the Lincoln Regional Center (LRC) in 1996 after being found not guilty of various charges by reason of insanity. Following a statutory annual review hearing in 2004, the district court for Lancaster County ordered that Schinzel's physical custody be transferred to a community residential facility but that his legal custody remain with LRC. Further hearings were held to address concerns raised by LRC with regard to the arrangement. On April 26, 2005, the court entered an order providing that LRC and the Lancaster County Community Mental Health Center (LCCMHC) "shall have joint legal custody" of Schinzel and directing that Schinzel's physical placement be transferred to the community residential facility. The State appeals. Because "joint legal custody" is not authorized under the controlling statutes, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

On October 19, 1995, Schinzel was charged in the district court with various counts including attempted assaults, attempted murders, and weapons violations. On May 9, 1996, the court found Schinzel not guilty by reason of insanity. Following a hearing held pursuant to Neb. Rev. Stat. § 29-3701(1) (Reissue 1995), Schinzel was found to be dangerous to himself or others

by reason of mental illness and defect. Schinzel was ordered to undergo an evaluation at LRC. Following the evaluation, a hearing was held pursuant to Neb. Rev. Stat. § 29-3702 (Reissue 1995), and the court, on September 26, 1996, ordered Schinzel committed to LRC for treatment.

Annual reviews of Schinzel's status were subsequently conducted pursuant to Neb. Rev. Stat. § 29-3703 (Reissue 1995). A statutory annual review hearing was held on May 6, 2004. In a report prepared for the annual review, the LRC treatment team opined that inpatient hospitalization of Schinzel was no longer the least restrictive alternative consistent with public safety. The team recommended that Schinzel be discharged from LRC but that he receive outpatient mental health services through LCCMHC with residency at Prescott Place, Inc., a residential living facility. LRC is a state facility administered by the Department of Health and Human Services, while LCCMHC is operated by Lancaster County. Prescott Place is a private entity that is not managed or directly funded by LRC or the State. Following the May 6 hearing, the court entered an order dated June 15, 2004, that Schinzel's physical custody be transferred to Prescott Place but that his legal custody remain with LRC.

LRC subsequently notified the court of its concerns regarding the June 15, 2004, order, under which LRC was to retain legal custody of Schinzel while transferring his physical custody to Prescott Place. A hearing was held to address these concerns, and following the hearing, the court on February 17, 2005, ordered Schinzel to be discharged from LRC and committed to a LCCMHC treatment program with his physical placement at Prescott Place. The February 17 order included directions to various agencies as to what steps they were to take if Schinzel's conduct did not comport with public safety. The court conditioned the February 17 order upon the signing of affidavits by law enforcement agencies, including the Lincoln Police Department, the Lancaster County Sheriff's Department, and Lancaster County Corrections, and by the treatment agencies. The affidavits were to state that all such agencies would comply with the elements of the court's order. The law enforcement agencies were unwilling to sign affidavits, and, therefore, another hearing was held.

On April 26, 2005, the court filed an order in which it expressed concern for the protection of the public safety while Schinzel was being treated outside a locked inpatient facility. As a consequence, the court ordered that Schinzel's physical placement be transferred to Prescott Place, with treatment provided by LCCMHC, but that LRC and LCCMHC "shall have joint legal custody" of Schinzel. According to the order, such an arrangement would facilitate Schinzel's physical return to LRC if "there is a basis to believe that his presence in the community is a danger to the public."

The State appeals the April 26, 2005, order.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred in placing "joint legal custody" of Schinzel with LRC and LCCMHC and in failing to order Schinzel discharged from LRC when it placed him in a less restrictive facility. The State argues that joint legal custody is not authorized by statute.

STANDARDS OF REVIEW

[1] An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

ANALYSIS

The State argues on appeal that the district court was without authority to order that LRC and LCCMHC share "joint legal custody" of Schinzel. We agree that the relevant statutes do not provide for the arrangement ordered by the district court, and we therefore reverse the order and remand the cause for the district court to determine whether Schinzel should remain committed to LRC or whether Schinzel should be discharged from LRC for

the reason that a less restrictive alternative would be consistent with his treatment needs and with public safety.

In 1996, Schinzel was ordered committed to LRC for treatment pursuant to § 29-3702. Commitment to LRC was a permitted option under § 29-3702(2), which provides that a person found to be dangerous shall be ordered to participate in an appropriate treatment program and that such treatment program "may involve any public or private facility or program which offers treatment for mental illness and may include an inpatient, residential, day, or outpatient setting."

Once a person has been committed to a treatment program, § 29-3703(1) provides that the court shall annually review the status of the committed person. Following such review, § 29-3703(2) provides the reviewing court with options. Section 29-3703(2) provides:

> If as a result of such hearing the court finds that such person is no longer dangerous to himself, herself, or others by reason of mental illness or defect and will not be so dangerous in the foreseeable future, the court shall order such person unconditionally released from court-ordered treatment. If the court does not so find, the court shall order that such person participate in an appropriate treatment program specifying conditions of liberty and monitoring consistent with the treatment needs of the person and the safety of the public. The treatment program may involve any public or private facility or program which offers treatment for mental illness and may include an inpatient, residential, day, or outpatient setting. The court shall place the person in the least restrictive available treatment program that is consistent with the treatment needs of the person and the safety of the public.

We further note that § 29-3703(3) provides:

> If the person has been treated in a regional center or other appropriate facility and is ordered placed in a less restrictive treatment program, the regional center or other appropriate facility shall develop an individual discharge plan consistent with the order of the court and shall provide the less restrictive treatment program a copy of the discharge plan and all relevant treatment information.

[3,4] We read § 29-3703(2) and (3) together to provide that following the annual status review of a person committed to treatment in a regional center, the court may either order the person released unconditionally, order the person to remain committed to the regional center, or order the person discharged from the regional center and placed in a less restrictive treatment program. With respect to an individual who is not released unconditionally, the relevant statutes speak only of a person's being committed to a treatment program in a regional center or committed to another treatment program. Where the treatment program is "less restrictive," the person is subject to a "discharge plan." § 29-3703(3). Thus, under § 29-3703, when it is determined that a less restrictive treatment program is warranted, then the person should be discharged from his or her present program and should be ordered committed to the less restrictive program. The statutes do not mention the concept of "legal custody" with respect to commitments and therefore do not authorize "joint legal custody" as set forth in the court's April 26, 2005, order at issue in this case. Because the statutes do not authorize the "joint legal custody" ordered in this case, we conclude that under § 29-3703, a person cannot be placed in the "joint legal custody" of two separate agencies or treatment programs. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999) (concluding statutes and case law do not authorize placement of juvenile in "dual custody" of two separate agencies simultaneously).

Because the district court in the present case ordered an arrangement that was not authorized by the statutes, we reverse the April 26, 2005, order. From our reading of the order, the court may have determined that the LCCMHC treatment program was consistent with Schinzel's treatment needs, but the court appeared uncertain as to whether such placement was consistent with public safety. The court apparently attempted to reconcile these concerns with the "joint legal custody" arrangement which is not authorized by the statutes, and such order was an error of law. Accordingly, we reverse, and remand to the district court to determine the status of Schinzel consistent with the statutes and this opinion.

CONCLUSION

We conclude that the district court erred in ordering that LRC and LCCMHC share "joint legal custody" of Schinzel. We reverse the order and remand the cause to the district court to determine Schinzel's status and to enter an appropriate order consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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

711 N.W.2d 850

Filed March 24, 2006. Nos. S-04-1375, S-05-1115.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer disciplinary proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case.
5. ____. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

Original actions. Judgment of suspension and probation.

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

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, for respondent.

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

PER CURIAM.

INTRODUCTION

This opinion involves two separate attorney discipline proceedings filed against Paul M. Muia: cases Nos. S-04-1375 and S-05-1115. The cases have been consolidated for purposes of disposition. Muia was admitted to the practice of law in the State of Nebraska on September 14, 1990, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska.

In case No. S-04-1375, formal charges were filed on December 6, 2004, by the office of the Counsel for Discipline of the Nebraska Supreme Court. The formal charges set forth three counts alleging that Muia had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), (4), (5), and (6) (violating disciplinary rule); Canon 2, DR 2-110(A)(2) (failing to notify clients upon withdrawal from employment); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(1) and (2) (preserving identity of funds and property of client), and DR 9-102(B)(3) and (4) (maintaining records of funds and promptly paying funds to client). The Counsel for Discipline also claimed that Muia had violated his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). Muia's answer admitted some allegations and denied others.

After a hearing, the referee filed a report on July 13, 2005, in which he concluded that Muia's conduct had violated DR 1-102(A)(1), DR 2-110(A)(2), DR 6-101(A)(3), DR 9-102(B)(3) and (4), and his oath of office as an attorney. The referee found that the Counsel for Discipline had not proved a violation of DR 9-102(A)(1) and (2). The referee noted that Muia's license had been suspended for 4 months beginning November 7, 2003, for an earlier violation of the disciplinary rules, see *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970,

670 N.W.2d 635 (2003), and that Muia had not sought reinstatement of his license between March 8, 2004, and the time of the hearing before the referee on June 21, 2005. In recognition of these facts, the referee recommended that Muia receive a term of suspension from the practice of law beginning March 8, 2004, and extending through the date of the filing of this court's opinion in the current proceedings, with no additional period of suspension.

In No. S-05-1115, formal charges were filed on September 19, 2005, by the Counsel for Discipline. Amended formal charges were filed on December 27, alleging that Muia had violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), (5), and (6) (violating disciplinary rule), and Canon 5, DR 5-104(A) (entering into business transaction with client if attorney and client have differing interests). Muia consented to the motion for leave to file amended formal charges, and his answer admitted some allegations and denied others.

After a hearing, the referee filed a report finding that Muia had violated DR 1-102(A)(1), (5), and (6); DR 5-104(A); Neb. Ct. R. of Discipline 9(E) (rev. 2001); and his oath of office. The referee recommended that Muia be suspended from the practice of law from March 8, 2004, to the date of the filing of this court's opinion and that Muia be placed on probation and monitored by another licensed Nebraska attorney for not less than 2 years following his reinstatement. We impose discipline as indicated below.

FORMAL CHARGES

No. S-04-1375—Count I

The first count concerned Muia's representation of Steven P. Reed, who retained Muia on January 8, 2002, to represent him on a contingency fee basis in a personal injury case arising from an automobile collision. Muia settled Reed's case against the negligent party for that party's insurance policy limits of $25,000. When Muia received this amount on or about May 23, 2003, he deposited it into his trust account. Muia retained his attorney fee, as well as $10,897.88 to pay Reed's medical creditors. The remainder was paid to Reed. Between May 23 and

September 23, Muia worked to settle Reed's claim for underinsured motorist coverage against the insurance carrier for the car in which Reed was a passenger at the time of his accident. The claim was ultimately settled, and the proceeds were divided between Reed and Muia pursuant to their fee agreement.

After the insurance claim was settled, Muia negotiated settlement of a bill with an Omaha hospital on September 24, 2003. The $6,783.88 bill was settled for 90 percent, with Muia keeping the 10-percent savings as additional compensation pursuant to his agreement with Reed. Muia wrote a check to himself that day for $678.38. Payment was not made to the hospital at that time because Muia was planning to negotiate another bill with a different division of the hospital. When Muia settled the first claim with the hospital, six additional medical creditors had claims against Reed totaling $3,787.

On November 7, 2003, Muia's license to practice law was suspended. He then held $6,105.50 in his trust account to pay the hospital for Reed and $3,787 to pay Reed's other medical creditors.

Pursuant to Neb. Ct. R. of Discipline 16 (rev. 2001), Muia notified Reed that Muia's license had been suspended. However, Muia did not inform Reed that some of Reed's funds remained in Muia's trust account. Muia did not inform Reed that the medical creditors had not been paid; nor did Muia deliver Reed's funds to him. Muia did not make any payments on Reed's behalf between November 7, 2003, and June 7, 2004, due to Muia's belief that he could not make such payments while under suspension from the practice of law. Muia sent payment to Reed's medical creditors for the prior balances on June 7.

No. S-04-1375—Count II

At the time Muia was suspended on November 7, 2003, the balance of his trust account was $29,168.11. The funds represented personal injury settlements for 15 clients in addition to Reed and were to be used to negotiate with and pay the clients' medical creditors. Muia notified only 1 of these 15 clients that his license had been suspended. He did not inform any of the 15 clients that their funds remained in his trust account or that the medical creditors had not been paid; nor did he deliver the funds

to the clients. Due to Muia's belief that he could not make any payments to the medical creditors while under suspension, he did not make any payments between November 7, 2003, and June 7, 2004. On June 7, Muia sent payment to the medical creditors of the 15 clients for their respective prior balances. None of the 15 clients made a complaint against Muia with the Counsel for Discipline or indicated that they suffered any harm.

No. S-04-1375—COUNT III

On September 24, 2003, Christine Sutherland hired Muia to represent her in a child support collection matter. On November 18, 11 days after Muia's license to practice law was suspended, he contacted Sutherland to inform her that his license had been suspended. Although Sutherland was scheduled to appear in court in Washington County, Nebraska, on December 2, Muia did not inform her as to who would represent her in his place. Sutherland contacted the clerk of the court on the date of the scheduled hearing and was told that the case had not been settled.

Muia had apparently asked Maria Vera to represent Sutherland. On December 2, 2003, Vera contacted the opposing attorney in Sutherland's case to inform him that she was taking over Sutherland's representation, and the two attorneys agreed to continue the December 2 hearing.

On December 5, 2003, Sutherland filed a grievance against Muia with the Counsel for Discipline. Sutherland did not learn that Muia had turned over her file to Vera until around December 12, when she received a letter from Muia that was dated November 11, 2003, but not postmarked until December 10. Vera returned Sutherland's file to Muia in December 2003, but Muia did not deliver the file to Sutherland until November 23, 2004.

No. S-05-1115

In this case, the formal charges alleged that Muia had violated the disciplinary rules in relation to a client, Dr. Charles Muiu. Muia represented Dr. Muiu on a variety of legal matters between 2001 and November 7, 2003.

On June 21, 2003, Muia borrowed $5,000 from Dr. Muiu for a business venture. Muia allegedly failed to provide full disclosure

and failed to advise Dr. Muiu to seek independent counsel before entering into the business relationship. Muia did not provide a written promissory note for the loan, and he failed and refused to pay off the loan. Dr. Muiu filed a grievance against Muia with the Counsel for Discipline on February 16, 2005, but Muia failed to file a timely response.

After a hearing, the referee filed a report in which he summarized the evidence. The primary issue in contention was whether Dr. Muiu expected to be repaid the $5,000 loan, as alleged by Dr. Muiu, or whether it represented an investment in Muia's business, as claimed by Muia. No written documentation proved either assertion. The referee noted that the money was ultimately invested by Muia, along with his own funds, in a dog-grooming business that eventually failed.

The evidence showed that Muia and Dr. Muiu are both natives of Kenya who come from the same tribe. They met in the United States and became friends. At the time of the loan/investment, Muia was Dr. Muiu's attorney. Muia claimed that he became interested in a dog-grooming business in Omaha and wanted to buy it. He asked Dr. Muiu to invest $5,000 in the business. Muia claimed that he advised Dr. Muiu about the special rules governing an attorney going into business with his client and encouraged Dr. Muiu to get advice from another lawyer. Muia and Dr. Muiu had shared office space, but had not previously been in business together.

Muia purchased the dog-grooming business with Dr. Muiu's money and $19,000 of his own funds. Dr. Muiu was not a signatory on the purchase agreement or the business property lease. The business closed before the end of 2003, and Dr. Muiu never received any return of his investment.

The referee stated that the recollection of the two parties differed. Muia claimed that he told Dr. Muiu about his plans for the money, while Dr. Muiu claimed that Muia did not tell him the purpose of the loan. Dr. Muiu claimed the loan was to be at no interest and was to be repaid in 3 weeks. Dr. Muiu presented the canceled check, on which he had written "PL" on the memorandum line. He testified that this indicated the money was a "personal loan."

The referee also addressed whether Muia failed to timely respond to inquiries from the Counsel for Discipline. The first letter was sent to Muia on February 16, 2005, and after he failed to respond, the Counsel for Discipline sent followup letters on March 16 and 21, and April 18. Muia did not respond to the complaint until June 3. The referee noted that this failure to respond occurred while Muia was already under suspension.

ANALYSIS

No. S-04-1375

[1] Following a hearing, the referee concluded that Muia's conduct had violated the following disciplinary rules:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 2-110 Withdrawal from Employment.
> (A) In general.
> . . . .
> (2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> . . . .
> (3) Neglect a legal matter entrusted to him or her.
> . . . .
> DR 9-102 Preserving Identity of Funds and Property of a Client.
> . . . .
> (B) A lawyer shall:
> . . . .
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession

> of the lawyer and render appropriate accounts to the client regarding them.
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Based on the fact that Muia's license was suspended for 4 months on November 7, 2003, and that Muia had not sought reinstatement of his license at any time after the 4-month period ended on March 8, 2004, the referee recommended that Muia receive no additional suspension. Neither party filed exceptions to the referee's report. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

[2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *Id.* At the hearing before the referee, a joint stipulation of fact was received into evidence. Because the facts were not in dispute, we need only determine the appropriate sanction. In order to do so, we must consider whether Muia complied with rule 16 regarding notification of clients upon suspension. We must also consider the handling of his trust account while he was suspended.

Muia stated at the hearing before the referee that he did not believe he could continue to negotiate with his clients' medical creditors after his license was suspended because he was no longer representing the clients. He stated that the medical creditors had placed attorney liens on the funds, which prevented Muia from paying the funds to his clients, and that he was concerned that if he gave the money to his clients and they did not pay the medical creditors, the creditors could attempt to collect the funds from Muia. He said he did not believe he had the power either to send the money to his clients or to pay the medical creditors. Muia said he did not understand that the notification provision of rule 16 applied to clients for whom he was holding funds to pay medical creditors.

At the time the incidents in this case arose, rule 16(A) provided that whenever a member was disbarred or suspended from the practice of law, the member was required to:

> (1) Notify in writing all of the member's present clients of such fact, and
>
> (2) Assist each client in obtaining a member of the client's choice to complete all matters being handled by him or her, and
>
> (3) Notify in writing all members and nonresident attorneys involved in pending legal or other matters being handled by the member of his or her altered status, and
>
> (4) Return to the Clerk the member's Nebraska State Bar Association membership card.
>
> (5) Within thirty days from the date of said disbarment, suspension, or voluntary surrender, file an affidavit with the Court, stating full compliance with the requirements of this rule and . . . simultaneously submit evidence of full compliance.
>
> . . . .
>
> (7) The Clerk shall notify the Court, in writing, of the compliance or noncompliance of the Respondent with this Rule 16. Noncompliance shall be contempt of court.

Rule 16 was amended on November 10, 2004, to add a requirement that a disbarred or suspended member shall "[p]romptly refund all client funds and close all attorney trust accounts if the imposed sanction is greater than a 30-day suspension. A trust account may remain open if, after a reasonable search, the client or clients eligible to receive funds cannot be located . . . ." Neb. Ct. R. of Discipline 16(A)(3) (rev. 2004). We conclude that the treatment of trust account funds during an attorney's suspension has been addressed by the amendment of rule 16. Although this provision went into effect after the events in the present case, when Muia was suspended, the disciplinary rules provided that a lawyer who withdrew from employment was to give due notice to the client and deliver all papers and property to which the client was entitled. See DR 2-110(A)(2).

The referee found by clear and convincing evidence that Muia had violated DR 2-110(A)(2) (notice requirement) and DR 9-102(B)(3) and (4) (which requires recordkeeping and

payment of funds to clients). Because no exceptions were filed to the referee's report, we consider the referee's finding final and conclusive. The record supports a finding that Muia did not promptly notify all of his clients of his suspension or promptly pay to them the funds he retained in his trust account.

No. S-05-1115

In this case, the referee found by clear and convincing evidence that Muia had violated the following disciplinary rules:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 5-104 Limiting Business Relations with a Client.
>
> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The referee found that Muia failed to timely and adequately respond to inquiries by the Counsel for Discipline and that Muia failed to fully and adequately advise Dr. Muiu in regard to the rules and considerations when a lawyer and his client go into business together. The referee found it impossible to determine from the evidence who was correct concerning the arrangement between Muia and Dr. Muiu, but the referee was persuaded that Muia did not advise Dr. Muiu properly and sufficiently as to the requirements under DR 5-104, addressing when a lawyer enters into a business relationship with a client. The record supports by clear and convincing evidence the finding of the referee that Muia violated DR 1-102(A)(1), (5), and (6) and DR 5-104(A).

APPROPRIATE SANCTION

On February 10, 2006, Muia filed a motion to consolidate the two attorney discipline cases. The motion was sustained on

February 15, and this court ordered that case No. S-05-1115 be submitted without oral argument. The Counsel for Discipline filed a "Motion for Judgment" on February 28. On March 1, Muia entered a consent to the motion for judgment. We must now determine the appropriate sanction for Muia's actions.

[3,4] To determine whether and to what extent discipline should be imposed in a lawyer disciplinary proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case. *Id.*

At issue here is whether Muia should receive credit for the additional time he has, in effect, served on suspension voluntarily. He was initially suspended for 4 months beginning November 7, 2003, and could have sought reinstatement on March 8, 2004. At that time, the charges in case No. S-04-1375 were being investigated, and he did not seek reinstatement. As of March 24, 2006, he will have been suspended for a period of 28 months.

This court has previously entered orders of suspension that were retroactive to the date of a previously ordered suspension. In *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004), the attorney was temporarily suspended on December 30, 2002. After a hearing on the formal charges, the referee recommended suspension for 1 year, with credit given for the period of his " 'voluntary temporary suspension.' " *Id.* at 880, 678 N.W.2d at 109. This court noted that when the opinion was filed on April 23, 2004, the attorney had been suspended for a period of more than 15 months. We ordered the attorney suspended retroactively to December 30, 2002, with no possibility of readmission prior to December 30, 2004.

We also ordered a retroactive suspension in *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004). The attorney was temporarily suspended on January 18,

2001. Amended formal charges were filed on January 29, 2002, which charges formed the basis of the second case. In an opinion filed on May 14, 2004, this court ordered that the attorney be suspended for a period of 40 months retroactive to the date of his temporary suspension on January 18, 2001. Thus, he was eligible for reinstatement almost immediately upon the filing of the opinion in the second case. See, also, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000) (attorney temporarily suspended on September 15, 1999; on December 8, 2000, suspended for indefinite period retroactive to date of temporary suspension, with no possibility of reinstatement prior to September 15, 2001); *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999) (attorney temporarily suspended May 29, 1998; on May 21, 1999, suspended for indefinite period retroactive to date of temporary suspension, with no possibility of reinstatement prior to May 29, 2000).

However, we have distinguished cases in which the attorney voluntarily ceased the practice of law prior to the filing of formal charges. In *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002), the referee recommended that the attorney be suspended retroactively to the date he voluntarily ceased practicing law. This court noted that the case was distinguishable from *Jensen* and *Aupperle* because in those cases, the court had temporarily suspended the licenses to practice law during the pendency of the disciplinary proceedings. In *Apker*, no temporary suspension had been requested or entered by the court. We stated:

> To make a suspension from the practice of law retroactive under these circumstances would be to allow the respondent to choose the time and circumstances of his own suspension and would not serve the purposes of attorney discipline. . . . While we do not find that a retroactive suspension is appropriate where a temporary suspension has not been ordered by this court, we nonetheless consider Apker's voluntary cessation of the practice of law as a mitigating factor in determining what sanction should be imposed.

Id. at 750, 642 N.W.2d at 170.

The case at bar is slightly different from previous disciplinary cases. Muia was temporarily suspended from the practice of law for 4 months in a previous action. See *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003). He chose not to seek reinstatement because the events in case No. S-04-1375 were under investigation at the time he could have sought reinstatement. Thus, it is not a case in which the temporary suspension was ordered while the investigation proceeded, as in *Wintroub* and *Monjarez*, among others. Nor is it precisely like *Apker*, in which the attorney voluntarily ceased practicing law prior to the filing of formal charges. We believe it is appropriate to consider Muia's voluntary continuation of his suspension as a mitigating factor in determining his sanction.

In case No. S-04-1375, Muia was found to have failed to notify his clients of his suspension from the practice of law as required by rule 16. We have held that failure to comply with rule 16 "places one in contempt of this court and constitutes an aggravating circumstance." *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 989, 568 N.W.2d 214, 216 (1997). See, also, *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997). However, the Counsel for Discipline did not file charges against Muia asserting that he violated rule 16.

The referee also found in case No. S-04-1375 that Muia had violated the disciplinary rules related to withdrawal from employment, neglecting a legal matter, and maintaining records of funds and delivering such funds or other property to the client. The facts, as stipulated, showed that Muia failed to timely pay settlement proceeds to Reed and his medical creditors, failed to inform Reed that Muia was under suspension, failed to notify other clients that he was under suspension or to refund money in his trust account to them, and failed to notify Sutherland of the replacement attorney or of the correct court date for her case. In case No. S-05-1115, the referee found that Muia had violated the disciplinary rules related to limiting business relations with a client and that he failed to timely and adequately respond to inquiries by the Counsel for Discipline. The evidence showed that Muia did not fully and adequately advise

Dr. Muiu concerning the necessary procedures to follow when a lawyer and his client go into business together.

The factors to be considered in determining a sanction include the nature of the offense. As the referee noted, Muia's failure to properly advise Dr. Muiu "continues a thread that goes through all of . . . Muia's disciplinary matters - namely, his botched relations with his clients and his failure to do what is proper in regard to client relations." In case No. S-04-1375, Muia neglected clients and failed to follow through in negotiating settlements for them. He failed to notify them of his suspension, and he failed to take any action related to the client funds in his trust account. Our cases show a wide range of sanctions for similar violations. In *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004), the attorney was suspended for 90 days after being found to have violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 9-102(B)(4) by neglecting a client's case and failing to turn over a client's file. However, in *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003), the attorney was disbarred after evidence was presented that the attorney failed to timely return a retainer, neglected a case, and failed to maintain records of client funds.

Another factor we may consider is the attitude of the offender generally. In case No. S-04-1375, Muia apparently was cooperative in working with the Counsel for Discipline. However, his testimony at the hearing indicates that he was not willing to accept full responsibility for failing to return funds to his clients during his suspension. Muia stated that he asked his attorney for advice about the matter and that the attorney recommended Muia wait before taking any action. Muia claimed that he did not know how to handle the funds while he was on suspension. In case No. S-05-1115, Muia failed to timely respond to letters from the Counsel for Discipline.

[5] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004). Rule 4(B) provides that this

court may, in its discretion, impose one or more of these disciplinary sanctions.

We conclude that the referee's reports support a finding that Muia should be suspended from the practice of law for a certain period of time. Muia's license was suspended for 4 months beginning November 7, 2003. See *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003). However, he did not seek reinstatement of his license after the expiration of this 4-month period. In case No. S-04-1375, the referee recommended a term of suspension from the practice of law beginning March 8, 2004 (the date Muia could have requested reinstatement), and concluding upon the filing of this opinion. In case No. S-05-1115, the referee again recommended that Muia be placed on suspension, followed by a term of probation with monitoring by another licensed Nebraska attorney for not less than 2 years following reinstatement of Muia's license. We agree with these recommendations. In addition, to protect the public, we order that Muia receive additional assistance in running a law practice.

In *State ex rel. Counsel for Dis. v. Waggoner*, 267 Neb. 583, 675 N.W.2d 686 (2004), the respondent was publicly reprimanded after it was determined that she had unduly delayed completion of certain legal matters for two clients and had failed to deposit into her attorney trust account a retainer paid to her by a third client. In addition, we entered an order placing the respondent on probation with monitoring for 18 months. In a second matter, additional charges were filed concerning events that occurred during the same timeframe and before discipline had been imposed. *State ex rel. Counsel for Dis. v. Waggoner*, 268 Neb. 895, 689 N.W.2d 316 (2004). We entered an order continuing the probationary period with monitoring for an additional 12 months.

In case No. S-04-1375, the parties agreed at oral argument that Muia would benefit from the assistance of a monitor to help him learn techniques to operate and organize a law practice. In addition to the suspension Muia has served during the pendency of this matter, we find that he should be subject to probation with monitoring for a period of at least 24 months, subject to the following terms:

The probation shall include the monitoring of Muia by a lawyer that is agreed upon by the parties. Before Muia resumes the practice of law, the monitor shall be appointed as per agreement by the parties. The monitor shall not be compensated for his or her monitoring duties; however, the monitor shall be reimbursed by Muia for actual expenses incurred.

Each month during the probationary period, Muia shall provide the monitor with a list of all cases for which Muia is then responsible. Muia shall personally meet with the monitor each month to discuss the list of cases. The monitor shall also assist Muia in developing and implementing appropriate office procedures.

The names of Muia's clients shall be kept confidential between Muia and the monitor. The list of cases shall include the following for each case:

1. Name of client and date attorney-client relationship began.
2. General type of case (e.g., divorce, adoption, probate, contract, real estate, civil litigation, criminal).
3. Date of last contact with client.
4. Last type and date of work completed on file (e.g., pleading, correspondence, document preparation, discovery, court hearing).
5. Next type of work to be done on case and date on which work should be completed.
6. Any applicable statute of limitations and its date.

The monitor shall have the right to contact Muia with any questions regarding the list. If at any time the monitor believes Muia has violated a disciplinary rule or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. At the conclusion of the term of probation, the monitor shall notify this court whether Muia has successfully completed the probationary period. If Muia successfully completes the probation, it shall be terminated.

CONCLUSION

Based on the recommendation of the Counsel for Discipline, the reports of the referee, and our independent review of the record, we find by clear and convincing evidence that Muia has violated DR 1-102(A)(1), (5), and (6); DR 2-110(A)(2);

DR 5-104(A); DR 6-101(A)(3); DR 9-102(B)(3) and (4); disciplinary rule 9(E); and his oath as an attorney. Muia should be and hereby is suspended from the practice of law in the State of Nebraska retroactive to March 8, 2004. Upon the appointment of a monitor as required above and upon notice to the court of such appointment, Muia may resume the practice of law in the State of Nebraska. It is further ordered that Muia be subject to probation with monitoring as outlined above for a period of at least 24 months and that Muia shall successfully comply with the terms of the probation. Muia is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

WRIGHT, J., participating on briefs.

MCCORMACK, J., not participating.

PERRY LUMBER COMPANY, INC., APPELLANT,
v. DURABLE SERVICES, INC., APPELLEE.
710 N.W.2d 854

Filed March 24, 2006. No. S-05-005.

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 requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether testimony is admissible as expert testimony: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
4. **Expert Witnesses.** In determining whether a witness is qualified to testify as an expert, the court must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education.

5. **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.
6. **Trial: Juries: Expert Witnesses.** Determining the weight to be given expert testimony is uniquely within the province of the fact finder, and the jury, as the trier of fact, is entitled to determine the weight and credibility to be given to witnesses' testimony.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

Jeffrey H. Jacobsen and William T. Wright, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Perry Lumber Company, Inc. (Perry), appeals from an order of the district court for Phelps County entering judgment based on a jury verdict in favor of the defendant, Durable Services, Inc. (Durable). Perry brought suit against Durable claiming that Durable was responsible for a fire that damaged facilities owned by Perry. On appeal, Perry asserts that the district court erred in connection with certain rulings with respect to expert testimony presented by both parties regarding the cause of the fire. We conclude that the district court erred in failing to admit the testimony offered by Perry's witness as expert testimony and in limiting the weight the jury could give to such testimony. Such error was prejudicial to Perry and constituted reversible error. We therefore reverse the judgment of the district court, and we remand the cause for a new trial.

STATEMENT OF FACTS

Perry owned and operated a lumberyard and retail sales store in Holdrege, Nebraska. Perry's facilities were remodeled in the early 1990's. As part of the remodeling, Durable designed and installed improvements to the heating and air-conditioning units. Durable's work included installing several duct heaters.

On January 21, 1999, Perry's facilities were damaged by a fire. Perry filed the present action against Durable, claiming that the fire was caused by Durable's improper construction and installation of the duct heaters. Perry asserted theories of recovery based upon negligence, breach of implied warranty, and breach of contract. Perry sought damages of approximately $1.3 million. The action went to trial, and judgment was entered based on a jury verdict in favor of Perry in the amount of $960,840. Durable appealed to this court. We concluded that the trial court had committed reversible error by ruling that Durable's expert could not testify concerning the results of his test which Perry had previously placed in evidence through the testimony of its own expert. We reversed the judgment of the district court and remanded the cause for a new trial. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003).

On remand, prior to trial, Perry filed a motion in limine seeking an order excluding any opinion evidence of Durable's expert, William Buxton, regarding the origin and cause of the fire and any opinion evidence of Buxton to the effect that no expert could determine the origin or cause of the fire. The court overruled Perry's motion in limine and other motions in limine by each party with regard to the anticipated testimonies of other experts. The court stated in its order that

> after reviewing the qualifications of the experts, and assuming proper foundation is laid at trial, the objections go primarily to the weight the jury should give the opinions rather than to their admissibility 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).

The court reserved ruling on admissibility until foundation had been provided at trial.

The second trial was held November 29 through December 3, 2004. Perry presented the testimony of various witnesses, including James Wagner, who was chief of the Holdrege Volunteer Fire Department at the time of trial and was acting chief at the time of the fire at issue in this case. Wagner's duties as fire chief included investigating the origin and cause of fires. Wagner had over 30 years' experience investigating fires. Wagner testified regarding

his education and training in fire investigation which included approximately 40 classes offered by the State of Nebraska and by other entities. In those classes, Wagner had studied, inter alia, the National Fire Protection Association's publication No. 921 (NFPA 921), which provides guidelines for a scientific method of fire investigation.

Wagner testified that he was on the scene of the fire on January 21, 1999. After taking part in fighting the fire, Wagner investigated the fire. Wagner testified without objection that in his opinion, the origin of the fire was above the south office and that a duct heater that was in that area had suffered more damage than duct heaters in other areas. Wagner also testified that he had investigated to determine the cause of the fire. When Wagner was asked his opinion regarding the cause of the fire, Durable objected on the basis that although Wagner was qualified to testify as an expert regarding origin, he was not qualified to testify as an expert regarding cause.

After argument and further foundation testimony, the court ruled:

> Okay. I'm going to rule [Wagner] can answer the question based on the following: Even if he does not qualify as an expert to provide scientific knowledge, he would qualify under Rule 701. Even if he's not an expert, his testimony in the form of opinions is limited to those opinions that are — which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact at issue.
>
> So, I'm not necessarily, ladies and gentlemen of the jury, finding he is an expert, but he can testify based on his observations; and that's the weight you give this testimony. Objection overruled. The witness may answer the question.

Although the court did not read or summarize the text of "Rule 701" to the jury, we note that Nebraska Evidence Rule 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 1995). Following the court's ruling quoted above, Wagner testified that the fire was caused by some material that ignited inside the duct heater and that he had come to this conclusion by eliminating other ignition sources.

In addition to Wagner's testimony, Perry also presented testimony by Charles Hoffman, a deputy State Fire Marshal, and Lewis T. Strait, a fire investigator retained by Perry. Both Hoffman and Strait testified that they had investigated the fire pursuant to NFPA 921, and both testified that in their opinions, the origin of the fire was in the area above the south office. Hoffman testified that he could not give an opinion to a reasonable degree of certainty as to the cause of the fire, but he testified that possible ignition sources included elements found in the area of the point of origin. Strait testified that in his opinion, the cause of the fire was the buildup of material in the duct heater above the south office and that the material acted as fuel for the fire and was ignited by the coils of the duct heater.

In its defense, Durable presented, inter alia, the testimony of Buxton. Buxton was a fire investigator, and he testified regarding his training and experience in fire investigation. Buxton's training included sessions of various federal, state, and local training programs, and his experience included investigating between 3,500 and 4,000 fires over 30 years. Buxton also testified regarding his familiarity with NFPA 921 which he described as a "guide" and "an accepted practice for doing the origin and cause investigation of a fire." In discussing NFPA 921, Buxton stated that under its guidelines, if an investigator must assume evidence or information, then the investigator must conclude that the origin and cause of the fire are "undetermined."

Buxton had reviewed the testimony and reports of the experts who testified at the present trial and who had testified at the first trial in this case. Buxton testified that he considered the principles of NFPA 921 in reviewing such materials. When Durable asked Buxton whether he was able to form an opinion to a reasonable degree of certainty as to either the origin or the cause of the Perry fire, Perry objected on the basis of foundation and requested an opportunity to voir dire Buxton about his investigation. The court overruled Perry's objection and request to voir

dire and allowed Buxton to answer the question. Buxton testified that he "could not determine the origin of the fire because you would have to assume too many things." He also testified that in his opinion, the other experts who had testified regarding origin and cause of the fire had "assume[d] too many things . . . without having the evidence to back it up." Buxton then testified regarding specific assumptions that the other experts would have to have made. When Durable asked Buxton his opinion regarding whether any reasonable investigator following NFPA 921 would have been able to state to a reasonable degree of certainty an opinion as to the origin of the fire, Perry objected, and after argument outside the presence of the jury, the court sustained Perry's objection.

On cross-examination, Buxton acknowledged that he had not performed a site inspection or other procedures which were part of a fire investigation made pursuant to NFPA 921. He also testified that following an investigation pursuant to NFPA 921, an investigator can either make a determination as to the origin or cause or conclude that it is undetermined, but that an investigator must perform an investigation prior to making either conclusion. Following cross-examination, Perry moved the court to strike Buxton's testimony and his opinions on the basis that he had not performed a proper investigation pursuant to NFPA 921. The court denied Perry's motion to strike.

The case was submitted to the jury. The jury returned a unanimous verdict in favor of Durable, and, based on the verdict, the court entered judgment in Durable's favor. Perry appeals.

ASSIGNMENTS OF ERROR

Perry asserts, restated, that the district court erred in (1) failing to perform its gatekeeping function 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), with respect to the testimonies of Wagner and Buxton; (2) refusing to allow Wagner to give expert testimony regarding the cause of the fire and in instructing the jury that it must consider Wagner's testimony as lay testimony rather than as expert testimony; and (3) permitting Buxton to testify regarding the origin and cause of the fire.

STANDARD OF REVIEW

[1,2] 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. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

ANALYSIS

The Trial Court's Ruling Regarding Wagner's Testimony Was Reversible Error.

With regard to Wagner's testimony, Perry argues that the district court erred in failing to perform its gatekeeping function, refusing to allow Wagner to give expert testimony regarding the cause of the fire, and instructing the jury that it must consider Wagner's testimony as lay testimony rather than as expert testimony. We agree with Perry that on the record in this case, the court should have found Wagner to be an expert. Because the court failed to declare Wagner an expert and thereupon effectively directed the jury to circumscribe the weight to be accorded to Wagner's testimony, the ruling unfairly prejudiced Perry and constituted reversible error.

We note first that Perry does not appear to assert that Wagner's opinion relating to the origin and cause of the fire was completely excluded in this case. Instead, Perry's argument is that although Wagner's testimony was admitted, because of the court's comments to the jury, Wagner's testimony was effectively admitted only as lay testimony and the jury instructed to minimize its weight. We therefore consider Perry's claim surrounding the determination that Wagner's testimony was not admitted as expert testimony and the consequence of that determination relative to the fairness of the trial.

[3] Four preliminary questions must be answered in order to determine whether testimony is admissible as expert testimony: (1) whether the witness qualifies as an expert pursuant to rule 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4)

whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Realty Trust Group, supra.*

The court in the present case did not fully explain why it did not admit Wagner's testimony as expert testimony. However, because the court admitted the testimony as lay testimony, we can assume that the court found that the testimony was relevant, that it would assist the jury to understand the evidence or determine a controverted factual issue, and that its probative value was not substantially outweighed by the danger of unfair prejudice or other considerations. We would agree with these assessments. Looking at the context, it is apparent that the court found that Wagner did not qualify as an expert pursuant to rule 702. We disagree with this determination.

[4] We have stated that in determining whether a witness is qualified to testify as an expert, the court "must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education." *State v. Mason, ante* p. 16, 33, 709 N.W.2d 638, 653 (2006). In the present case, Wagner testified that he had over 30 years' experience investigating fires; that he had received education and training in fire investigation, which included approximately 40 classes offered by the State of Nebraska and by other entities; and that in those classes, he had studied, inter alia, fire investigation procedures pursuant to NFPA 921. Wagner's testimony also established that his investigation was based on NFPA 921, which he and other experts in this case recognized as an accepted approach to conducting fire investigations. We determine that the record reflects that Wagner had sufficient knowledge, skill, training, and experience to establish himself as an expert in fire investigation and was thus qualified to testify as an expert witness on issues regarding fire investigation. See, similarly, *Bayse v. Tri-County Feeds, Inc.*, 189 Neb. 458, 203 N.W.2d 171 (1973) (permitting fire chief to testify as expert regarding origin and cause of fire).

With respect to Perry's argument based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), we have stated: "If it is necessary for the

court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable." *Mason, ante* at 33-34, 709 N.W.2d at 653. With respect to the underlying reasoning and methodology, Wagner testified that he followed NFPA 921. We note that Wagner and the other experts in this case generally recognized NFPA 921 as setting forth procedures by which a fire investigation is conducted. In this regard, we further note that NFPA 921 has been accepted as a methodology in other cases. See, *Fireman's Fund Ins. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707 (W.D. Va. 2004); *Royal Ins. Co. of America v. Joseph Daniel Const.*, 208 F. Supp. 2d 423 (S.D.N.Y. 2002); *Travelers Property & Cas. Corp. v. General Elec.*, 150 F. Supp. 2d 360 (D. Conn. 2001). Durable does not appear to have challenged the scientific validity and reliability of the methodology set forth by NFPA 921, nor does anything in the record indicate that such methodology was the reason the court did not admit Wagner's testimony as expert testimony. We have recently observed that *Daubert* "'"does not require that courts reinvent the wheel each time that evidence is adduced."'" *Mason, ante* at 37, 709 N.W.2d at 656 (quoting *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001)). Based on the foregoing, a *Daubert* analysis of methodology was not necessary in this case and Perry's arguments to the contrary are unavailing. Instead of a *Daubert* issue, the issue before the court was whether Wagner was qualified as an expert in fire investigation. As noted above, the record demonstrates that Wagner was so qualified.

[5] Because Wagner's testimony was admissible as expert testimony, we conclude that the district court erred when it admitted Wagner's testimony only as lay witness opinion. The combination of this ruling and the court's comments to the jury relative to the admission of Wagner's testimony constituted reversible 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. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). Because

Wagner was allowed to give his opinion, Perry was not harmed in the sense that Wagner's testimony was completely excluded. However, when admitting Wagner's testimony, the court told the jury, "So, I'm not necessarily, ladies and gentlemen of the jury, finding he is an expert, but he can testify based on his observations; and that's the weight you give this testimony." By making this statement, the court limited the weight that the jury could give Wagner's testimony by stating that it should be given the weight of testimony based on personal observation but not the weight of expert testimony.

[6] We have stated that determining the weight to be given expert testimony is uniquely within the province of the fact finder, and the jury, as the trier of fact, is entitled to determine the weight and credibility to be given to witnesses' testimony. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999). In this case, Wagner was the first expert to arrive at and evaluate the scene of the fire. The jury, having heard Wagner's testimony regarding his qualifications and the techniques he used to form his opinions, was entitled to determine the weight and credibility it would give to Wagner's testimony. However, by its ruling in this case, the court effectively circumscribed the weight the jury could give Wagner's testimony, and such limitation unfairly prejudiced Perry. Inasmuch as the cause of the fire was a critical issue of fact in this case, such error affected a substantial right of Perry and necessitates a new trial. We therefore conclude that it is necessary to reverse the judgment of the district court and to remand the cause for a new trial.

Buxton's Testimony Was Admissible.

Although our resolution of Perry's assignments of error with regard to Wagner's testimony disposes of the appeal, we will consider Perry's assignment of error with regard to Buxton's testimony, because issues related to Buxton's testimony are likely to recur on remand for a new trial. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

Perry asserts that the court erred in permitting Buxton to testify regarding the cause of the fire after Buxton acknowledged

that he had not completed a proper investigation. Specifically, Perry argues on appeal that Buxton testified that the cause of the fire was "undetermined," which is a technical conclusion that one can come to only after having completed a proper investigation pursuant to NFPA 921. We find no merit to Perry's arguments with regard to Buxton's testimony.

Contrary to Perry's characterization of Buxton's testimony, our review of the record indicates that Buxton testified that he was not able to give an opinion as to cause. Buxton did not testify that he came to the technical conclusion that the cause was "undetermined." Buxton did testify that he had reviewed the other experts' testimony and that in his opinion, such experts did not have adequate information to form their opinions. Further, the court did not allow Buxton to answer Durable's question of whether he thought any investigator could have determined cause.

The thrust of Buxton's testimony therefore was not to give an opinion as to cause but to critique the investigations conducted and the opinions formed by Perry's experts. Testimony critiquing the procedures and opinions of another expert is an acceptable form of expert testimony. See *Lincoln Tel. & Tel. Co. v. County Board of Equalization*, 209 Neb. 465, 308 N.W.2d 515 (1981). Under the standards set forth above with regard to determining the existence of expert testimony, we determine that the record reflects that Buxton had sufficient knowledge, skill, training, and experience to establish himself as an expert in fire investigation and that Buxton was qualified to testify as an expert witness on issues regarding fire investigation. See *State v. Mason, ante* p. 16, 709 N.W.2d 638 (2006). Because Buxton was qualified to testify as an expert in fire investigation, he was qualified to critique the investigations conducted and the opinions offered by other witnesses in this case. We therefore conclude that the district court did not abuse its discretion in admitting Buxton's expert testimony, and Perry's assignment of error relative to Buxton's testimony is without merit.

CONCLUSION

We conclude that the district court did not err in admitting Buxton's expert testimony. However, we conclude that the court

did err in failing to find that Wagner's testimony was admissible as expert testimony and by effectively directing the jury that it should not give Wagner's testimony the weight it would give to expert testimony. Such error unfairly prejudiced Perry and constitutes reversible error. We therefore reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
JAMES A. DUNLAP, APPELLEE.
710 N.W.2d 873

Filed March 24, 2006. No. S-05-578.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ___: ___. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Final Orders: Appeal and Error.** The State's right to appeal in criminal cases is limited by Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), which provides that the State may appeal only after a final order has been filed in the case.
4. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
5. **Judgments: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.
6. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Stuart J. Dornan, Douglas County Attorney, Jennifer Meckna, and Kevin J. Edwards, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Stephen P. Kraft for appellee.

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

WRIGHT, J.

NATURE OF CASE

The State appeals from a district court order which disqualified the Douglas County Attorney's office from prosecuting James A. Dunlap due to an alleged conflict of interest involving one of the deputy county attorneys. See Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004) (specifying procedure by which prosecuting attorneys may appeal trial court rulings).

SCOPE OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

FACTS

Dunlap was charged by information on December 21, 2004, with attempted burglary and possession of burglar tools. The State filed an amended information on January 25, 2005, in order to deem Dunlap a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995). The State alleged that Dunlap had been convicted of two previous felonies. Based on the addition of the habitual criminal charge, Dunlap moved the district court to disqualify the entire Douglas County Attorney's office and to appoint a special prosecutor.

At a hearing on his disqualification motion, Dunlap asserted that Thomas McKenney, a deputy county attorney, had represented Dunlap on a prior felony conviction. Dunlap argued that because the State was charging him as a habitual criminal, the prior attorney-client relationship between Dunlap and McKenney created a conflict of interest for the county attorney's office.

The State asserted that McKenney did not represent Dunlap in the prior felony convictions set forth in the amended information. The State further argued that if the court found that a conflict of interest existed, the conflict should not be imputed to the entire county attorney's office.

The district court took judicial notice that Dunlap was being prosecuted as a habitual criminal and, despite the State's argument to the contrary, that one of the predicate prior convictions involved a case in which Dunlap was represented by a current

deputy county attorney. In reaching its decision to disqualify the county attorney's office, the court stated:

> The problem isn't that [Dunlap] was represented by a lawyer on a prior occasion, who is now in the prosecutor's office, the same office that is prosecuting the pending information, the problem is that with the charge involving an allegation that [Dunlap is] an habitual criminal . . . McKenney is essentially involved on both sides of the case.

The court found persuasive Nebraska civil cases in which entire law firms were disqualified when an attorney or employee experienced a conflict of interest. On March 11, 2005, the district court disqualified the Douglas County Attorney's office and appointed a special counsel to prosecute Dunlap.

The State timely applied to appeal the district court's order under § 29-2315.01.

ASSIGNMENT OF ERROR

The State's assignments of error can be summarized as follows: The district court erred in disqualifying the Douglas County Attorney's office.

ANALYSIS

Section 29-2315.01 grants to the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). The statute provides in pertinent part:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court. Such application shall be presented to the trial court within twenty days *after the final order is entered in the cause*, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall

> sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall then present such application to the appellate court within thirty days from the date of the final order.

(Emphasis supplied.) § 29-2315.01.

[2] As a preliminary matter, we must determine whether this court has jurisdiction over the present 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. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

[3] The State's right to appeal in criminal cases is limited by § 29-2315.01, which provides that the State may appeal only after a final order has been filed in the case. *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977). Thus, to determine whether we have jurisdiction over this appeal, we confront the following questions: Is an order to disqualify an entire county attorney's office due to a conflict of interest a final order sufficient to create appellate jurisdiction? If not, is an exception to the final order rule applicable?

[4,5] A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. See *State v. Wieczorek, supra*. The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment. *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965).

In *Wieczorek*, after both parties had rested in a jury trial, the trial court granted a directed verdict in favor of the defendant on three of the four counts charged against him. Between the date of the directed verdict and the date of sentencing, the State appealed the directed verdict. This court dismissed the appeal for lack of jurisdiction because the State's appeal was premature, having been filed "during a time in which further action, i.e., sentencing, was necessary to completely dispose of the cause pending in the trial court." *Id.* at 710, 565 N.W.2d at 484.

In the instant case, Dunlap's motion to disqualify the county attorney's office was made and ruled on prior to trial and prior to any conviction or sentencing. Further action was required before the cause could be terminated. Accordingly, the order to disqualify the county attorney's office was not a final, appealable order.

Having concluded that the disqualification order was not a final order, we must determine whether an exception to the final order rule applies that would give jurisdiction to this court to consider the State's appeal. In *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), we concluded that an order disqualifying counsel in a civil case was not a final order. Nevertheless, we adopted the following narrow exception to the final order requirement: If the appeal from an order of disqualification of counsel involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Id.* This court has not yet entertained whether the *Richardson* exception should apply in a criminal case in which a county attorney's office has been disqualified.

We need not decide whether this appeal involves issues collateral to the basic controversy because the second requirement of the *Richardson* exception is not met in this case. The State's interest in prosecuting this criminal matter is protected notwithstanding that the order disqualifying the county attorney's office is not immediately appealable. The State's interest in prosecuting Dunlap was protected by the appointment of a special counsel to prosecute Dunlap on behalf of the State. As a result, we decline to apply the *Richardson* exception to the final order rule in this case and conclude that interlocutory review of the disqualification order is not appropriate.

CONCLUSION

[6] The district court's order disqualifying the county attorney's office was not a final order, and an exception to the final order rule does not apply in this case. Because the State did not appeal from a final order as required by § 29-2315.01, we lack jurisdiction over this appeal. When an appellate court is without

jurisdiction to act, the appeal must be dismissed. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). Therefore, we dismiss this appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ANTHONY C. COE, RESPONDENT.

710 N.W.2d 863

Filed March 24, 2006. No. S-05-744.

1. **Disciplinary Proceedings.** Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case.
2. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
3. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors.
5. ____. A pattern of attorney neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court (the Counsel) brought this action against attorney Anthony C.

Coe. We sustained the Counsel's motion for judgment on the pleadings and reserved the issue of the appropriate sanction. We now order that Coe be disbarred.

BACKGROUND

Formal Charges

Coe was admitted to the practice of law in 1993. In June 2005, the Counsel filed formal charges alleging five counts of misconduct.

Count 1 alleges that in 2004, Coe was retained to prosecute a claim before the Nebraska Equal Opportunity Commission and failed to serve the defendant with summons. An order to show cause was issued, and Coe did not respond. The action was dismissed with prejudice and is believed to be time barred.

Count 2 alleges that in 2004, Coe failed to inform a client of hearings and failed to submit discovery responses in an action to recover lost wages. After a motion to compel was filed, Coe did not attend the hearing on the motion or advise his client of the hearing. The motion was granted, and Coe still did not submit the responses. He next failed to appear at a hearing on a motion for sanctions. The motion for sanctions was granted, and the case was dismissed, with an order requiring Coe's client to pay attorney fees. The client was never informed and learned of the status of his case from the Counsel.

Count 3 alleges that in 2004, Coe failed to serve a defendant with summons in another action before the Nebraska Equal Opportunity Commission and failed to respond to an order to show cause. The case was dismissed; the client did not learn of the dismissal until he retained a new attorney. The client requested that his files be returned to him, and as of the date of the filing of the formal charges, Coe had not returned the files.

Count 4 alleges that in 2003, Coe was paid for a consultation concerning a dispute with the Nebraska Department of Labor. The client later retained Coe to appeal a disqualification from receiving unemployment compensation. Coe assured the client the appeal would be filed on time but never filed it. After the appeal time had run, Coe discussed with the client the possibility of filing a wrongful termination action and agreed to do the work pro bono because he had missed the appeal deadline. Coe

sent a letter to the employer but took no further action on the case. The client did not learn until 2004 that Coe had left the private law practice.

Count 5 alleged that in 2003, Coe began representing a client on a pro bono basis in an employment action. Part of the case was dismissed, but certain parts were allowed to proceed. Coe did not take further action on the case after February 2004 and failed to inform the client of that fact.

Previous Application for Temporary Suspension

Court files show that in January 2005, the Counsel filed an application for temporary suspension. An affidavit in support of the application stated that Coe had failed to respond to grievances. After a member of the Counsel left a business card at Coe's home in November 2004, Coe responded that he was suffering from psychological stress, had been hospitalized twice, and was probably going to leave the practice of law. He stated that he would file responses to the grievances as soon as possible. The possibility of disability status was also discussed.

A month later, Coe called and stated that he was receiving treatment and that he had obtained employment with a private agency that required he keep his license to practice law. He stated that he would respond to the grievances. As of January 2005, Coe had not responded. The application for temporary suspension was withdrawn in February because Coe responded to the grievances and appeared to be cooperating in the investigations. See *State ex rel. Counsel for Dis. v. Coe*, 269 Neb. xxii (No. S-05-061, Feb. 9, 2005).

The formal charges were filed in June 2005, and alleged violations of Canon 1, DR 1-102; Canon 2, DR 2-110; Canon 6, DR 6-101; and Canon 7, DR 7-101, of the Code of Professional Responsibility. Coe entered a voluntary appearance but did not respond to the formal charges. We granted the Counsel's motion for judgment on the pleading. Coe has not filed a brief to this court.

ANALYSIS

Having granted judgment on the pleadings, the sole issue before us is the appropriate discipline. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by

this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

[1,2] Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case. *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005). See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). In determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

[3,4] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. Id. In addition, the determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors. *Id.*

[5] Here, Coe violated several disciplinary rules and his oath of office as an attorney, to his clients' detriment. Although the record contains some evidence concerning mental illness, Coe has ultimately failed to respond to the formal charges. We have previously disbarred attorneys who, like Coe, neglected their clients' cases and failed to cooperate with the Counsel during the disciplinary proceedings. See, e.g., *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005). In particular, a pattern of neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public. See *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). The record shows that Coe is either unable or unwilling to respond to the charges and that through a pattern of neglect, he is not fit to practice law.

We have considered the undisputed allegations of the formal charges and the applicable law. Upon consideration, we find that

Coe should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

We order that Coe be disbarred from the practice of law in the State of Nebraska, effective immediately. Coe is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Coe is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

IN RE COMPLAINT AGAINST JACK B. LINDNER, COUNTY COURT JUDGE OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF NEBRASKA.

STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. JACK B. LINDNER, RESPONDENT.

710 N.W.2d 866

Filed March 24, 2006. No. S-35-050002.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the commission.
2. **Judges: Disciplinary Proceedings.** Pursuant to Neb. Rev. Stat. § 24-722(6) (Reissue 1995), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Original action. Judgment of public reprimand.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for relator.

James E. Gordon, of DeMars, Gordon, Olson & Zalewski, for respondent.

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

PER CURIAM.

BACKGROUND

This original action is before the court following a complaint filed on February 7, 2005, by the Nebraska Commission on Judicial Qualifications (Commission). The complaint charged the respondent, Jack B. Lindner, a county court judge for the Third Judicial District, with misconduct in violation of the Nebraska Code of Judicial Conduct; Neb. Const. art. V, § 30; and Neb. Rev. Stat. § 24-722(6) (Reissue 1995).

A hearing on the complaint was held on April 21, 2005, before the Honorable Gerald E. Moran, a district court judge who was appointed to serve as special master. The special master concluded that the allegations of the complaint were supported by clear and convincing evidence, that Lindner's conduct violated the Nebraska Code of Judicial Conduct, and that the conduct brought the judicial office into disrepute, as prohibited by § 24-722(6).

The Commission adopted the findings of the special master and found by clear and convincing evidence that Lindner had violated the Nebraska Code of Judicial Conduct. The Commission recommended a public reprimand. On August 3, 2005, Lindner and special counsel for the Commission stipulated that this court may accept the findings and recommendation of the Commission, and Lindner consented to an order of reprimand. On October 13, we entered an order directing the parties to brief whether the proposed disposition is just, proper, and consistent with prior dispositions involving similar conduct in violation of the Nebraska Code of Judicial Conduct.

FACTS

The complaint filed by the Commission alleged that during the processing of a misdemeanor criminal matter in Lancaster County Court on June 24, 2004, Lindner addressed the defendant with a "harsh and angry tone and demeanor." As the defendant was leaving the courtroom, Lindner made a derogatory remark in an apparent reference to the defendant or persons with him. The

complaint alleged that the statement was directed toward court personnel working in their official capacity. The complaint also asserted that Lindner's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute in violation of article V, § 30, and § 24-722(6).

The complaint alleged that the conduct violated the following provisions of the Nebraska Code of Judicial Conduct:

> CANON 1
> A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY
>
> A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code shall be construed and applied to further that objective.
>
> . . . .
>
> CANON 3
> A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY
>
> . . . .
>
> B. Adjudicative Responsibilities.
>
> . . . .
>
> 4. A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . .
>
> 5. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race [or] national origin . . . and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

In his answer, Lindner admitted that he was "stern and insistent in his intention" to continue the defendant's case over his objections. Lindner stated that he used this approach to maintain order, "not out of anger or hostility," and that the remark was

made to himself, although it was overheard by a witness because of the witness' proximity to the judge.

After a hearing, the special master determined that the two main issues to be decided were whether Lindner made the remark to court personnel working in their official capacity and whether the defendant had left the courtroom by the time the remark was made.

The special master reviewed and summarized the testimony offered at the hearing as follows: Paul A. Johnson, a former Lancaster County Court bailiff who was on duty in Lindner's courtroom at the time the remark was made, testified that the defendant required the assistance of an interpreter, although the defendant appeared to understand some English. When the defendant's case was called, he was told by Lindner that the case would be continued due to a lack of time. The defendant tried to explain that a continuance would impose a hardship on him because of his frequent travels to Europe. The special master found that Lindner "rather harshly informed" the defendant that he would be required to appear or would face arrest for failure to appear. The special master stated: "[Lindner's] tone may have been somewhat angry because he misunderstood the defendant in that he thought the defendant said his case could not be continued because he was an 'important businessman' both in the United States and in Europe. The defendant never made such a statement." The special master found that the defendant appeared frustrated by the continuance and Lindner's admonition.

According to the special master, the defendant and his interpreter walked away, apparently intending to leave the courtroom. Lindner then ordered the defendant to return to the bench and told him that he could not leave until Lindner excused him. The special master stated that Lindner appeared "rather harsh and angry." The defendant's paperwork was completed and handed to Johnson, who then handed it to the interpreter. The interpreter and the defendant turned to leave the courtroom.

The special master found that when the defendant was approximately 30 feet away from the bench, Lindner looked at Johnson and the deputy sheriff and stated: " 'Son of a bitch. Fucking Bosnian.' " Johnson testified that the statement was

made in a conversational tone of voice and that he feared the comment would be picked up and amplified by the courtroom sound system. The special master stated that neither the defendant nor the interpreter appeared to react to the comment, and they exited the courtroom. When the defendant went to the court clerk's window to be assigned a new trial date, he asked for a different judge. Upon learning of the defendant's request, Johnson reported Lindner's remark to the county court's presiding judge. Lindner subsequently recused himself from the defendant's case, and it was reassigned to the presiding judge.

The special master found that Johnson's recollection of the events was accurate and was corroborated by the transcript and a tape recording and that the remark was said in a normal tone of voice, not mumbled or muttered. The special master found that the remark was "obviously said to someone" and that Lindner looked directly at Johnson and at the deputy when he made the remark.

Johnson testified that he had not previously heard Lindner make a racist or discriminatory remark. The special master found that Lindner's only disagreement with Johnson's testimony was whether the remark was directed at or spoken to anyone. The special master found by clear and convincing evidence that Lindner made the offensive remark to court personnel working in their official capacity and that the defendant had not left the courtroom before the remark was made.

The special master found that the defendant did not hear the offensive remark when it was made. His request for a different judge appeared to be based on the exchange between Lindner and the defendant concerning continuation of his case. A letter from the defendant dated July 19, 2004, requesting a new judge referred only to the court proceeding itself and made no mention of any improper remark.

The special master found by clear and convincing evidence that the allegations contained in the complaint were true, and he concluded that Lindner's conduct violated Canons 1, 1A, 3, and 3B(4) and (5) of the Nebraska Code of Judicial Conduct and was conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of article V, § 30, and § 24-722(6).

The Commission considered the entire record before the special master and received into evidence an additional exhibit containing testimonial letters from members of the Nebraska State Bar Association who had practiced before Lindner. The Commission independently reviewed the proceedings before the special master and adopted his findings.

The Commission found by clear and convincing evidence that the comment violated Canons 1A and 3B(4) of the Nebraska Code of Judicial Conduct; article V, § 30; and § 24-722(6). The Commission concluded that the statement, on its face, manifested bias based on national origin and thus compelled a determination that Lindner had also violated Canon 3B(5). It found that the statement was not intended as a generalized ethnic slur, "but was made out of personal irritation and frustration."

The Commission noted that Lindner had served as a judge for 22 years and had not previously been disciplined. It was uncontroverted that Lindner had been "remorseful, apologetic and genuinely contrite during these proceedings, admitting from the outset that the statement was a mistake on his part." The Commission recommended that this court publicly reprimand Lindner.

STANDARD OF REVIEW

[1] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the Commission. *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002). See, also, Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1995); Neb. Comm. on Jud. Qual. R. of Proc. 18 (rev. 2001); *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001).

ANALYSIS

We must first determine whether the charges against Lindner are supported by clear and convincing evidence and whether the Nebraska Code of Judicial Conduct and § 24-722 have been violated. See *In re Complaint Against White, supra.*

There is no dispute that the statement was made. From our review of the record, we conclude that the allegations in the complaint were supported by clear and convincing evidence, that Lindner's conduct violated Canons 1A and 3B(4) and (5) of the Nebraska Code of Judicial Conduct, and that the conduct brought the judicial office into disrepute, as prohibited by § 24-722(6). Thus, the Commission was correct in adopting the findings of the special master and in finding by clear and convincing evidence that Lindner had violated the Nebraska Code of Judicial Conduct.

We next determine the appropriate sanction. In doing so, we consider previous Nebraska cases involving judicial misconduct.

In re Complaint Against Coady, No. S-35-920001 (Neb. Comm. on Jud. Qual. Apr. 1, 1992), was filed after Judge Orville L. Coady made racially derogatory remarks to a litigant appearing before him. The complaint alleged that the statements violated Canons 2A and 3A(3) of the Nebraska Code of Judicial Conduct and brought the judicial office into disrepute, as prohibited by § 24-722(6).

In recommending to this court that Judge Coady receive a 3-month suspension, the Commission noted that his statements were not justified by his frustration with the litigant before him. The Commission stated that the comments had "undermine[d] the perception of the impartiality of the judiciary" and "marred the image of a justice system blind to prejudice." This court suspended Judge Coady from the performance of any judicial duties for 1 month without pay. We also ordered Judge Coady to enroll in and successfully complete a course or seminar on sensitivity to racial and cultural bias.

In another case, Judge Stephen M. Swartz was publicly reprimanded by the Commission for shouting and behaving in a hostile, excessively angry, and demeaning manner toward a defendant during sentencing. See *In re Complaint Against Swartz*, No. S-35-000003 (Neb. Comm. on Jud. Qual. Sept. 8, 2000). The Commission found that the incident in question was not an isolated incident and that Judge Swartz' "extreme tone of voice, demeanor, and language . . . were representative of courtroom behavior at certain sentencings, for a period of years preceding 1999, when he routinely hollered and berated defendants well

beyond any bounds of acceptable decorum and judicial temperament." The reprimand noted that Judge Swartz' hostile courtroom behavior and disrespectful language led to the judge's reputation for having a hostile and unreasonable disposition during criminal proceedings. The Commission found mitigating circumstances in that Judge Swartz had not been subject to prior discipline, he had acknowledged the impropriety of his behavior, and he had taken affirmative steps to remedy and control his courtroom behavior.

Judge John E. Huber was reprimanded by the Commission for demonstrating impatience, rudeness, and inappropriate judicial demeanor. See *In re Complaint Against Huber*, No. S-35-050003 (Neb. Comm. on Jud. Qual. Aug. 11, 2005). His behavior caused one of the litigants to cry, and after the case had been resolved, Judge Huber berated the litigant for crying. He stated: " 'Stop it. Grow up. That doesn't make me feel bad for you in any way.' " The Commission found that Judge Huber had cooperated fully, taken steps to correct his conduct, demonstrated improvement in his disposition, and expressed remorse.

In discussing sanctions imposed in judicial misconduct cases, we have stated:

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned.

In re Complaint Against Kneifl, 217 Neb. 472, 485-86, 351 N.W.2d 693, 700 (1984).

[2] Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without

pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998). See, also, Neb. Const. art. V, § 30(1). Therefore, a clear violation of the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Jones, supra.*

The Commission adopted the findings and recommendation of the special master that the appropriate sanction for Lindner is a public reprimand. The Commission has suggested that Lindner's comment was made out of frustration and was not an expression of racial bias. Nonetheless, such an insensitive and inappropriate comment is not to be condoned or tolerated under any circumstance.

Lindner has asserted that he did not intend his remark to be overheard by anyone, and his comment was not made directly to the defendant. Lindner has acknowledged that the remark was insensitive and inappropriate, and he has offered apologies. Lindner has served on the bench for 22 years, and this is the first disciplinary action taken against him. Evidence was received that Lindner ordinarily treats individuals equally and demonstrates no bias from the bench. There was no evidence of a pattern of unacceptable behavior on his part.

CONCLUSION

It is this court's responsibility to dispense judicial discipline in a manner that preserves the integrity and independence of the judiciary and restores and reaffirms public confidence in the administration of justice. The sanction must serve to discourage others from engaging in similar conduct in the future. Discipline is imposed to assure the public that we will neither permit nor condone judicial misconduct.

In the case at bar, the Commission has recommended that Lindner be publicly reprimanded, and we adopt this recommendation.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

MATTHEW CURRAN AND EMILY CURRAN, HUSBAND AND WIFE, APPELLANTS, V. KERREY B. BUSER, APPELLEE.

711 N.W.2d 562

Filed March 31, 2006. No. S-04-1303.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
2. **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.
3. ____: ____. 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.
4. ____: ____. Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
5. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Statutes: Appeal and Error.** An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result.
8. **Health Care Providers: Negligence: Informed Consent: Proof: Proximate Cause.** Under Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 2004), the professional theory governs the standard of care and the evidence required to prove the standard of care, but causation is determined through a two-prong test: The first prong uses an objective standard to evaluate the plaintiff's decision to forgo the surgery, while the second requires proof that the lack of informed consent proximately caused the injury and damages.
9. **Physician and Patient: Informed Consent.** Under Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 2004), consent is informed when a doctor advises a patient of the risks in the same manner as doctors in similar localities and under similar circumstances ordinarily would.
10. **Health Care Providers: Negligence: Informed Consent: Proof: Proximate Cause.** In a medical negligence action, before a plaintiff may recover any damages sustained, the plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment if he or she were "properly informed" under Neb. Rev. Stat. § 44-2816 (Reissue 2004) and that his or her injuries were proximately caused by the lack of informed consent.
11. **Physician and Patient: Informed Consent.** A doctor's personal standard regarding information for a patient's consent is irrelevant.
12. **Health Care Providers: Informed Consent: Statutes.** Neb. Rev. Stat. § 44-2816 (Reissue 2004) does not distinguish between treatment risks and doctor-related risks; it asks only whether similarly situated doctors would ordinarily provide the information.

13. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Health Care Providers: Negligence.** Under Neb. Rev. Stat. § 44-2816 (Reissue 2004), a doctor's disciplinary history, like other doctor-related risks, is required only when mandated by the standard of care.
15. **Rules of Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 27-401 (Reissue 1995), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
16. **Rules of Evidence.** Under Neb. Rev. Stat. § 27-402 (Reissue 1995), evidence which is not relevant is not admissible.
17. ____. Under Neb. Rev. Stat. § 27-403 (Reissue 1995), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
18. **Witnesses: Impeachment.** Witnesses can only be impeached as to matters that are not collateral—matters that are independently provable.
19. ____: ____. Facts which would have been independently provable regardless of a contradiction are not collateral. It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen & Strigenz, P.C., for appellants.

Joseph S. Daly and Michael G. Monday, of Sodoro, Daly & Sodoro, P.C., for appellee.

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

CONNOLLY, J.

Appellants, Matthew Curran and Emily Curran, sued Matthew's surgeon, appellee, Kerrey B. Buser, for medical malpractice, because of complications arising after Buser removed Matthew's gallbladder. Before Matthew's surgery, the Department of Health and Human Services Regulation and Licensure disciplined Buser for "unprofessional conduct" and restricted his surgical privileges for 1 year. Nine days after the year had passed, Buser operated on Matthew. The Currans sued Buser, alleging both negligence and lack of informed consent. The Currans wanted to introduce evidence of Buser's disciplinary history. Buser filed a

motion in limine, prohibiting mention of his disciplinary issues, which the trial court granted. The jury found for Buser on the negligence issue, and the Currans appeal only the court's ruling on the motion in limine.

The Currans ask us to apply a different standard of care to informed consent cases involving a doctor's disciplinary history. Because the Legislature adopted the professional theory as governing the standard of care in all informed consent cases, we affirm the trial court's decision.

BACKGROUND

In February 2001, after suffering abdominal pains, Matthew sought assistance from general practitioner Gregory Kloch. After an ultrasound revealed abnormalities in Matthew's gallbladder, Kloch referred Matthew to Buser. On February 13, Buser diagnosed Matthew as having an inflamed gallbladder. Buser told Matthew he needed to remove the gallbladder as soon as possible, using a procedure called laparoscopic cholecystectomy. Later on that date, Buser performed the surgery.

After the surgery, Matthew experienced complications, and Buser performed another surgery on him 6 days later. Buser discovered that a suture from the earlier surgery had come loose, so he inserted a "T-tube." When Matthew complained of bile drainage at the site of the "T-tube," Kloch recommended that Matthew go to a hospital in Omaha, Nebraska, for further treatment. While there, Matthew had numerous corrective surgeries and experienced prolonged pain, fatigue, nausea, and depression, although these conditions have gradually improved.

After the surgery, the Currans sued Buser for negligence. During discovery, the Currans obtained photocopies of the Department of Health and Human Services Regulation and Licensure disciplinary order that restricted Buser's surgical privileges. The Currans alleged that Buser negligently performed the surgeries and failed to obtain informed consent.

Before trial, Buser moved in limine to prevent the Currans from mentioning the disciplinary action. Buser claimed that the disciplinary proceedings were irrelevant and that any probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

On the motion in limine, the court admitted the following evidence: The day of Matthew's first surgery, Buser sent a letter to Kloch, stating: "The patient is aware of the [State Board of Health] issue and declines referral to another surgeon." In Buser's deposition, he explained the disclosure as follows:

> A. You know, I don't know if I went into the details of the exact restrictions of [the disciplinary order]. What I more than likely told him was that I was the doctor that was accused of being a bad doctor in the newspapers and was sanctioned by the medical board.
>
> The other thing that I said was that if any of that bothers you or anything that you've read or heard, if you want to talk about it or if you want to go to another surgeon, that's fine, we'll be happy to arrange that.

Buser also testified in his deposition that he thought he told Matthew that the State Board of Health wanted to "pull" his license. Buser said that he believed his own standard of care required that he tell Matthew about the disciplinary action, but that he was not sure that the majority of surgeons feel obligated to do so. He said he explained to Matthew "the gist" of what he thought Matthew would want to know.

By contrast, the Currans, in their depositions, refute Buser's recollection, claiming that they learned of the disciplinary issues after the surgery and that Buser never indicated they could get a second opinion. The trial court sustained Buser's motion in limine.

At the beginning of the trial, the Currans made an offer of proof regarding Buser's disclosure of his disciplinary actions. In the offer of proof, the Currans sought to admit photocopies of disciplinary actions against Buser from both Minnesota and Nebraska. The Minnesota action restricted Buser's surgical practice, finding a "clustering of major laparoscopic complications," arising from "inappropriate" practices in the treatment of 13 different patients between 1992 and 1994. In the Nebraska disciplinary action, the chief medical officer recognized the Minnesota action and found clear and convincing evidence of "unprofessional," but not negligent, conduct in four new cases.

The court denied the offer of proof, citing *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004), as requiring expert

testimony about the standard of care in informed consent cases. The court stated that the Currans' evidence could still be admitted if an expert testified that the standard of care required disclosure of disciplinary proceedings. No such expert testified, and the jury never heard the disciplinary evidence. The jury returned a verdict for Buser on the negligence issue. The Currans appeal only the trial court's order sustaining Buser's motion in limine.

ASSIGNMENT OF ERROR

The Currans assign that the trial court erred by sustaining Buser's motion in limine, disallowing them to introduce evidence of Buser's disciplinary action and his failure to inform Matthew of that action.

STANDARD OF REVIEW

[1] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *In re Grand Jury of Lancaster Cty.*, 269 Neb. 436, 693 N.W.2d 285 (2005).

[2,3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. 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. See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

[4,5] Also, because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000).

ANALYSIS

The Currans do not contend that Matthew was not made aware of all the risks of the procedure. The thrust of the Currans' argument is that Buser operated on Matthew without informed consent because Buser failed to inform him of his disciplinary history. The Currans urge this court to apply the material risk theory to informed consent cases when the omitted information relates to the doctor's disciplinary history. They (1) argue that the statute embraces material risk principles; (2) in the alternative, ask us to carve out a special exception; and (3) contend that the trial court improperly excluded their evidence because it was relevant, not unduly prejudicial, and admissible for impeachment purposes.

Difference Between Professional Theory and Material Risk Theory.

Informed consent concerns a doctor's duty to inform his or her patient of the risks involved in treatment or surgery. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984). Although initially treated as a battery action, modern courts recognize it as a negligence action hinging on the standard of professional conduct. See *id.* Regarding the sufficiency of the information, we have stated:

> "Surgeons and other doctors are . . . required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment or surgical procedure. Such a disclosure should include the nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all. Thus, although the procedure be skillfully performed, the doctor may nevertheless be liable for an adverse consequence about which the patient was not adequately informed."

Eccleston v. Chait, 241 Neb. 961, 967, 492 N.W.2d 860, 864 (1992) (quoting Keeton et al., *supra*). When determining what information a patient needs to make an informed decision, jurisdictions have generally split between two different theories: the

professional theory and the material risk theory. We have explained the difference between the theories as follows:

> The "professional" theory holds that the duty is measured by the standard of the reasonable medical practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom. On the other hand, the "material risk" theory holds the duty to disclose is measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. Although under this theory expert medical testimony may be necessary to establish the undisclosed risk as a known danger of the procedure, expert testimony is not required to establish the physician's duty to disclose, and the fact finder can decide, without the aid of a medical expert, whether a reasonable person in the patient's position would have considered the risk significant in making his or her decision.

Smith v. Weaver, 225 Neb. 569, 573-74, 407 N.W.2d 174, 178 (1987).

Nebraska Legislature Codified Informed Consent Doctrine, Adopting Professional Theory to Govern Standard of Care.

The professional theory is firmly entrenched in Nebraska law; we have both statutory provisions and case law adopting the doctrine. First, Neb. Rev. Stat. § 44-2816 (Reissue 2004) defines informed consent:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

Moreover, Neb. Rev. Stat. § 44-2820 (Reissue 2004) provides the burden of proof in an action based on failure to obtain informed consent. It states:

> Before the plaintiff may recover any damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

This court has routinely determined that "notwithstanding voluminous criticism of the professional theory of informed consent, [we are] bound by § 44-2816 as a statutory standard and prescription for an informed consent." *Eccleston v. Chait*, 241 Neb. 961, 968, 492 N.W.2d 860, 864 (1992). See, also, *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), *disapproved on other grounds, Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987); *Smith v. Weaver, supra.*

Nonetheless, the Currans point to the dissent in *Smith v. Weaver, supra*, which argued that § 44-2820 committed this state to the material risk theory. In doing so, the Currans argue that the statutory language does not support our adherence to the professional theory, but embraces material risk principles.

[6,7] But statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. See *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). And an appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). The approach urged here would lead to an absurd result insofar as the Currans argue that § 44-2816 adopts the professional theory, while § 44-2820 adopts the material risk theory. If this were the case, we would have two mutually exclusive standards governing a doctor's duty to inform his or her patient.

[8] Instead, we read §§ 44-2816 and 44-2820 together. Doing so demonstrates that the Nebraska Legislature adopted the professional theory for its standard of care and the evidence

required to prove the standard of care and that it adopted a two-prong test for causation. The first prong uses an objective standard to evaluate the plaintiff's decision to forgo the surgery, while the second requires proof that the lack of informed consent proximately caused the injury and damages. Although our statutory framework is somewhat unique, we note that other professional theory jurisdictions also use objective standards for causation. See, e.g., *Funke v. Fieldman*, 212 Kan. 524, 512 P.2d 539 (1973).

[9,10] Under §§ 44-2816 and 44-2820, consent is informed when a doctor advises a patient of the risks in the same manner as doctors in similar localities and under similar circumstances ordinarily would. However, before a plaintiff may recover any damages sustained, the plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment if he or she were "properly informed" and that his or her injuries were proximately caused by the lack of informed consent. Although § 44-2820 does not define proper information, when read in conjunction with § 44-2816, a patient must be properly informed under § 44-2816.

Under this framework, the Currans must first prove by expert testimony that doctors in similar locations and situations would ordinarily disclose their disciplinary history. After establishing the standard of care, the Currans must next prove that Buser deviated from that standard. To prove causation, the Currans must prove both that a reasonable person in their situation would have refused the surgery if Buser had properly informed them under the standard and that the lack of information proximately caused the injury sustained and damages alleged. The statute's requirements are cumulative; thus, in order to proceed to the next step, the plaintiff must prove the one before it.

Here, Buser was the only doctor to testify about the standard of care in the locality. He said that although it was his personal practice to inform his patients of the recent disciplinary action, "I don't know if the majority feel that they are obligated to do that." Although Buser's testimony does not decisively state that most doctors would not feel obligated to disclose their disciplinary

history, it is the plaintiff's burden to prove the standard of care. Thus, the Currans failed to prove that the standard of care required Buser to disclose his disciplinary history.

Under Professional Theory, Doctor's Personal Standard of Care Does Not Establish Standard of Care.

[11] Nonetheless, the Currans point out that Buser said his personal standard of care required him to disclose his disciplinary history. They ask us to hold Buser to his own standard of care. But as we said in *Eccleston v. Chait*, 241 Neb. 961, 969, 492 N.W.2d 860, 865 (1992), a doctor's "personal standard regarding information for a patient's consent is irrelevant." Under the professional theory, the standard of care in medical malpractice cases for informed consent is not determined by the doctor's personal or customary routine, but on the information doctors ordinarily supply to patients in similar circumstances and locations. Here, Buser was the only doctor to testify about the standard of care for informed consent. He explained that although it was his practice to inform his clients about the disciplinary action, he was not sure that most doctors would do so.

However, if a doctor chooses to provide more information than similarly situated practitioners ordinarily would—adopting a higher standard of care—the doctor should not be penalized for straying from that higher standard as long as the doctor does not drop below the community's standard of care. Holding doctors to their personal standard of care when that personal standard exceeds the community standard would discourage doctors from exceeding the community standard and encourage blind conformity.

Although the Legislature bound the state to the professional theory, we have frequently reiterated that the professional theory "'paternalistically leaves the right of choice to the medical community, in derogation of the patient's right to self-determination.'" *Eccleston v. Chait*, 241 Neb. at 968, 492 N.W.2d at 864 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984)). Thus, we do not wish to discourage doctors from providing a patient more information than the community standard requires and we refuse to do so here.

We Decline to Carve Out Material Risk Exception for Cases When Omitted Information Relates to Doctor's Disciplinary History.

Although the Currans acknowledge that in Nebraska, the professional theory governs informed consent, they argue that their case is distinguishable from the "typical claim for failure to obtain informed consent," brief for appellants at 16, and that thus, the material risk theory should govern. They contend their case warrants an exception because Matthew was insufficiently informed about the doctor's disciplinary history, not about the operation itself. And when the unwarned risk relates to a doctor's disciplinary history, we should apply the material risk theory—asking whether a reasonable person would consider that information material, not whether ordinary doctors would disclose that information. Although enticing, we decline the invitation.

Our research could not uncover precedent for defining the standard of care differently depending on the kind of risks involved. Although other jurisdictions have questioned what role a doctor's experience should play in the context of informed consent, they are unsurprisingly split on the issue. Some courts adopt a bright-line rule requiring disclosure of treatment risks, but not of a doctor's experience. See, *Duttry v. Patterson*, 565 Pa. 130, 771 A.2d 1255 (2001); *Whiteside v. Lukson*, 89 Wash. App. 109, 947 P.2d 1263 (1997). Others require doctor-related disclosures only when mandated by the standard of care. See, *Duffy v. Flagg*, 88 Conn. App. 484, 869 A.2d 1270 (2005); *Tashman v. Gibbs*, 263 Va. 65, 556 S.E.2d 772 (2002); *Johnson v. Kokemoor*, 199 Wis. 2d 615, 545 N.W.2d 495 (1996); *Arato v. Avedon*, 5 Cal. 4th 1172, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993).

The evidence proffered here would not be required under either approach. The Currans plainly limit their claim to warnings about Buser's disciplinary history, not the operation. The Currans never established that the standard of care required such disclosures. Rather, they ask us to adopt a different standard of care for a narrow class of plaintiffs. Not only is their approach unprecedented, it contravenes the Legislature's adoption of the professional theory by supplanting, in a single narrow context, the Legislature's judgment.

[12] Instead, our statutes comport with an approach that requires doctor-related disclosures only when mandated by the standard of care. Under § 44-2816, informed consent means "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities." While the Currans ask us to distinguish treatment risks from doctor-related risks, § 44-2816 does not make this distinction. It asks only whether similarly situated doctors would ordinarily provide the information.

[13,14] We give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006). The language of the statute is unambiguous, and we are bound by it. Under § 44-2816, a doctor's disciplinary history, like other doctor-related risks, is required only when mandated by the standard of care.

As in the past, we recognize that the professional theory "places a patient, who more than likely lacks a medical background or training, in the precarious position of exploring and inquiring about adverse consequences of a surgical procedure." *Eccleston v. Chait*, 241 Neb. 961, 969, 492 N.W.2d 860, 865 (1992). Nonetheless, we do not write on a blank slate; the Legislature adopted the professional theory in § 44-2816, and its language binds this court to that theory.

The Currans' Evidence Was Properly Excluded Because Trial Court Did Not Abuse Its Discretion When Finding It Inadmissible.

[15-17] The Currans next argue that the excluded evidence is admissible under the Nebraska rules of evidence because it is relevant, not unduly prejudicial, and admissible for impeachment purposes. Under § 27-401, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Under Neb. Rev. Stat. § 27-402 (Reissue 1995), evidence which is not relevant is not admissible. *Holden v. Wal-Mart Stores*, 259

Neb. 78, 608 N.W.2d 187 (2000). Moreover, under § 27-403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Because we continue to adhere to the professional theory, the question is, What is the standard of care—what information do doctors in similar localities ordinarily give patients under similar circumstances? Here, the Currans failed to prove that the standard of care required Buser to disclose his disciplinary history. Thus, any evidence about Buser's disciplinary history is irrelevant to their informed consent claim.

Although the Currans argue that the evidence excluded is relevant to whether Matthew "would have allowed Buser to perform the recommended surgical operation," brief for appellants at 22, this misreads the statute. The Currans argue that the information is relevant to the first prong of the causation analysis required by § 44-2820. But § 44-2820 asks whether "a reasonably prudent person in the plaintiff's position would . . . have undergone the treatment *had he or she been properly informed.*" (Emphasis supplied.) As discussed above, §§ 44-2816 and 44-2820, when read together, suggest that proper information means properly informed under the professional theory which asks, What information do doctors in similar localities ordinarily give patients under similar circumstances? Because the record lacks expert testimony that the standard of care required disciplinary disclosures, the proffered evidence is also irrelevant to causation.

[18] Finally, the Currans argue that the court should have admitted Buser's disciplinary history to impeach his credibility. But this court has said that witnesses can only be impeached as to matters that are not collateral—matters that are independently provable. *Jones v. Tranisi*, 212 Neb. 843, 326 N.W.2d 190 (1982). In *Jones*, this court upheld a jury verdict in a medical malpractice case. The plaintiff sued her doctor, claiming he negligently performed her thyroidectomy, impairing her vocal cords and leaving her permanently hoarse. On cross-examination, the doctor testified that no patient upon whom he had performed

a thyroidectomy complained of losing his or her voice after the operation.

[19] The plaintiff tried to introduce evidence that a former patient of the defendant experienced similar adverse consequences after the defendant performed the same surgery on her. We refused to admit rebuttal evidence proffered by the plaintiff, stating that if the plaintiff was offering the evidence to prove the doctor's negligence in performing the operation on the plaintiff, it was not relevant for that purpose because one cannot prove negligence by demonstrating merely that the defendant acted negligently in the past. We further stated that the evidence was inadmissible for impeachment because it related to a collateral matter. " '[F]acts which would have been independently provable regardless of the contradiction are not "collateral." . . . "It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment." . . .' " *Id.* at 846, 326 N.W.2d at 192.

Although Buser and the Currans dispute whether Buser warned them about his disciplinary record, the dispute involves evidence that is irrelevant under the professional theory. Moreover, the trial court recognized that the proffered evidence implicates both §§ 27-401 and 27-403. While the parties' dispute may be marginally relevant to credibility, its probative value is outweighed by the dangers described in § 27-403. We conclude that the trial court did not abuse its discretion when excluding the Currans' evidence.

CONCLUSION

To carry out the Legislature's intent, we decline to distinguish doctor-related risks from other treatment risks. Moreover, the Currans failed to demonstrate that the standard of care in similar communities required Buser to disclose his disciplinary history; thus, the trial court did not abuse its discretion by sustaining the motion in limine. The trial court's decision is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

JASON SCHWARTING, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

711 N.W.2d 556

Filed March 31, 2006. No. S-04-1440.

1. **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.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Liquor Licenses.** The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably.
4. ____: ____. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised.
5. **Administrative Law: Liquor Licenses: Final Orders: Appeal and Error.** Proceedings for review of a final decision of the Nebraska Liquor Control Commission are to the district court, which shall conduct the review de novo on the record of the agency.
6. **Administrative Law: Appeal and Error.** In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1999), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
7. **Administrative Law: Liquor Licenses: Courts: Evidence: Appeal and Error.** A district court in its de novo review is not required to give deference to the findings of fact made by the Nebraska Liquor Control Commission, but it may consider the fact that the commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the commission's judgment as to credibility.
8. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.

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

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

PER CURIAM.

Donald Schwarting, the former owner of the Arrowhead Inn, an off-sale, beer-only business, was convicted of a Class IV felony, thereby prohibiting him from holding a liquor license under Neb. Rev. Stat. § 53-125 (Reissue 2004). His son, Jason Schwarting, took steps to purchase the business. Jason applied for a liquor license with the Nebraska Liquor Control Commission (the Commission), but his application was denied due to Jason's two prior liquor license violations while employed by Donald and the Commission's belief that Donald maintained an ownership interest in the business. Jason appealed, and the district court reversed the order of the Commission. The Commission appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The Arrowhead Inn is an off-sale, beer-only business in Whiteclay, Nebraska, that was started by Jason's grandfather in 1980 or 1981. In 1996, Jason's father, Donald, purchased the business, and in 1998, Jason began working as a clerk at the store. Jason was cited for two liquor license violations while working as a clerk: selling to an intoxicated person in June 1998 and selling on credit in August 2001. The Arrowhead Inn was penalized accordingly.

In 2003, Donald was convicted of a Class IV felony for selling more than eight used vehicles without a dealer's license and was fined $1,000. Subsequently, Jason began operating the Arrowhead Inn under a temporary agency agreement. In addition, Jason purchased the land, building, inventory, and equity composing the business. Jason purchased the real estate from Donald and assumed a promissory note previously owed by Donald to Jason's grandfather. After Donald filed a chapter 13 bankruptcy proceeding, Jason petitioned for and was granted permission to purchase the assets of the Arrowhead Inn.

Jason filed an application for a class B liquor license with the Commission on February 3, 2004. The Commission issued an

order to show cause why the application should be approved and a license issued, stating that Jason had

> previously as an employee sold alcohol to an intoxicated person 6/23/98, and sold alcohol on credit 8/27/01 which may reflect upon his willingness to abide by the rules and regulations of the Liquor Control Act; and further, to determine what if any involvement or financial interest the previous owner, Donald Schwarting, convicted of a Class IV Felony, will have.

During a hearing before the Commission, Jason testified that Donald was working part time as a clerk at the Arrowhead Inn, selling beer, pop, and cigarettes, and was paid an hourly wage of $5.25. However, Jason explained that Donald did not perform any managerial duties, including bill paying, ordering, and hiring and firing, and did not share in the profits or losses of the business. Furthermore, Jason testified that if the Commission was concerned about Donald's position as a clerk at the Arrowhead Inn, Jason would be willing to terminate Donald's employment.

After the hearing, the Commission voted to deny the application, finding that Jason was unable to conform to the provisions of the Nebraska Liquor Control Act (the Act). See Neb. Rev. Stat. § 53-101 et seq. (Reissue 2004 & Supp. 2005). In making its determination, the Commission considered, as stated in its order:

> a) That [Jason] is not of good character and reputation in the community.
>
> b) That his previous actions where he was an employee who violated aspects of [the Act] show that he is unable to conform to all provisions of [the Act].
>
> c) That the Commission is unconvinced that Donald Schwarting does not continue to have an ownership interest in the Arrowhead Inn.

On appeal, the district court reversed the determination of the Commission, finding no evidence in the record of a hidden ownership arrangement between Jason and Donald and determining that the evidence of Jason's two prior violations did not support a finding that Jason is not of good character or reputation. The Commission appeals the judgment of the district court.

ASSIGNMENTS OF ERROR

The Commission assigns that the district court erred in finding that the evidence did not support the Commission's conclusion that Jason was unable to conform to all provisions of the Act.

In its appellate brief, the Commission also assigned that the court erred in finding that the evidence did not support the Commission's conclusion that Donald continued to have an ownership interest in the business. However, at oral argument, the Commission withdrew this assignment of error; thus, we will not consider it.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918 (Reissue 1999); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

In its order, the Commission determined that Jason was "not fit, willing, and able to properly provide the service proposed within the community where the premises described in the application are located" and that he "can not [sic] conform to all provisions and requirements of and rules and regulations adopted pursuant to [the Act]." The Commission stated that it based those conclusions on additional findings that Jason is not of good character and reputation in the community and that his prior license violations show his inability to conform to the provisions of the Act. In addition, the Commission stated that it was unconvinced that Donald no longer held an ownership interest in the business.

We note that the order to show cause issued by the Commission prior to the hearing listed just two matters of concern: Donald's involvement and interest in the business, and Jason's two previous violations and their relevance to his willingness to abide by the

provisions of the Act. The order to show cause did not mention the issue of Jason's character and reputation, and the hearing was not directed at that issue. In fact, neither party presented evidence regarding Jason's reputation in the community. However, at the conclusion of the hearing, one of the commissioners stated, "I vote to deny it based on character and reputation also." The hearing officer then stated, "Just to make sure the rationale for the record is — you're voting — you believe that there is a hidden ownership and that the applicant is not fit and willing and able to conform . . . [t]o the rules and regulations." The commissioner agreed, stating, "Right, that's correct. . . . That would be the reason." Nevertheless, the Commission's order included among its findings that Jason was not of good character and reputation.

On appeal, the district court found no evidence to support the Commission's belief that Donald maintained an ownership interest in the business. In addition, the district court found Jason's two prior license violations to be insufficient to support the Commission's determination that Jason is not of good character or reputation. The district court couched its analysis of Jason's two previous violations in the context of their reflection on his character and reputation. However, we conclude that implicit in the court's judgment to reverse the order of the Commission is a determination that Jason's two previous violations were also insufficient to support the Commission's finding that Jason was unable to abide by the provisions of the Act.

We agree that the record presents insufficient evidence to conclude that Jason is not of good character and reputation in his community; as stated above, no such evidence was presented at the hearing by either party. In addition, during oral argument, the State withdrew its assignment of error regarding any alleged interest that Donald may have in the business. Thus, the only issue remaining for our consideration is whether the district court's conclusion that there was insufficient evidence to support the Commission's findings that Jason was unable to abide by the provisions of the Act is supported by competent evidence.

The Commission assigns that the district court erred in finding insufficient evidence to support the Commission's conclusion regarding Jason's inability to abide by the Act. The Commission asserts that the two license violations attributable to Jason during

his employment at the Arrowhead Inn reflect his inability to conform to the provisions of the Act. In contrast, Jason argues that the district court correctly determined that two "stale" license violations do not indicate an unwillingness to abide by the provisions of the Act.

[3,4] The Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. As in the case of other administrative bodies, the Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975), *overruled in part on other grounds, 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978).

[5-7] Proceedings for review of a final decision of the Commission are to the district court, which shall conduct the review de novo on the record of the agency. See *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1999), but is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). The district court is not required to give deference to the findings of fact made by the Commission, but it may consider the fact that the Commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the Commission's judgment as to credibility. See *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

[8] Upon appeal from the district court, our review is limited to error on the record, in which our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693

N.W.2d 539 (2005). 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. See *id.* Based on the record before the district court and our narrow standard of review, we conclude that the district court's order following its de novo review, reversing the judgment of the Commission, is supported by competent evidence.

Jason testified at the hearing that he was willing to abide by the rules and regulations of the Commission and of the State, and he introduced evidence that he had completed a course offered by the Commission and the Nebraska State Patrol regarding alcohol server training. Evidence was presented of Jason's two violations in the form of administrative citations. In addition, a report completed by an investigator with the State Patrol was presented, detailing the events of the violation concerning the sale of alcohol on credit. In its order, the district court emphasized the fact that the violations occurred 3 and 6 years prior to Jason's application. The district court also evidently was influenced by the fact that the Commission had made findings on other issues, such as Donald's ownership interest in the business and Jason's character and reputation, that were so unsupported by evidence as to be unsustainable.

Although different decisionmakers might reach an opposite result in reviewing the record, we simply cannot say that the district court's judgment, following its de novo review, is unsupported by any competent evidence, nor can we say that the judgment is arbitrary, capricious, or unreasonable. Given the statutory standard of review, we conclude that the district court committed no reversible error based on this record.

CONCLUSION

For the foregoing reasons, we conclude that the district court's judgment reversing the order of the Commission is supported by competent evidence; we affirm.

AFFIRMED.

WRIGHT, J., not participating.

HOME BUILDERS ASSOCIATION OF LINCOLN, A NEBRASKA NOT-FOR-PROFIT CORPORATION, AND HARTLAND HOMES, INC., A NEBRASKA CORPORATION, APPELLANTS AND CROSS-APPELLEES, V. THE CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

711 N.W.2d 871

Filed April 7, 2006. No. S-04-782.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Municipal Corporations.** There is a distinction between a legislative charter, which emanates from the sovereign legislature and grants power to a municipality, and a home rule charter, which has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs.
3. ____. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference.
4. ____. There is a distinction between a home rule charter that operates as a grant of powers, which expresses the specifically enumerated functions of the municipality and is strictly construed, and a limitation of powers charter, which empowers a municipality to exercise every power connected with the proper and efficient government of the municipality which might be lawfully delegated to it by the Legislature, without waiting for such delegation.
5. ____. A rule of strict construction of a municipality's express powers, also known as Dillon's rule, does not apply to a city operating under a limitation of powers home rule charter.
6. **Constitutional Law: Municipal Corporations.** Under a home rule charter, a city's power must be consistent with and subject to the constitution and laws of this state, except as to local matters of strictly municipal concern.
7. **Municipal Corporations: Statutes.** The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation; but until the superior authority of the state has been asserted by a general statutory enactment, the municipality may properly act under its charter.
8. **Constitutional Law: Municipal Corporations: Legislature: Taxation.** Neb. Const. art. VIII, §§ 1 and 6, provides that the Legislature can empower a city to tax, and Neb. Const. art. XI authorizes a city with a limitation of powers home rule charter to exercise that power to tax without first waiting for express delegation.
9. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.

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

William G. Blake, Mark A. Hunzeker, and Jason L. Scott, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellants.

Dana W. Roper, Lincoln City Attorney, and Ernest R. Peo III for appellee.

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

GERRARD, J.

The plaintiffs in this action have challenged the legal authority of the City of Lincoln (the City) to enact an ordinance conditioning the issuance of a building permit for new residential development on the payment of "impact fees," intended to offset the expenses associated with providing municipal services to the new development. For the reasons that follow, we conclude that the City's home rule charter permits it to impose such impact fees. Therefore, we affirm the judgment of the district court dismissing the plaintiffs' petition.

BACKGROUND

In 2003, the City enacted an "Impact Fee Ordinance" (the Ordinance), providing that

> any person who applies for a building permit for a development or who applies for any other permit for a development where a building permit is not required, or who seeks to engage in a development for which no permit is required, shall pay a water system impact fee, water distribution impact fee, wastewater impact fee, arterial street impact fee, and neighborhood park and trail impact fee unless the type of development described in the permit or to be engaged in is specifically exempted, waived or subsidized by this ordinance, or unless the type of development described in the permit or to be engaged in is not located in an impact fee benefit district for the above-described impact fees.

Lincoln Mun. Code § 27.82.050 (2003). The Ordinance set forth the findings of the Lincoln City Council that new development in the City was creating additional demand for public facilities such as water treatment and wastewater systems, arterial streets, and neighborhood parks and trails. See Lincoln Mun. Code

§ 27.82.020 (2003). The city council further found that protection of the citizens of the City required expansion of new development for public facilities and that the City's revenue structure did not generate sufficient funds to serve the new development. See *id.* The city council found that "[t]he creation of an equitable impact fee system would enable the City to impose a more proportionate share of the costs of required improvements to the water and wastewater systems, arterial streets, and neighborhood parks and trails on those developments that create the need for them." § 27.82.020(f).

In the Ordinance's statement of intent, it was explained that the intent of the Ordinance was not to collect moneys from new development in excess of the actual amount necessary to offset demands generated by new development, or for moneys collected from the impact fee to be commingled with moneys from a different impact fee account, or to be used for a type of facility different from that for which the fee was paid. See Lincoln Mun. Code § 27.82.030 (2003). Rather,

> [t]he intent of this ordinance is to ensure that adequate water and wastewater systems, arterial streets, and parks and trails are available to serve new growth and development in the City of Lincoln and to regulate the use and development of land so as to ensure that new growth and development bears its proportionate share of the cost of improvements to the City's water and wastewater systems, arterial streets, and neighborhood parks and trails needed to serve such new growth and development; to ensure that the proportionate share for each type of public facility does not exceed the cost of providing that type of public facility to the new development that paid the fee; and to ensure that funds collected from new developments are actually used to construct pub[l]ic facilities that benefit such new developments.

Id.

The plaintiffs, the Home Builders Association of Lincoln and Hartland Homes, Inc., filed a complaint against the City in district court, seeking declaratory and injunctive relief declaring the Ordinance invalid and unenforceable. On cross-motions for summary judgment, the court concluded that the Ordinance was

within the power granted to the City and did not violate any constitutional provisions; thus, the court granted the City's motion for summary judgment.

The court first concluded that contrary to the City's argument, the Ordinance was not a regulatory measure; rather, relying on the city council's findings, the court concluded that the Ordinance was a tax intended to collect revenue for municipal purposes. The court found that the Ordinance was not an occupation tax, because payment of the impact fee is a condition precedent to obtaining a building permit. Thus, the City's imposition of the tax was not specifically authorized by the City's statutory power to collect occupation taxes.

However, the court concluded that under the City's home rule charter, it had the implicit authority to collect the impact fee. Relying on *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), the court determined that the City's home rule charter was a limitation of powers charter, giving the City the power to take certain actions without explicit, authorizing language from the Legislature. Because the court found no express statutory limitation on the City's power to tax, the court found the City had the authority to enact and impose the Ordinance as a tax. The court rejected the plaintiffs' contentions that the Ordinance violated the Equal Protection Clauses of the federal and state Constitutions, or the uniformity requirements of the state Constitution.

ASSIGNMENTS OF ERROR

The plaintiffs assign that the court erred (1) in finding that the City's home rule charter vested the City with the power to assess and collect taxes without authorization from the Legislature, (2) in failing to recognize that the home rule charter is subject to the state Constitution and that the constitution vests plenary power over taxation to the Legislature, (3) in finding that occupation taxes and excise taxes are in effect one and the same, and (4) in failing to find that the impact fees must be ruled to be license fees when analyzed under the authority conferred by the home rule charter.

The plaintiffs also assign that the court erred in finding that the dissimilar taxation of persons and properties similarly situated is

lawful under the constitution. While some discussion of this issue appears in the plaintiffs' reply brief, no argument in support of this assignment of error is found in their appellants' brief. Thus, we do not consider it. See, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). The plaintiffs also argue that the constitution requires the City to pay the impact fee revenues to the county for the benefit of school districts, but this was not assigned as error. Similarly, we do not consider this argument. See *Demerath v. Knights of Columbus*, 268 Neb. 132, 680 N.W.2d 200 (2004).

On cross-appeal, the City assigns that the court erred in finding that the Ordinance was the enactment of a tax rather than an exaction, regulatory fee, or service charge and that, even if the impact fee is a tax, the court erred in concluding that the impact fee was not a valid occupation tax.

STANDARD OF REVIEW

[1] This appeal presents questions of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005).

ANALYSIS

The plaintiffs' first two assignments of error address the dispositive conclusion of the district court that pursuant to its home rule charter, the City had the legal authority to enact the Ordinance in the absence of express statutory authorization to that effect. The plaintiffs argue that this understanding of the home rule charter is incorrect and that in matters of taxation, the City can act only pursuant to an express grant of authority from the Legislature.

[2] As noted by the district court, our most recent discussion of the City's authority under its home rule charter was *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), in which the issue was whether the City had the legal authority to provide for-hire telecommunications services. We noted the distinction between a legislative charter, which emanates from the sovereign legislature and grants power to a municipality, and a home rule charter, which has as its basis

a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.*

[3,4] The purpose of a home rule charter "is to render the city as nearly independent as possible from state interference." *Id.* at 81, 655 N.W.2d at 372-73. Pursuant to the language of the Nebraska Constitution authorizing home rule charters, Neb. Const. art. XI,

> "the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks."

(Emphasis in original.) *In re Application of Lincoln Electric System*, 265 Neb. at 82, 655 N.W.2d at 373, quoting *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922). We further noted the distinction between a home rule charter that operates as a grant of powers, which expresses the specifically enumerated functions of the municipality and is strictly construed, and a limitation of powers charter, which empowers a municipality to exercise every power connected with the proper and efficient government of the municipality which might be lawfully delegated to it by the Legislature, without waiting for such delegation. See *id.*

After examining the City's 1992 home rule charter, the pertinent language of which is unchanged, we concluded that the City's home rule charter is a limitation of powers charter. See *In re Application of Lincoln Electric System, supra.* Thus, we concluded that the relevant question in that appeal, which we answered in the affirmative, was whether the City's broad authorization to engage in municipal powers and functions encompassed the provision of for-hire telecommunications services. See *id.*

The scope of that broad municipal authority is again before us in this case. The plaintiffs do not take issue with the district

court's conclusion that the Ordinance was connected with the proper and efficient government of the City, within the meaning of its limitation of powers charter. Rather, the plaintiffs contend that with respect to the specific matter of taxation, the broad authority afforded a municipality under a limitation of powers charter nonetheless requires the express delegation by the Legislature of the power to tax.

The plaintiffs first turn to *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980), in which we reversed the district court's determination that the City was authorized to impose the costs of paving arterial streets on the developer of a proposed subdivision. We stated that a municipal corporation could exercise only such powers as were expressly granted to it, or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. *Id.* We further stated that "[s]tatutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Id.* at 176, 291 N.W.2d at 732. We found no authority for the imposition of paving costs in the Nebraska statutes, or even in the City's ordinances. See *id.*

[5] However, our decision in *Briar West, Inc.*, was made in the context of a substantially different legal framework. As explained by *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), the City did not adopt a limitation of powers home rule charter until 1992. Our decision in *Briar West, Inc., supra*, as noted above, rested on a rule of strict construction of a municipality's express powers, also known as Dillon's rule. In 1980, when *Briar West, Inc.* was decided, that was the applicable law. But Dillon's rule does not apply to a city operating under a limitation of powers charter such as that adopted by the City in 1992. See *In re Application of Lincoln Electric System, supra.* Unlike the City's home rule charter at the time *Briar West, Inc., supra*, was decided, the City's current home rule charter does not merely enumerate specified powers, but grants all powers possible to the City. Consequently, our decision in *Briar West, Inc.* does not apply to the City's current home rule charter.

The plaintiffs also contend that in matters of taxation, express delegation of authority to a municipality is required. The

plaintiffs rely on Neb. Const. art. VIII, § 1, which provides in part that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Similarly, the plaintiffs direct us to Neb. Const. art. VIII, § 6, which provides that "[t]he Legislature may vest" municipal corporations with the power to make assessments for local improvements, and that municipal corporations "may be vested" with authority to assess and collect taxes. The plaintiffs argue that these constitutional provisions reserve the Legislature's "plenary power" over taxation to the Legislature in the absence of express delegation.

[6,7] It is well established that under a home rule charter, a city's power must be consistent with and subject to the constitution and laws of this state, except as to local matters of strictly municipal concern. See *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960). See, also, *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982). But the plaintiffs are incorrect in contending that the City's assertion of authority to enact the Ordinance is inconsistent with the Nebraska Constitution. The question here is not whether the Legislature could assert its plenary power over taxation to preclude the City from imposing impact fees—rather, the question is whether, in the absence of an express provision, the City may exercise that power. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. *State, ex rel. Fischer, v. City of Lincoln*, 137 Neb. 97, 288 N.W. 499 (1939). But until the superior authority of the state has been asserted by a general statutory enactment, the municipality may properly act under its charter. *Id.*

[8] The constitutional language relied upon by the plaintiffs does not act as a restriction of the authority a municipality may exercise under a home rule charter. Had this purpose been intended, it could have been expressed in article XI in no uncertain terms. Instead, when read together, article VIII, §§ 1 and 6, and article XI support the City's position in this case. The very purpose of a home rule charter is to permit municipalities to

exercise " 'every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation.' " *In re Application of Lincoln Electric System*, 265 Neb. 70, 82, 655 N.W.2d 363, 373 (2003), quoting *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922). Article VIII, §§ 1 and 6, simply establishes the Legislature's power to tax, and its authority to delegate that power to governmental subdivisions. In short, article VIII, §§ 1 and 6, provides that the Legislature can empower a city to tax, and article XI authorizes a city with a limitation of powers home rule charter to exercise that power to tax without first waiting for express delegation.

[9] A constitution represents the supreme written will of the people regarding the framework for their government. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, *ante* p. 173, 710 N.W.2d 609 (2006). As we stated in *In re Application of Lincoln Electric System, supra*, a home rule charter is just another method of empowering a municipality to govern its own affairs, in which the sovereign people authorize the electorate to empower municipalities with the authority to govern their own affairs. The plaintiffs' reading of the constitution would frustrate the will of the sovereign people in that regard, as it would limit the sovereignty acquired by the adoption of a home rule charter, and contravene the intent of article XI.

The plaintiffs also rely on cases in which this court has referred to the Legislature's "plenary power" over taxation, and required municipalities to rely on an express grant of the power to tax. See, e.g., *Consumers Public Power Dist. v. City of Lincoln*, 168 Neb. 183, 95 N.W.2d 357 (1959). But the plaintiffs do not identify, nor has our research revealed, any case in which we have concluded that a municipality governed by a limitation of powers charter was nonetheless without the power to tax in the absence of express delegation from the Legislature. It would be utterly inconsistent with the nature of a limitation of powers home rule charter, and the presumptions associated with such a charter, to conclude that a municipality operating under a limitation of powers charter was still dependent on express authority from the Legislature for the exercise of municipal powers.

CONCLUSION

We conclude that the district court correctly determined that the City was empowered, under its home rule charter, to enact the Ordinance. Having so determined, we need not address the plaintiffs' remaining assignments of error, as they would have been relevant only if express statutory authority for the Ordinance was required. Similarly, we decline to address the City's cross-appeal, as the issues it presents are unnecessary to our disposition of this appeal. The judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.
CONNOLLY, J., not participating in the decision.

CITY OF ASHLAND, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE, V. ASHLAND SALVAGE, INC., A NEBRASKA CORPORATION, AND ARLO REMMEN, APPELLANTS.

711 N.W.2d 861

Filed April 7, 2006. No. S-04-1365.

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. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that when credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **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.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken.
6. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
7. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.

8. **Pleadings: Intent.** A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.
9. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Terry K. Barber for appellants.

Glen Th. Parks and Mark A. Fahleson, of Rembolt Ludtke, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Plaintiff-appellee, the City of Ashland, Nebraska, brought this declaratory judgment action in the district court for Saunders County against defendants-appellants, Ashland Salvage, Inc., and Arlo Remmen, seeking a declaration as to the existence and lawful boundaries of certain public rights-of-way claimed by the city and further seeking an injunction against appellants' improper use of the public rights-of-way. Following a bench trial, the district court ruled in favor of the city, declaring the boundaries with regard to appellants' property and the city's public rights-of-way and enjoining appellants from any inappropriate use of the rights-of-way. We affirm.

STATEMENT OF FACTS

This case involves the city's claim to two public rights-of-way (sometimes hereinafter referred to as "the disputed property") originally dedicated to the city in 1871. The disputed property forms a backward "L" and borders on the southern and eastern boundaries of a salvage yard operated by Ashland Salvage. The salvage yard is located south of U.S. Highway 6 in Ashland. Remmen is the president and sole shareholder of Ashland Salvage. The record reflects that in 1994, Remmen purchased the property that forms the southeast corner of the salvage yard

and, by a quitclaim deed dated October 5, 1994, transferred the property to Ashland Salvage.

At issue in this case are the existence and boundaries of two rights-of-way claimed by the city. The first right-of-way runs in an east-west direction along Fir Street (formerly known as Prairie Street) as it runs along the southern edge of the salvage yard, and the second right-of-way runs in a north-south direction along 9th Street, or Dennis Dean Road (formerly known as Cherry Street), as it runs along the eastern edge of the salvage yard. These claimed rights-of-way intersect at the southeast corner of the salvage yard to form a backward "L." Appellants dispute the existence of these rights-of-way and assert an ownership interest over the disputed property.

In May 2002, the city notified appellants that materials belonging to the salvage yard were being stored on portions of the Fir Street and Dennis Dean Road public rights-of-way. The city requested that appellants remove these materials. At some point, the city removed materials from the disputed property. Thereafter, the city imposed a special assessment against appellants for the cleanup costs.

In 2002, appellants filed suit in the district court for Saunders County against the city, challenging the special assessment. On July 25, 2003, the city filed in the district court a declaratory judgment action against appellants, seeking a declaratory judgment with regard to the existence and the boundaries of the Fir Street and Dennis Dean Road public rights-of-way as they abutted the southeast corner of appellants' property and requesting, in effect, an injunction enjoining appellants' storage of materials on the disputed property. Prior to trial, the district court consolidated the city's declaratory judgment action with appellants' action challenging the city's special assessment.

As part of the pretrial proceedings, the city served its "First Set of Requests for Admissions" upon appellants, which requests sought appellants' admissions or denials with regard to the boundaries for the southeast corner of appellants' salvage yard property and the Fir Street and Dennis Dean Road rights-of-way. Specifically, attached to the requests for admissions was a copy of a 2003 survey ordered by the city, which survey included the boundaries of the southeast corner of the salvage yard. The

survey identified the borders of the Fir Street and Dennis Dean Road public rights-of-way as they met to form the backward "L" abutting the southeast corner of appellants' property. Moreover, the survey identified certain markers that established the original boundaries of the city's claimed public rights-of-way, including a pipe, marking the northwest corner of the intersection between Fir Street and Dennis Dean Road, and a bolt, marking the northern boundary of the Fir Street right-of-way. The survey noted that these markers were located under salvage items on property claimed by appellants. (The 2003 survey was later admitted into evidence during the trial in this case as Exhibit 14, and will hereinafter be referred to as "Exhibit 14.") In summary, the requests for admissions sought appellants' admission or denial with regard to the accuracy of the property boundaries and public rights-of-way identified in Exhibit 14.

Appellants failed to respond to the city's "First Set of Requests for Admissions" within 30 days, as required by Neb. Ct. R. of Discovery 36 (rev. 2000). Appellants later moved for leave to serve responses out of time, and following a hearing, the district court denied appellants' motion.

On June 22, 2004, the consolidated cases came on for a bench trial. The city and appellants offered various evidence. During the trial, the city offered and the court received into evidence a copy of the city's "First Set of Requests for Admissions." The city also introduced into evidence the affidavit of one of the city's attorneys that sets forth the date on which the city served its requests for admissions upon appellants and that also, in effect, noted appellants had failed to provide timely responses to these requests for admissions.

Following the trial, in a file-stamped journal entry dated November 22, 2004, the district court ruled in favor of the city in the declaratory judgment action, declaring the boundaries of appellants' property and the existence of the city's public rights-of-way. Specifically, in its journal entry, the district court stated that "a public right-of-way exists and its legal boundaries are as set forth in Exhibit 14." In its journal entry, the district court "enjoined [appellants] from any use of [the disputed] property inconsistent with its use as a public right-of-way." The journal entry also directed the city to prepare an "injunction," and an

"Order of Permanent Injunction" was subsequently filed on December 6. On November 30, appellants filed their notice of appeal from the November 22 adverse ruling in the declaratory judgment case. The declaratory judgment action is the subject of the present appeal.

In the special assessment case, the trial court ruled in favor of appellants, determining that the cleanup costs could not be charged against appellants as a special assessment, and no appeal was taken by the city in that case.

ASSIGNMENT OF ERROR

Appellants assign numerous errors, which in summary assert that the district court erred in determining that the city's evidence relating to its claimed public rights-of-way was sufficient to establish the existence and boundaries of the rights-of-way.

STANDARDS OF REVIEW

[1-3] 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. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). An action for injunction sounds in equity. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005). In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that when credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003).

ANALYSIS

Appellate Jurisdiction Exists.

[4] In their briefs filed on appeal, the parties note that the Order of Permanent Injunction was entered after the November 30, 2004, notice of appeal that challenged the November 22 ruling. Given the December 6 entry of the Order of Permanent Injunction, the parties question the timeliness of appellants'

notice of appeal and thus challenge this court's appellate jurisdiction. 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. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). We conclude we have appellate jurisdiction.

[5] Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) controls our analysis and provides:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.
>
> (4) The clerk shall prepare and maintain the records of judgments, decrees, and final orders that are required by statute and rule of the Supreme Court.

For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken. In the present case, we conclude that the file-stamped November 22, 2004, journal entry is a judgment under § 25-1301 and that the November 30 notice of appeal challenging this judgment constitutes a timely appeal. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004) (providing for 30 days to file notice of appeal from district court judgment, decree, or final order).

As noted above, the district court's file-stamped journal entry of November 22, 2004, found in favor of the city, declared the boundaries of the rights-of-way, and enjoined appellants from any use of the disputed property inconsistent with the city's rights-of-way. This ruling resolved all issues raised in the city's declaratory action. Although the November 22 journal entry also directed the city to prepare an injunction, the November 22 ruling nevertheless disposed of the whole merits of the case, and the November 22 file-stamped journal entry was a judgment

from which the November 30 appeal was timely taken. See § 25-1301. Although the Order of Permanent Injunction complicates the jurisdictional analysis, its entry on December 6 does not defeat the finality of the November 22 ruling from which the notice of appeal was explicitly taken and which forms the substance of our consideration on appeal. We take this opportunity to again disapprove of the practice of a trial court's filing of a journal entry that describes an order that is to be entered at a subsequent date. As we stated in *Hosack v. Hosack*, 267 Neb. 934, 940, 678 N.W.2d 746, 752-53 (2004) (quoting *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986)),

> "the confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case." The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. See commentary to Canon 3(B)(7) of the Nebraska Code of Judicial Conduct. Only the signed [judgment, decree, or] final order should be filed with the clerk of the court.

In contrast to the journal entry in *Hosack v. Hosack* that left certain matters unresolved, in the instant case, the district court's file-stamped journal entry of November 22, 2004, disposed of all claims and constituted a judgment for purposes of § 25-1301, and the appeal was timely taken. Accordingly, we have jurisdiction to consider this appeal.

The City's Allegation in Paragraph 3 of Its Complaint Did Not Constitute a Judicial Admission.

Appellants assert that certain allegations in the city's complaint constitute a judicial admission with regard to the legal description of appellants' property and that the district court erred in entering judgment establishing the existence and boundaries of

the city's claimed public rights-of-way that are inconsistent with the purported admission. Appellants claim that as a result of such admission, the city has waived any controversy with regard to the disputed boundaries. We find no merit to appellants' assertion of a judicial admission on the part of the city.

Appellants focus on paragraph 3 in the city's complaint. In paragraph 3, the city alleged as follows: "[Ashland Salvage] is the owner of record of property generally described as 602 Dennis Dean Road, Ashland, Nebraska ('Property'). The Quit Claim Deed providing the legal description for the Property is attached hereto as Exhibit 'A' and incorporated herein by this reference." Attached to the complaint is a copy of the October 5, 1994, quitclaim deed by which Remmen transferred ownership of the salvage yard property at issue in this case to Ashland Salvage. The deed contains a description of the property that includes portions of the rights-of-way at issue. The deed was recorded. Appellants argue that by including paragraph 3 within its complaint, the city has judicially admitted that appellants are the owners of the disputed property. We do not agree.

[6-8] This court has recognized that

> an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.

(Emphasis omitted.) *Saberzadeh v. Shaw*, 266 Neb. 196, 199, 663 N.W.2d 612, 615 (2003). We have also stated that "[j]udicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence." *U S West Communications v. Taborski*, 253 Neb. 770, 784, 572 N.W.2d 81, 91 (1998). This court has further recognized that an admission "does not extend beyond the intendment of the admission as clearly disclosed by its context." (Emphasis omitted.) *Robison v. Madsen*, 246 Neb. 22, 29, 516 N.W.2d 594, 599 (1994).

We read paragraph 3 of the complaint as merely reciting the historical fact that the quitclaim deed transferred whatever ownership interest Remmen had to Ashland Salvage and that such deed is attached to the complaint as "Exhibit A." Paragraph 3 also recites the historical fact that such quitclaim deed has been

recorded. We do not read paragraph 3 to be an acknowledgment that the text or other description contained in Exhibit A is accurate.

More importantly, the context in which the purported admission occurs makes it readily apparent that the city was not admitting that appellants owned the disputed property. Paragraph 3 is but one paragraph of a seven-paragraph complaint, the thrust of which was that the city disputed appellants' entitlement to certain property that the city claimed as rights-of-way. In paragraph 1 of the complaint, the city states that "[t]his action is being brought pursuant to the Uniform Declaratory Judgments Act . . . requesting the Court to declare the rights and obligations of the parties relating to certain public rights-of-way adjacent to or running through real property owned and/or occupied by [appellants]." Paragraph 5 of the complaint alleges that "[t]he City possesses certain rights and title to streets, roads, alleys and rights-of-way (collectively 'Public Roads and Rights-of-Way') that are adjacent or run directly through the Property." In paragraph 6, the city alleges that "[appellants] have disputed the City's ownership of such Public Roads and Rights-of-Way, and have repeatedly challenged the City as to the lawful placement and location of such Public Roads and Rights-of-Way." Additionally, in paragraph 7, the city alleges that appellants have refused to remove personal property items from the disputed property and that appellants are likely to continue to refuse "until an Order is entered declaring the proper boundaries of the Property and Public Roads and Rights-of-Way and ownership thereto."

Reviewing the allegations contained within paragraph 3 of the complaint in the context in which the allegations occurred, we conclude there is no merit to appellants' argument that the city judicially admitted appellants' ownership of the disputed property. Compare *First Nat. Bank v. Avondale Mills Bevelle Emp.*, 967 F.2d 556 (11th Cir. 1992) (determining under federal notice pleading that motion allegation which was amenable to more than one interpretation did not constitute judicial admission, given remaining allegations in motion). On the contrary, paragraph 3, along with the remaining allegations in the complaint, combine to put the boundaries of appellants' property at issue, and paragraph 3 did not constitute a judicial admission.

Appellants Have Admitted the Essential Facts Relative to the Allegations in the City's Complaint, and the Evidence Is Sufficient to Support the Trial Court's Decision Declaring the City's Entitlement to the Rights-of-Way and Enjoining Appellants Relative Thereto.

As noted above, during the discovery phase of these proceedings, the city served certain requests for admissions upon appellants that appellants failed to answer. The requests pertained to the boundaries of the disputed property, and the requests were admitted into evidence at trial.

On appeal, appellants challenge the sufficiency of the evidence. In its brief in response, the city argues that appellants' failure to answer the requests for admissions resulted in admitted facts that, along with other evidence, are sufficient to support the district court's decision in this case. We agree with the city.

[9] We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission. *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). We have recognized that rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Id.*; *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). We have noted, however, that rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *Schwarz v. Platte Valley Exterminating, supra*; *Wibbels v. Unick, supra*. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of rule 36. *Schwarz v. Platte Valley Exterminating, supra*. The city followed the indicated procedures in this case.

The record reflects that the city's "First Set of Requests for Admissions" to appellants was served on April 12, 2004, and that appellants failed to respond within the time period specified in rule 36. Appellants' failure to make a timely and appropriate response to the requests for admissions constituted an admission of the subject matter of the requests. See *Schwarz v. Platte Valley Exterminating, supra*. Appellants sought leave to withdraw their admissions or file responses; but the district court denied their motion, and appellants make no assignment of error relative to this ruling.

The record reflects that at trial, the city offered into evidence a copy of the requests for admissions and also offered evidence of service of the requests upon appellants and appellants' failure to respond. This evidence was received. Accordingly, the city is entitled to claim appellants' admission of the requests included within the "First Set of Requests for Admissions" as a result of appellants' failure to respond to those requests. See *id.*

Given the content of the requests for admissions, appellants admitted, inter alia, that Exhibit 14 accurately describes the boundary lines for appellants' property and accurately describes the boundary lines for Fir Street and Dennis Dean Road. Other evidence in the record showed that the rights-of-way claimed by the city had been acquired by the city in 1871. This evidence and the admissions resolved the facts in controversy in the city's declaratory judgment case. Relying in part upon Exhibit 14, the accuracy of which was admitted by appellants, the district court declared the existence of the Fir Street and Dennis Dean Road rights-of-way as they abutted the southeast corner of appellants' property, declared the boundaries of appellants' property and those of the city's rights-of-way, and enjoined appellants from any inappropriate use of the rights-of-way. We have reviewed the record de novo, see *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003), and we determine the district court did not err in entering judgment in favor of the city on the evidence before it. The district court's decision is affirmed.

CONCLUSION

For the reasons stated above, we affirm the district court's decision declaring the existence and boundaries of the city's

public rights-of-way at issue in this case and enjoining appellants from any use inconsistent with the city's rights-of-way.

AFFIRMED.

WRIGHT, J., not participating.

REBECCA WENDELN, APPELLEE, V.
THE BEATRICE MANOR, INC., APPELLANT.
712 N.W.2d 226

Filed April 7, 2006. No. S-05-188.

1. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
4. **Limitations of Actions: Pleadings.** The essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is.
5. **Actions: Pleadings.** To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading.
6. **Actions.** Just because there may be some overlap between relevant facts, it does not change the conclusion that various causes of action are stated based on separate and distinct factual occurrences.
7. **Fair Employment Practices: Limitations of Actions.** Neb. Rev. Stat. § 48-1118(2) (Reissue 1998) provides the applicable statute of limitations (i.e., within 300 days after the occurrence of the alleged unlawful employment practice) for Nebraska Fair Employment Practice Act claims brought pursuant to Neb. Rev. Stat. § 20-148 (Reissue 1997).
8. **Statutes: Constitutional Law.** Neb. Rev. Stat. § 20-148 (Reissue 1997) is a procedural statute which does not create any new substantive rights.
9. **Termination of Employment: Public Policy: Torts.** A public policy-based retaliatory discharge claim is based in tort.
10. **Termination of Employment: Public Policy: Limitations of Actions.** A public policy-based retaliatory discharge claim is governed by the 4-year statute of limitations period found in Neb. Rev. Stat. § 25-207 (Reissue 1995).

11. **Termination of Employment: Public Policy.** The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated.
12. **Employer and Employee: Health Care Providers.** The purpose of the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004), would be circumvented if employees mandated by the act to report suspected patient abuse could be threatened with discharge for making such a report.
13. **Criminal Law: Legislature: Public Policy.** The Legislature articulates public policy when it declares certain conduct to be in violation of the criminal law.
14. **Employer and Employee: Health Care Providers: Public Policy.** The Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004), makes a clear public policy statement by utilizing the threat of criminal sanction to ensure the implementation of the reporting provisions set forth to protect the vulnerable adults with which the act is concerned.
15. **Actions: Termination of Employment: Health Care Providers: Public Policy.** A public policy exception to the employment-at-will doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).
16. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
17. **Termination of Employment: Health Care Providers.** In order for a retaliatory discharge action to lie against an employer for discharging an employee in retaliation for the mandatory filing of a report of patient abuse pursuant to Neb. Rev. Stat. § 28-372 (Reissue 1995), such report must be based upon reasonable cause.
18. **Actions: Termination of Employment: Health Care Providers: Public Policy.** Good faith is not required to state a cause of action for retaliatory discharge in contravention of the public policy expressed by the mandatory reporting provisions of the Adult Protective Services Act, Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).
19. **Termination of Employment: Damages: Mental Distress: Public Policy.** Damages for mental suffering are recoverable in a retaliatory discharge action brought by a former at-will employee alleging that the discharge violated a clear mandate of public policy.
20. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its 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 the damages proved.
21. **Actions: Mental Distress: Proof.** There is a distinction between proof requirements in an action for negligent or intentional infliction of emotional distress and damages for mental suffering sought where other interests have been invaded and tort liability has arisen apart from the emotional distress.
22. **Termination of Employment: Damages: Mental Distress: Torts: Public Policy.** Severe emotional distress is not an element of the tort of retaliatory discharge in contravention of public policy. Accordingly, there is no threshold limitation based upon the degree of severity of the mental suffering, nor is it necessary to show that the

plaintiff sought medical treatment or counseling for the mental suffering in order for it to be recoverable as past and present damages.

23. **Damages: Mental Distress.** In awarding damages for mental suffering, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder.
24. **Judgments: Damages: Mental Distress: Appeal and Error.** An appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement.
25. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

Michaela Skogerboe and Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellant.

Carole McMahon-Boies for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The primary issue presented in this appeal is whether we should recognize a public policy-based cause of action for retaliatory discharge when an employer discharges an employee for making a report to the Nebraska Department of Health and Human Services (DHHS) as mandated by the Adult Protective Services Act (APSA), Neb. Rev. Stat. §§ 28-348 to 28-387 (Reissue 1995 & Cum. Supp. 2004).

FACTUAL BACKGROUND

Rebecca Wendeln, a certified nursing assistant, began working at The Beatrice Manor, Inc. (Beatrice Manor), in May 2000 as a staffing coordinator. A particular patient at Beatrice Manor was wheelchair-bound, and it was Wendeln's understanding that any time the patient was lifted or transferred, such transfer needed to be done by two persons and with a gait belt (an ambulatory aid used to transfer or mobilize patients). In December 2001, a "very upset" medical aide approached Wendeln, describing that

approximately 2 weeks prior, this patient had been improperly moved and had fallen and bruised herself. The aide reported that she had offered to assist another aide in the transfer of the patient, but that the other aide had refused to let her help. The next thing the aide observed was the patient on the floor with no gait belt in sight. The aide told Wendeln that she had informed the administrator and the acting director of nursing about the incident, but that the aide did not believe that it had been properly reported to DHHS or was otherwise being taken care of.

That same day, a licensed practical nurse at Beatrice Manor also approached Wendeln about the incident, expressing concern that nothing was being done about it. The nurse did not witness the incident, but was a relative of the patient. In response to these reports, Wendeln approached another aide who was working the day of the incident to confirm that it had actually occurred. That aide had been called to help the patient off of the floor and told Wendeln that pain medication had been given to the patient as a result of the fall.

Wendeln then called DHHS to make sure that it had been reported. When DHHS indicated that no incident had been reported, Wendeln made a report.

A few days after her report to DHHS, Wendeln was called into her supervisor's office. Wendeln said that her supervisor was very angry with her after having learned that Wendeln had made a report with DHHS without having first spoken to her. Wendeln testified that her supervisor was "very aggressive" and made her feel scared and intimidated. Wendeln, who was 21 years old at the time, asked for some time off work because she "didn't know how [she] was going to face [her supervisor] after the way she had aggressively approached [her]." Her supervisor granted her the time off. Wendeln testified that during this time, she felt very nervous and upset. She explained that she had never before been "attacked" in such a manner by either a peer or a supervisor.

Upon Wendeln's return to work on her next scheduled workday, Wendeln found that the locks to her office had been changed. Eventually, her supervisor appeared and told Wendeln to follow her to her office. There, Wendeln was asked to resign, and when she refused, she was told she was fired. Her official termination date was January 2, 2002.

Wendeln testified that after her discharge from employment, even though she had a close family friend as a patient at Beatrice Manor, she never felt comfortable enough to be able to return to visit. She explained that on the one occasion she had returned to the facility to pick up her W-2 form, her former supervisor had come out of the building and stood watching her park her car. Thereafter, the supervisor stood by the nurses' station as Wendeln picked up the W-2 form, making Wendeln feel uncomfortable.

After her discharge from employment at Beatrice Manor, Wendeln was unable to find other employment in Beatrice, where she lived near her mother. She eventually found work in Lincoln.

PROCEDURAL HISTORY

On January 27, 2003, Wendeln filed this action against Beatrice Manor. Her original action sought declaratory, injunctive, and monetary relief under the whistleblower provisions of the Nebraska Fair Employment Practice Act (NFEPA), Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1998), as actionable under Neb. Rev. Stat. § 20-148 (Reissue 1997). However, she was allowed to amend her complaint to add the allegation that she suffered from wrongful termination in contravention of the public policy of the State of Nebraska, as articulated in the APSA. On April 5, 2004, Beatrice Manor, pursuant to leave granted by the court, filed an amended answer alleging for the first time that Wendeln's claims were barred by the 300-day statute of limitations period set forth in § 48-1118(2).

The court granted a motion by Wendeln to dismiss her first cause of action which alleged relief under the NFEPA and § 20-148, reasoning that essentially the same cause of action was pending before the Nebraska Equal Opportunity Commission. The court overruled respective motions for summary judgment by Wendeln and Beatrice Manor, and the case went to trial before a jury on Wendeln's second cause of action alleging retaliatory discharge in contravention of the public policy mandate expressed by the reporting provisions of the APSA.

Prior to trial, the court overruled Beatrice Manor's motion in limine for an order precluding Wendeln from making any reference to damages in the form of pain and suffering, loss of enjoyment of life, or humiliation. Beatrice Manor's motion was

based on its argument that Wendeln's claim sounded in contract and that noneconomic damages were not recoverable as a matter of law. The jury was eventually instructed that it "must determine the amount of any *noneconomic damages* sustained by [Wendeln] such as mental suffering, emotional distress and humiliation." (Emphasis in original.) Beatrice Manor objected to the instruction on the ground that Wendeln's cause of action sounded in contract and on the alternative ground that "there has been no evidence that [Wendeln] did sustain the mental suffering, emotional distress and humiliation as a result of this incident, as required by law."

The court also refused Beatrice Manor's proposed jury instruction that Wendeln had the burden to prove that she "acted in good faith and upon reasonable cause in reporting the suspected abuse." Over Beatrice Manor's objection, the jury was instructed only that it must find that Wendeln "acted upon reasonable cause in reporting the suspected abuse."

The jury returned a verdict in favor of Wendeln, finding actual damages in the amount of $4,000 and noneconomic damages in the amount of $75,000, for a total of $79,000. Beatrice Manor moved for a new trial and remittitur, which alleged that the noneconomic damages granted Wendeln were clearly excessive and made under the influence of passion or prejudice.

ASSIGNMENTS OF ERROR

Beatrice Manor argues, summarized and restated, that the trial court erred in (1) failing to find that the applicable statute of limitations was the 300-day period set forth in § 48-1118(2), rather than the general 4-year limitation period found in Neb. Rev. Stat. § 25-207 (Reissue 1995); (2) failing to find as a matter of law that Wendeln's public policy retaliatory discharge claim sounded in contract and, therefore, noneconomic damages were not recoverable; (3) instructing the jury that it was Wendeln's burden to prove that her report to DHHS was made upon reasonable cause, without also instructing the jury that she must prove the report was made in "good faith"; (4) instructing the jury on noneconomic damages when the evidence was insufficient to show that Wendeln suffered "severe" emotional distress as a result of her discharge; and (5) failing to set aside the jury's verdict of noneconomic damages as excessive.

Beatrice Manor also assigns as error the trial court's failure to grant Beatrice Manor summary judgment on the ground that no material issue of fact existed as to Wendeln's lack of good faith and reasonable cause in reporting the alleged abuse to DHHS. However, the issue of whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). Moreover, Beatrice Manor did not preserve any issue as to the sufficiency of the evidence regarding whether Wendeln acted upon reasonable cause because it failed to make a motion for directed verdict at the close of the evidence, or any other motion questioning the sufficiency of the evidence in that respect. We do not, therefore, consider this issue. As to good faith, we determine in this opinion that "good faith" is not a requirement in reporting under the APSA.

STANDARD OF REVIEW

[1] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[2] A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id.*

Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

ANALYSIS

STATUTE OF LIMITATIONS

We first address Beatrice Manor's assertion that Wendeln's claim is barred by the applicable statute of limitations, which it asserts is the 300-day period stated in the NFEPA. The trial court

determined that Wendeln's action was governed by the general 4-year statute of limitations set forth by § 25-207.

[3-6] In determining which statute of limitations applies to any given cause of action, we bear in mind that a special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject. *Andres v. McNeil Co., supra.* Moreover, the essential nature of a proceeding may not be changed, thereby lengthening the statute of limitations, merely by denominating it as something other than what it actually is. *ABC Radio Network v. State of N.Y. Dept.*, 294 A.D.2d 213, 742 N.Y.S.2d 261 (2002). To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading. See *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). However, just because there may be some overlap between relevant facts, it does not change the conclusion that various causes of action are stated based on separate and distinct factual occurrences. See *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997).

Beatrice Manor asserts that although Wendeln denominates her cause of action as a retaliatory discharge action in contravention of public policy, it remains in essence an employment discrimination case under the NFEPA brought directly for judicial relief against the former employer pursuant to § 20-148. In *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000), we stated that NFEPA actions brought pursuant to § 20-148 were governed by the 300-day statute of limitations period found in § 48-1118(2) of the NFEPA.

Wendeln asserts that her amended complaint states only a cause of action for retaliatory discharge in violation of public policy, which constitutes a cause of action separate and distinct from a claim based on the NFEPA. Indeed, Wendeln argues that in her case, a careful examination of the essential allegations of her complaint would reveal that she does not state a cause of action under the NFEPA at all.

In *Adkins*, the plaintiff alleged that the decision of his employer not to hire him for a specific position was substantially

motivated by racial or retaliatory animus and that these actions constituted illegal discrimination in violation of the NFEPA. His claims under the NFEPA, however, were not brought pursuant to the NFEPA, which provides administrative relief from employment discrimination. Rather, they were brought pursuant to § 20-148, which authorizes judicial relief for a deprivation of rights, privileges, or immunities secured by the U.S. Constitution or the Constitution and laws of the State of Nebraska.

[7] We ultimately rejected the plaintiff's argument that since § 20-148 contained no statute of limitations, his claim was governed by the 4-year catchall limitations period set forth in Neb. Rev. Stat. § 25-212 (Reissue 1995). Instead, we held that "§ 48-1118(2) provides the applicable statute of limitations (i.e., within 300 days after the occurrence of the alleged unlawful employment practice) for [N]FEPA claims brought pursuant to § 20-148." *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. at 163, 615 N.W.2d at 473.

[8] We noted that by determining the 300-day statute of limitations under § 48-1118(2) to be controlling, we avoided "using § 20-148 to inadvertently create expanded rights (other than an alternative civil avenue of recovery) not present in an administrative [N]FEPA claim." 260 Neb. at 163, 615 N.W.2d at 474. This was important because we had previously held that § 20-148 was " 'a procedural statute which does not create any new substantive rights.' " 260 Neb. at 163, 615 N.W.2d at 474 (quoting *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996)).

Under the NFEPA, § 48-1114 states:

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

Section 48-1102(15) defines "[u]nlawful under federal law or the laws of this state shall mean acting contrary to or in defiance of the law or disobeying or disregarding the law." Wendeln explains that she does not state a claim under the NFEPA insofar as she fails to allege that her discharge from employment was related either to (1) her opposition to any practice made unlawful by the NFEPA; (2) making a charge, testifying, assisting, or participating in any charge, investigation, proceeding, or hearing under the NFEPA; or (3) opposing any practice or refusing to carry out any unlawful action.

Instead, Wendeln asserts that she was discharged in retaliation for reporting a negligent act which was not unlawful. Specifically, she asserts that she was discharged in retaliation for filing a complaint as required by the APSA. Section 28-384 makes it a Class III misdemeanor for any person to willfully fail to make any report required by the APSA. Section 28-372(1) provides in part:

> When any physician, psychologist, physician assistant, nurse, nursing assistant, other medical, developmental disability, or mental health professional, law enforcement personnel, caregiver or employee of a caregiver, operator or employee of a sheltered workshop, owner, operator, or employee of any facility licensed by the Department of Health and Human Services Regulation and Licensure, or human services professional or paraprofessional not including a member of the clergy has reasonable cause to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse, he or she shall report the incident or cause a report to be made to the appropriate law enforcement agency or to the department.

"Abuse" is defined in § 28-351 as "any knowing, intentional, or negligent act or omission on the part of a caregiver, a vulnerable adult, or any other person which results in physical injury, unreasonable confinement, cruel punishment, sexual abuse, exploitation, or denial of essential services to a vulnerable adult." "Physical injury" is defined in § 28-363 as "damage to bodily tissue caused by nontherapeutic conduct, including, but not limited to, fractures, bruises, lacerations, internal injuries, or

dislocations, and shall include, but not be limited to, physical pain, illness, or impairment of physical function."

We agree with the trial court's determination that the essential nature of Wendeln's stated cause of action does not lie in the NFEPA, but, rather, lies in the public policy mandate that she alleges is expressed by the APSA. Without making any determination as to the hypothetical complaint which simultaneously states a cause of action under both the civil rights provisions of the NFEPA and under a public policy exception allowing a retaliatory discharge action for an at-will employee, it is clear in this case that not only does the denomination of Wendeln's cause of action accurately reflect its true nature, but that the facts alleged simply do not state a cause of action for a claim under the NFEPA. Wendeln did not allege that she was discharged for opposing any unlawful employment practice, participating in a proceeding under the NFEPA, or opposing or refusing to carry out an unlawful act. Rather, she claimed that her employment was terminated because she did what the law affirmatively required her to do.

As such, *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000), has no bearing to the case at bar. In *Adkins*, there was no dispute that the employer's conduct violated the NFEPA. The employee in *Adkins* merely elected the alternative judicial remedy for that conduct claimed to be found in § 20-148, rather than the administrative remedy found in the NFEPA. Our holding in *Adkins* narrowly focused on the applicability of the 300-day limitations period *to claims under the NFEPA*, and nowhere stated that the 300-day limitations period should apply to any wrongful discharge claim or to any claim cognizable under § 20-148. *Adkins v. Burlington Northern Santa Fe RR. Co., supra.* See, also, *Hassler v. Alegent Health*, 198 F. Supp. 2d 1108 (D. Neb. 2002) (statute of limitations *for NFEPA claims* brought pursuant to § 20-148 is 300 days). Thus, while it may be argued that Wendeln's claim falls under the broad language of § 20-148, given the strictly procedural nature of the statute, such fact alone is of little significance. We conclude that the 300-day NFEPA statute of limitations is inapplicable to Wendeln's public policy retaliatory discharge claim currently before us.

Yet despite a line of cases allowing limited retaliatory discharge claims for discharge in contravention of a clear mandate of public policy, this court has never clearly expressed exactly what statute of limitations period is applicable to these claims. In *Poppert v. Brotherhood of R. R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971), we held that an employee's wrongful discharge claim was governed by the statute of limitations on written contracts. However, the plaintiff's retaliatory discharge action in *Poppert* was based upon a collective bargaining agreement. An examination of authority from other jurisdictions reveals that generally, when a wrongful discharge claim is based on public policy, and not on an implied or actual employment contract, such claim sounds in tort.

Thus, for example, in *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), the court found that a public policy retaliatory discharge claim arising out of the employee's filing for workers' compensation benefits sounded in tort and not in contract. The court noted that generally, a breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. This is not to say, the court further explained, that a tort cannot be committed by parties to a contract. " 'The question to be determined . . . is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged expressed agreement between the parties.' " *Id.* at 492, 630 P.2d at 190.

The court in *Murphy* thus focused on the fact that the employee's retaliation claim was based upon the public policy implicit in the workers' compensation statute, and the employee did not claim the existence of a contract of employment. His termination of employment did not breach any express or implied contractual obligations, but, rather, it was recognized that he was an employee at will who could be terminated at any time with or without cause. Therefore, the court concluded that the employee's cause of action arose only from a violation of a duty imposed by law, that duty imposed by the public policy of the workers' compensation statute. Accordingly, such action clearly sounded in tort. *Id.* See, also, e.g., *Tameny v. Atlantic Richfield*

Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Mackie v. Vaughan Chapter-Paralyzed Vets.*, 354 Ill. App. 3d 731, 820 N.E.2d 1042, 289 Ill. Dec. 967 (2004); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nelson v. Productive Alternatives, Inc.*, 696 N.W.2d 841 (Minn. App. 2005); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Porter v. City of Manchester*, 151 N.H. 30, 849 A.2d 103 (2004); *Potts v. Catholic Diocese of Youngstown*, 159 Ohio App. 3d 315, 823 N.E.2d 917 (2004); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Korslund v. Dyncorp Tri-Cities Services*, 156 Wash. 2d 168, 125 P.3d 119 (2005); *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). But see, e.g., *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

[9,10] We agree that a public policy-based retaliatory discharge claim is based in tort. Accordingly, such a claim is governed by the general 4-year statute of limitations period found in § 25-207. Wendeln's claim is not barred by the applicable statute of limitations.

PUBLIC POLICY EXCEPTION

The public policy upon which Wendeln relies for her retaliatory discharge claim has not yet been recognized by this court. Beatrice Manor asserts that unlike other retaliatory discharge cases decided by this court, "[t]here is no clear legislative enactment declaring an important public policy with such clarity as to provide a basis for [Wendeln's] civil action for wrongful discharge." Brief for appellant at 27-28.

[11] The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). We recognize, however, a public policy exception to the at-will employment doctrine. *Id.* Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.* In *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 905, 416 N.W.2d 510, 515 (1987), we explained, however, that it was

important that abusive discharge claims of employees at will be limited to "manageable and clear standards." Thus, "[t]he right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated." *Id.*

In *Jackson v. Morris Communications Corp., supra*, we held that an employee could state a cause of action for retaliatory discharge based upon the allegation that the employee was terminated from her employment because she filed a workers' compensation claim. In so doing, we recognized that Nebraska law neither specifically prohibited an employer from discharging an employee for filing a workers' compensation claim, nor specifically made it a crime for an employer to do so. Nevertheless, we concluded that "the general purpose and unique nature of the Nebraska Workers' Compensation Act itself provides a mandate for public policy." *Jackson v. Morris Communications Corp.*, 265 Neb. at 431, 657 N.W.2d at 640. We explained that the Nebraska Workers' Compensation Act was meant to create substantive rights for employees and that such beneficent purpose would be undermined by failing to adopt a rule which allows a retaliatory discharge claim for employees discharged for filing a workers' compensation claim. This is because were we not to recognize such a public policy exception to the employment-at-will doctrine, the substantive rights granted by the Nebraska Workers' Compensation Act could simply be circumvented by the employer's threatening to discharge the employee if he or she exercised those rights.

In *Hausman v. St. Croix Care Center*, 214 Wis. 2d 655, 571 N.W.2d 393 (1997), the Wisconsin Supreme Court applied similar principles in determining whether nursing home employees could state a claim of retaliatory discharge for reporting the alleged inappropriate care of patients. The bureau in charge of investigating reports of abuse and neglect in nursing home care ultimately concluded the investigation without issuing any citations. The law provided that any person who failed to act through reporting or taking some other form of action with regard to abuse or neglect of a nursing home patient was subject to a punishment ranging from a Class B misdemeanor to a Class D

felony, but did not specifically provide for a right of action for discharge in retaliation for such reporting.

The court in *Hausman* concluded that where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents, and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action under the "fundamental and well-defined public policy of protecting nursing home residents from abuse and neglect." 214 Wis. 2d at 665, 571 N.W.2d at 397. The court generally abided by the principle that it would not protect an employee from discharge for "merely engaging in praiseworthy conduct consistent with public policy." *Id.* at 666, 571 N.W.2d at 397. However, it concluded that the mandatory reporting in issue went well beyond " 'merely praiseworthy conduct.' " *Id.* at 669, 571 N.W.2d at 398. The court explained that "[b]y applying the public policy exception to the situation presented here, employees would be relieved of the onerous burden of choosing between equally destructive alternatives: report and be terminated, or fail to report and be prosecuted." *Id.* at 668-69, 571 N.W.2d at 398. See, also, *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799 (Mo. 2003); *McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or. App. 107, 684 P.2d 21 (1984).

[12-15] We agree with the reasoning expressed above and find that the purpose of the APSA would be circumvented if employees mandated by the APSA to report suspected patient abuse could be threatened with discharge for making such a report. The Legislature articulates public policy when it declares certain conduct to be in violation of the criminal law. See, *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988); *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997). The APSA makes a clear public policy statement by utilizing the threat of criminal sanction to ensure the implementation of the reporting provisions set forth to protect the vulnerable adults with which the APSA is concerned. Thus, we determine that a public policy exception to the employment-at-will doctrine applies to allow a

cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the APSA. Having made such a determination, we examine Beatrice Manor's remaining assignments of error regarding "good faith" and noneconomic damages.

GOOD FAITH

Beatrice Manor asserts that pursuant to *Schriner v. Meginnis Ford Co., supra*, if we recognize a retaliatory discharge claim for reporting abuse under the APSA, then such reporting must be made in "good faith" in order to state a cause of action. In *Schriner*, we stated that an action for wrongful discharge for reporting an employer's suspected criminal activities will lie only when the employee acts in good faith and upon reasonable cause in reporting his employer's suspected violation of the criminal code. Beatrice Manor asserts that the trial court erred in failing to recognize the good faith requirement when it refused to give the jury Beatrice Manor's proferred instruction that Wendeln had the burden to prove, by the greater weight of the evidence, that she "acted in good faith and upon reasonable cause in reporting the suspected abuse." The jury was ultimately only charged that it must find that Wendeln "had reasonable cause to believe that a vulnerable adult had been subjected to abuse."

[16] Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003).

[17] We agree with the trial court that in order for a retaliatory discharge action to lie against an employer for discharging an employee in retaliation for the mandatory filing of a report of patient abuse pursuant to § 28-372, such report must be based upon reasonable cause. Section 28-372 explicitly conditions its mandate to report upon the employee's having "*reasonable cause*

to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse." (Emphasis supplied.) It would follow that a discharge cannot be in violation of the public policy underlying the mandatory reporting of the APSA unless the APSA requires the reporting in question.

[18] However, in specifying the standard which the employee must meet in order for an employee to fall under the mandatory reporting provisions, the APSA makes no mention of "good faith." We find no reason to write such an additional requirement into the public policy expressed by the APSA. Rather, under the language of the APSA, the reporting itself is broadly encouraged with the only caveat being that it be based upon a reasonable cause to believe that a vulnerable adult has been subjected to abuse or subjected to conditions or circumstances which reasonably would result in abuse. Such broadly encouraged reporting simply begins a further investigatory process which may or may not ultimately result in a conclusion that the abuse actually occurred. We find that Beatrice Manor's assignment of error as to the failure to instruct the jury as to "good faith" is without merit.

NONECONOMIC DAMAGES

Finally, Beatrice Manor makes several assignments of error based upon its assertion that noneconomic damages are not recoverable as a matter of law in the type of retaliatory discharge action here presented or, alternatively, that there was insufficient evidence to support any finding of such damages. We first address whether, as a matter of law, noneconomic damages are recoverable in a public policy-based retaliatory discharge claim.

The issue of whether noneconomic damages are recoverable in a public policy-based retaliatory discharge claim presents a question of law, which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). Beatrice Manor's argument that as a matter of law, noneconomic damages are not recoverable in Wendeln's retaliatory discharge action is predicated on its assertion that "[a]n action for wrongful discharge is in reality an action for

breach of contract." Brief for appellant at 33. Having already resolved this issue to the contrary conclusion that this action is an action in tort, we find Beatrice Manor's argument to be without merit.

In Nebraska, we have allowed plaintiffs in other types of tort actions to attempt to recover damages for mental suffering. See, e.g., *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977); *Crouter v. Rogers*, 193 Neb. 497, 227 N.W.2d 845 (1975); *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995). We have not specifically addressed whether such damages are recoverable in actions claiming the tort of retaliatory discharge in contravention of public policy. However, it appears that the majority of other jurisdictions addressing this issue have explicitly recognized that an employee may recover damages for mental suffering in a wrongful discharge case, so long as the action lies in a public policy tort action, and not upon a contract of employment. See, *Travis v. Gary Community Mental Health Center*, 921 F.2d 108 (7th Cir. 1990); *Wiskotoni v. Michigan Nat. Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D. Or. 2000); *Montgomery Coca-Cola Bottling v. Golson*, 725 So. 2d 996 (Ala. Civ. App. 1998); *Stivers v. Stevens*, 581 N.E.2d 1253 (Ind. App. 1991); *Hamer v. Iowa Civil Rights Com'n*, 472 N.W.2d 259 (Iowa 1991); *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982). Compare, e.g., *Brewster v Martin Marietta*, 145 Mich. App. 641, 378 N.W.2d 558 (1985); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Chavez v. Manville Products Corp.*, 108 N.M. 643, 777 P.2d 371 (1989); *Cagle v. Burns and Roe*, 106 Wash. 2d 911, 726 P.2d 434 (1986); *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999).

The court in *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 355 (Iowa 1989), explained that it could think of "no logical reason why a wrongfully discharged employee's damages should be limited to out-of-pocket loss of income, when the employee also suffers causally connected emotional harm." The court noted

that it would not be unusual for a wrongful discharge to not only cause monetary loss, but also mental suffering, elaborating that "'[h]umiliation, wounded pride, and the like may cause very acute mental anguish.'" *Id.* The court thus concluded that the same public policy that justified the underlying retaliatory discharge claim also justified a recovery for the employee's complete injury and that "fairness alone justifies the allowance of a full recovery in this type of a tort." *Id.*

[19] We hold that, as a matter of law, damages for mental suffering are recoverable in a retaliatory discharge action brought by a former at-will employee alleging that the discharge violated a clear mandate of public policy. We next consider whether the evidence was sufficient to support the jury's apportionment of such damages in this case.

[20] Beatrice Manor argues that Wendeln failed to sustain her burden of proof of any such damages. Therefore, the trial court erred in submitting the issue of noneconomic damages to the jury and in failing to set aside the jury's verdict either by remittitur or by granting Beatrice Manor's motion for new trial. The amount of damages to be awarded is a determination solely for the fact finder, and its 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 the damages proved. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

The crux of Beatrice Manor's argument that there was insufficient evidence of noneconomic damages lies in its legal assumption that in order to be recoverable, Wendeln's mental distress must be "'so severe that no reasonable person could have been expected to endure it'" and that "'the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically diagnosable.'" Brief for appellant at 38 (quoting *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003)). Beatrice Manor thus emphasizes that Wendeln failed to present evidence of "severe emotional distress," stating as follows:

> For example, she offered no evidence of a change in personality as a result of her termination, erosion of her relationship with her parents or friends, inability to work, inability to obtain employment, inability to participate in activities

> she previously enjoyed, difficulty sleeping or eating, continuous crying, nightmare, nausea, medical attention or psychological counseling as the result of her alleged mental suffering or emotional distress, etc.

Brief for appellant at 39.

The cases upon which Beatrice Manor relies for its assertion that Wendeln was required to show that her mental suffering was medically diagnosable and severe are inapposite to the case at bar because they involve actions for intentional or negligent infliction of emotional distress. Wendeln's action is for retaliatory discharge, and while she claims emotional distress as an element of her damages, she does not attempt to set forth a separate cause of action for negligent or intentional infliction of emotional distress.

[21] In *Kant v. Altayar*, 270 Neb. 501, 506, 704 N.W.2d 537, 541 (2005), we recently explained that there is a distinction between proof requirements in an action for negligent or intentional infliction of emotional distress and damages for mental suffering sought " 'where other interests have been invaded, and tort liability has arisen apart from the emotional distress.' " (Quoting Restatement (Second) of Torts § 46, comment *b.* (1965).) We thus held that a person suing on a theory of battery need not prove severe emotional distress in order to recover compensatory damages for such an injury, reasoning that " 'severe emotional distress' is not an element of the tort of battery." 270 Neb. at 507, 704 N.W.2d at 541. Instead, we concluded that the evidence was sufficient to submit damages for mental suffering to the jury where the plaintiff testified that she was ill for 2 days, continued to suffer emotionally, and had a lingering fear resulting from the battery, despite the fact that she had never sought medical treatment or counseling. See, also, *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351 (Iowa 1989).

[22] As in the tort of battery considered in *Kant v. Altayar, supra*, and unlike the torts of negligent or intentional emotional distress, severe emotional distress is not an element of the tort of retaliatory discharge in contravention of public policy. Accordingly, there is no threshold limitation based upon the degree of severity of the mental suffering, nor is it necessary to

show that the plaintiff sought medical treatment or counseling for the mental suffering in order for it to be recoverable as past and present damages. We find that mental suffering is simply an aspect of providing full recovery for the wrong, where present, and there is no rational reason to confine such full recovery to those former employees whose mental suffering has been severe.

[23,24] That having been determined, we consider whether the evidence was sufficient to support the damages for mental suffering granted to Wendeln by the jury. In awarding damages for mental suffering, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder. See *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). Accordingly, an appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

In considering whether the trial court erred in failing to grant Beatrice Manor's motions for remittitur and for new trial, we first note that Beatrice Manor asks us to consider the fact that Wendeln's closing argument asked the jury to assess an amount of damages that "sends a message" to Beatrice Manor. Specifically, Wendeln's attorney argued that the jury "must assess the amount of damages that makes [Wendeln] whole, that makes up for the humiliation, the mental suffering, loss of enjoyment of life, the things that went along with this horrible experience." Counsel then proceeded to state:

> I encourage you to pick a figure that sends a message to Beatrice Manor that if you do this, we'll make sure [Wendeln] gets made whole. And that figure's up to you. This is a — Beatrice Manor is a corporation, and to make a corporation know that you have to pay what's right and what makes somebody whole, it's a little bit different. Pick a range, and it's your range, but I'd suggest a range somewhere between $25,000 and $125,000. Pick a figure that you think lets this corporation know that this was not right and it cannot be done.

Beatrice Manor acknowledges that it made no objection to these statements, but asks this court to consider them simply as "further evidence that the jury relied on passion and prejudice in support of its verdict." Brief for appellant at 43.

[25] In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument. *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). One may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error. *Wolfe v. Abraham, supra.* Beatrice Manor, although attempting to innocently frame this claim into its argument that the jury's verdict was excessive, is still attempting to press consideration of the alleged impropriety and prejudicial nature of statements made during closing argument. Since such statements were not properly objected to, we do not consider them in this review.

In arguing that the jury's verdict was excessive, Beatrice Manor also relies on this court's opinion in *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001), wherein we affirmed the trial court's grant of a new trial on the basis that the damages awarded were so excessive as to indicate that they were the result of passion or prejudice. The underlying claims were for assault and battery and for false imprisonment. The plaintiff was awarded $250,000 and $50,000, respectively, for the two causes of action, despite the fact that there was no evidence of medical bills or evidence of permanent injury or inability to work, and little evidence of emotional distress.

Beatrice Manor specifically focuses on our statement in *Holmes* as to the false imprisonment action that "[t]he record reflects that [the plaintiff] experienced a demeaning, humiliating, and anxiety-inducing incident and aftermath. However, there was no medical testimony by a physician or any other health professional regarding [the plaintiff's] asserted mental distress." 262 Neb. at 115, 629 N.W.2d at 525. *Holmes*, however, is clearly inapplicable to the case at bar. Most importantly, *Holmes* involved the review of a trial court's granting of a new trial, which, as we took pains to point out, involves a different

analytical framework than that for the review of a jury verdict where no new trial was granted. Here, we give deference to the fact finder in its assessment of these inherently imprecise damages. See, *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

Wendeln presented evidence of the manner in which she was reprimanded and later fired and how she felt extremely upset, scared, and intimidated as a result. She reported that these feelings lasted not only through her time off before her official discharge, but for a long period of time thereafter. In light of all the evidence presented, we cannot say that the jury's findings were unsupported or bore no reasonable relationship to the evidence. See, e.g., *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999) (award of $75,000 in noneconomic damages to former employee, in action for retaliatory discharge, was supported by evidence that employee suffered from embarrassment, depression, and periods of marital discord over financial pressures due to his unemployment). We thus find this assignment of error to likewise be without merit.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the trial court.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF SEAN H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. SEAN H., APPELLEE.

711 N.W.2d 879

Filed April 7, 2006. No. S-05-894.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions.
2. **Homicide.** Under Neb. Rev. Stat. § 28-305 (Reissue 1995), a person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
5. **Statutes: Appeal and Error.** Appeals under specific statutory provisions require strict adherence to the statute's procedures.
6. **Prosecuting Attorneys: Judgments: Notice: Appeal and Error.** Under Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004), prosecuting attorneys can take exception to any ruling or decision of the county court by presenting to the court a notice of intent to take an appeal to the district court.
7. **Courts: Juvenile Courts.** In counties without a separate juvenile court, the county court sits as the juvenile court.
8. **Appeal and Error.** Under Neb. Rev. Stat. § 43-2,106.01(2)(d) (Reissue 2004), the State must file its exception proceeding according to Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004).

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER, Judge. Exception dismissed.

L. Kenneth Polikov, Sarpy County Attorney, and Carolyn A. Rothery, and Michael E. Brzica and Adam Kent, Senior Certified Law Students.

Thomas P. Strigenz, Sarpy County Public Defender, Dennis Marks, and Patrick J. Boylan, and Tina Kula, Senior Certified Law Student.

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

CONNOLLY, J.

While handling a revolver, 15-year-old Sean H. shot his 22-year-old friend, Jared Naughton. The State charged Sean with unlawful act manslaughter and deporting himself so as to injure another by being a minor in possession of a revolver. The juvenile court dismissed the manslaughter charge, finding that the State had failed to meet its burden of proof, but found that Sean did commit the predicate offense of unlawfully possessing a revolver. The State appeals the dismissal of the manslaughter charge under Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 29-2317 to 29-2319 (Reissue 1995 & Cum. Supp. 2004), which

allow the State to take exception to trial court decisions. Because the State did not strictly adhere to the statutory procedure for appeals, we dismiss the State's exception for lack of jurisdiction.

BACKGROUND

On November 14, 2004, Sean and his 18-year-old friend, Joshua B., were watching a movie at Sean's home when Naughton invited them to "hang out" at his home. When Joshua and Sean arrived, they found Naughton upstairs in his bedroom. The three talked while Naughton smoked marijuana. The conversation turned to guns, and Naughton showed them his handgun, pointing out the new grips. Naughton then handed the gun to Sean for inspection. When Sean asked if it was loaded, Naughton said, "[N]o, it's not loaded, you can point it at me and shoot it and it won't go off."

Joshua said he warned Sean not to "trust it," but Sean said later that he did not hear Joshua's warning. According to Sean, Naughton then told him to go ahead and "do it." Joshua recalled Sean pausing to think before pulling the trigger. After Sean squeezed the trigger, Naughton grabbed his chest and said, "Oh my God, you shot me." Thinking that Naughton was playing a trick on him, Sean fired the gun into the floor. As he did so, Sean felt air rush past his leg, saw Naughton fall to the floor with blood on him, and realized the gun was loaded. Sean began to panic and called the 911 emergency dispatch service.

The court made the following factual findings: that Sean persistently asked Naughton if the gun was loaded, that Naughton reassured Sean it was not, that Naughton told Sean to aim the gun at him and shoot, and that Sean paused to think before pulling the trigger, but acted unintentionally.

From this evidence, the court found that no assault occurred because Naughton was not in fear for his safety. The court opined that the salient issue was whether the State proved beyond a reasonable doubt that Sean intended to possess the revolver. The court concluded that Naughton remained in constructive possession of the revolver and in control of his surroundings. The court said that Sean's momentary thought before pulling the trigger could raise an issue whether Sean "thought independently of the victim's directive," but that the State did not meet its burden

of proving that he did. The court dismissed the manslaughter charge, but found that the State had met its burden on the allegation that he possessed a revolver.

ASSIGNMENTS OF ERROR

The State assigns that (1) the court erred in ruling that the crime of unlawful possession of a revolver is not sufficient to support the crime of unlawful act manslaughter and (2) the court erred in ruling that the State did not prove beyond a reasonable doubt that Sean had committed the crime of manslaughter.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions. See *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999).

ANALYSIS

[2] Under Neb. Rev. Stat. § 28-305 (Reissue 1995), "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Here, the State charged Sean with unlawful act manslaughter; to supply the requisite unlawful act, the State cited unlawful possession of a revolver. The State argues that any unlawful act can serve as the underlying offense in unlawful act manslaughter and asks us to apply this rule to future cases. In response, the defense points out that unlawful possession of a revolver is a status offense and argues that status offenses should not support manslaughter convictions. We do not address these issues, however, because we lack jurisdiction.

[3,4] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. See, *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000); *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991).

Nonetheless, Nebraska statutes authorize the State to appeal criminal decisions in a few specific instances. Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1995 & Cum. Supp. 2004) allow the State to take exception to district court decisions. See *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989) (finding "trial court" synonymous with "district court" under § 29-2315.01). Similarly, §§ 29-2317 to 29-2319 allow the same with county court decisions. Under § 43-2,106.01(2)(d), the Legislature similarly limited the State's right to appeal delinquency issues in juvenile court when jeopardy has attached. These statutory provisions allow the State to seek limited review of adverse rulings and outline the procedure to obtain such review. See *State v. Johnson, supra.*

[5] However, appeals under specific statutory provisions require strict adherence to the statute's procedures. See, e.g., *State v. Johnson, supra* (dismissing State's exception for failure to comply with § 29-2315.01); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990) (dismissing parents' appeals for failure to comply with the predecessor to § 43-2,106.01); *State v. Steinbach*, 11 Neb. App. 468, 652 N.W.2d 632 (2002) (directing lower court to dismiss appeal for State's failure to comply with § 29-2317).

The State appeals the juvenile court's order, claiming jurisdiction under § 43-2,106.01, which governs appellate jurisdiction for separate juvenile courts. See *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004). Section 43-2,106.01 provides:

> (1) Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals. The appellate court shall conduct its review within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . .
>
> (2) An appeal may be taken by:
>
> . . . .
>
> (d) The county attorney or petitioner, ***except that*** in ***any case*** determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such

> issues ***may only be taken*** *by exception proceedings pursuant to sections 29-2317 to 29-2319.*

(Emphasis supplied.)

As is clear from § 43-2,106.01(1), most cases arising under that statute are governed by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004), which sets forth the requirements for appealing district court decisions. See *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). But the plain language of § 43-2,106.01(2)(d) carves out an exception for delinquency cases in which jeopardy has attached. In such cases, appeal may be taken only under the procedures of §§ 29-2317 to 29-2319.

[6] Sections 29-2317 to 29-2319 outline exception proceedings, which allow prosecuting attorneys to "take exception to any ruling or *decision of the county court* . . . by presenting to the court a notice of intent to take an *appeal to the district court.*" § 29-2317(1). The language of § 29-2317 requires the appeal of a county court judgment to the district court sitting as an appellate court. Specifically, the pertinent portions of § 29-2317 provide:

> (1) A prosecuting attorney may take exception to any *ruling or* ***decision of the county court*** made during the prosecution of a cause *by presenting to the court a notice of intent to take an* ***appeal to the district court*** with reference to the rulings or decisions of which complaint is made.
>
> . . . .
>
> (3) The prosecuting attorney shall then ***file the notice in the district court*** within thirty days from the date of final order and within thirty days from the date of filing the notice shall file a bill of exceptions covering the part of the record referred to in the notice. Such appeal shall be on the record.

(Emphasis supplied.)

After the separate juvenile court of Sarpy County filed its order dismissing the manslaughter charge, the State filed notice of its intent to appeal with the separate juvenile court. But contrary to the language of § 29-2317, the State chose to file the appeal not with the district court, but with the Nebraska Court of Appeals, explaining that in Sarpy County, the "[s]eparate [j]uvenile [c]ourt sits in the same stead as the [d]istrict [c]ourt" and "it

would be unreasonable to expect our exception proceedings to go to an equal court for ruling."

Section 43-2,106.01(2)(d), however, plainly states that the procedure outlined in § 29-2317 governs delinquency appeals by county attorneys when jeopardy has attached and that under § 29-2317, the appeal must be to the district court. Indeed, the State alleges jurisdiction under §§ 29-2317 to 29-2319. Had the Legislature intended that appeals under § 43-2,106.01(2)(d) be made to the Court of Appeals, § 43-2,106.01(2)(d) would have referred to §§ 29-2315.01 to 29-2316 instead of §§ 29-2317 to 29-2319. When the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[7] Further, reference to the county court in §§ 29-2317 to 29-2319 also applies to the separate juvenile court. In counties without a separate juvenile court, the county court sits as the juvenile court. See Neb. Rev. Stat. §§ 43-245(5) and 43-2,113(2) (Reissue 2004). This court recognized in *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004), that both separate juvenile courts and county courts sitting as juvenile courts serve the same function. Thus, we treat separate juvenile courts as county courts under §§ 29-2317 to 29-2319.

[8] The plain language of § 43-2,106.01(2)(d) requires the State to file its exception proceeding according to §§ 29-2317 to 29-2319. Because the State failed to fully comply with the statutory procedures outlined in § 29-2317, as incorporated by § 43-2,106.01, we lack jurisdiction to consider the State's exception.

CONCLUSION

Because this case is not properly before this court, we dismiss the exception proceeding for lack of jurisdiction.

EXCEPTION DISMISSED.

WRIGHT, J., not participating.

BRIDGET L. KENLEY, APPELLEE, V. BEVERLY J. NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

MARC F. SHIELS, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

712 N.W.2d 251

Filed April 14, 2006. Nos. S-04-1186, S-05-230.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **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.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
8. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
9. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the U.S. Constitution.
10. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
11. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
12. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.

13. **Equal Protection.** The Equal Protection Clause requires the government to treat similarly situated people alike.
14. **Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid.
15. **Equal Protection.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action.
16. ____. The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
17. **Equal Protection: Statutes.** If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end.
18. **Drunk Driving: Public Health and Welfare: Implied Consent: Blood, Breath, and Urine Tests.** In addition to the interest of protecting the public by removing drunk drivers from the roadways, in the refusal-to-submit context, the State has an interest in enforcing its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety.

Appeals from the District Court for Clay County: VICKY L. JOHNSON, Judge. Cause in No. S-04-1186 remanded with directions. Cause in No. S-05-230 remanded for further proceedings.

Jon Bruning, Attorney General, Laura L. Neesen, and Milissa Johnson-Wiles for appellant.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellee Kenley.

No appearance for appellee Shiels.

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

WRIGHT, J.

NATURE OF CASE

Motorists in two cases appealed the decisions of the Department of Motor Vehicles (DMV) revoking their driver's licenses for refusing to submit to chemical testing for the unlawful presence of alcohol or drugs. The Clay County District Court reversed the license revocation in each case and declared Neb. Rev. Stat. § 60-498.01 (Reissue 2004) facially unconstitutional on due process and equal protection grounds. The State timely

appealed the district court's rulings. The cases were consolidated for oral argument, and we address both cases in this opinion.

SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

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

[4] 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. *Id.*

FACTS

Background in *Shiels*

On October 26, 2001, a vehicle driven by Marc F. Shiels was stopped in Clay County. Shiels was investigated for driving while under the influence of alcohol (DUI), and he refused a preliminary breath test. After being arrested and transported to the sheriff's office, he again refused to submit to a breath test.

The investigating law enforcement officer completed a "Notice/Sworn Report/Temporary License" form. This form notified Shiels that his driver's license would be revoked in 30 days because reasonable grounds existed to believe he had been driving while under the influence of alcoholic liquor or drugs; because he had been validly arrested pursuant to the DUI statutes; and because he had refused to submit to a chemical test of his blood, breath, or urine. Shiels filed a timely petition requesting a hearing before the DMV to contest the revocation of his driver's license.

An administrative license revocation (ALR) hearing was conducted, and on November 21, 2001, the director of the DMV revoked Shiels' driver's license for 1 year. Shiels appealed this determination to the district court. For some reason not apparent from the record, the matter was not decided until January 20, 2005.

Background in *Kenley*

On February 17, 2004, Bridget L. Kenley was arrested on suspicion of DUI. After Kenley refused to submit to a blood test, she was given a "Notice/Sworn Report/Temporary License" form, which informed Kenley that her driver's license would be revoked in 30 days. She timely filed a petition for an ALR hearing to contest the revocation.

An ALR hearing was conducted, and on March 24, 2004, the director of the DMV ordered Kenley's driver's license revoked for 1 year. Kenley appealed this determination to the district court. The district court entered its order on September 30.

District Court Rulings

The district court ruled in each of these cases that the ALR provisions in § 60-498.01 pertaining to motorists who refuse to submit to chemical testing were facially unconstitutional on due process and equal protection grounds. The court held that the statute was constitutionally impaired because it lacked a procedure whereby a motorist could obtain a reinstatement of his or her driver's license that had been administratively revoked if the motorist was subsequently acquitted of the criminal refusal charge. The court noted that the ALR statutes provide such a remedy for a motorist whose license is revoked for failing a chemical test, if that person is not subsequently convicted of the criminal DUI charge. See Neb. Rev. Stat. § 60-498.02(4) (Reissue 2004).

For the sake of clarity, we point out that the statute in effect at the time of Shiels' arrest and ALR hearing was Neb. Rev. Stat. § 60-6,205 (Reissue 1998). That statute number was changed as a result of 2003 Neb. Laws, L.B. 209, § 4. Also, the statute in effect at the time of Kenley's arrest and ALR hearing was § 60-498.01 (Supp. 2003). For purposes relevant to the issues in the appeals before us, the refusal-to-submit provisions were the

same. Thus, all references hereinafter will be to § 60-498.01 (Reissue 2004), unless otherwise specified.

ASSIGNMENTS OF ERROR

The State asserts the following assignments of error in both cases: The district court erred in reversing the ALR order by ruling that § 60-498.01 was unconstitutional on its face because it (1) violated the motorist's due process rights and (2) violated the motorist's equal protection rights.

In the Shiels case, the State also claims the district court erred in considering the constitutionality of § 60-498.01 because Shiels did not plead that issue in his petition on appeal.

ANALYSIS

[5-7] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Id.*

Due Process

In the instant cases, the district court concluded that, on its face, § 60-498.01 violated the due process rights of motorists who refuse to submit to chemical testing because the statute lacks a process whereby a motorist who is acquitted of the criminal refusal charge may obtain a reinstatement of his or her driver's license which has been administratively revoked. We consider this issue below, and for the reasons set forth, we determine that the district court's conclusion was erroneous.

[8,9] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and 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); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The due process requirements of Nebraska's Constitution are similar to those of the U.S. Constitution. *Hass, supra*; *Marshall, supra.*

The first step in analyzing whether an ALR provision satisfies due process concerns is to identify a property or liberty interest entitled to due process protections. See, *Chase, supra*; *Hass, supra*. The property interests at stake are the motorists' interests in retaining their driving privileges. Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Chase, supra*; *Hass, supra*. In such cases, the licenses are not to be taken away without the procedural due process required by the 14th Amendment. *Chase, supra*; *Hass, supra*.

[10,11] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Chase, supra*. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

In *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), we concluded that the ALR refusal-to-submit provisions afforded motorists meaningful notice and an opportunity to be heard. We concluded that the absence of a statutory procedure for challenging the validity of the traffic stop on Fourth Amendment grounds did not render the ALR statutes unconstitutional as applied to motorists who refuse to submit to chemical testing. *Chase* did not address the exact question presented in this appeal, but the analysis and principles set forth therein are relevant.

In *Chase*, we applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). A *Mathews* analysis is undertaken when determining whether an administrative procedure comports with due process. First, a court must consider the private interest that will be affected by some official action. We concluded that a "driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience." *Chase*, 269 Neb. at 894, 697 N.W.2d at 685.

Under *Mathews*, a court next considers the risk of an erroneous deprivation of such interest through the procedures used and the

probable value, if any, of additional or substitute procedural safeguards. We concluded in *Chase* that the risk that a motorist would be erroneously deprived of his or her driving privileges was only slight in ALR refusal-to-submit proceedings. We arrived at this conclusion in the following manner: "Because the current [ALR] statutory scheme gives the [refusal] motorist a reasonable time and opportunity to present evidence regarding the accusations and any potential statutory defense, we conclude that this risk is slight, if it exists at all." *Id.* at 894, 697 N.W.2d at 685-86.

The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. This court has found two substantial governmental interests advanced by the ALR provisions pertaining to refusal to submit. One interest is " 'in protecting public health and safety by removing drunken drivers from the highways.' " *Chase*, 269 Neb. at 894, 697 N.W.2d at 686 (quoting *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003)). The State has an additional interest in enforcing "its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety." *Chase*, 269 Neb. at 894, 697 N.W.2d at 686. After considering the above factors, we concluded in *Chase* that the ALR refusal-to-submit provisions fully comported with due process.

In the instant cases, the district court found the ALR scheme unsatisfactory under the second prong of the *Mathews* balancing test. The court was troubled that a motorist could be administratively deprived of his or her license despite an eventual acquittal on a refusal-to-submit criminal charge. The court erred in two respects.

First, the district court failed to recognize the distinction between ALR proceedings and criminal proceedings. This court has consistently opined that civil ALR proceedings are separate and distinct from a criminal prosecution arising from the same incident. For example, in *State v. Boyd*, 242 Neb. 144, 493 N.W.2d 344 (1992), a defendant in a criminal refusal case relied on the ALR statutes to support his contention that his license could not be revoked in a criminal proceeding if his refusal to

submit to a chemical test was reasonable. This court rejected that argument and reasoned as follows:

> "The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. . . ."

Id. at 148, 493 N.W.2d at 347 (quoting *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982)).

In *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996), the defendant had successfully shown at the ALR proceeding that he had not operated his vehicle when he was intoxicated, and thus, the DMV restored his driver's license. In criminal DUI proceedings stemming from the same incident, the defendant moved to dismiss the charge, arguing that the Double Jeopardy Clauses of the federal and state Constitutions prevented him from being prosecuted for DUI following his exoneration at the ALR hearing. The trial court overruled the defendant's dismissal motion, and this court upheld the trial court's ruling.

We found the primary purpose of ALR's to be remedial in nature; that is, the purpose of ALR's is to protect the public from the health and safety hazards of drunk driving by quickly getting DUI offenders off the road. We found that criminal DUI charges, on the other hand, serve the general purpose of deterrence. We concluded that although the "ALR statutes also further a purpose of deterring other Nebraskans from driving drunk . . . [t]he fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence does not require a conclusion that the statute results in punishment for double jeopardy purposes." (Citation omitted.) *Id.* at 542, 544 N.W.2d at 811.

The defendant in *Young* also argued that his criminal trial constituted relitigation of a settled claim, and he asserted that the doctrine of collateral estoppel barred such relitigation by the State. We rejected this argument as well. We stated that granting the defendant's plea for preclusion "would violate not only our own precedent of collateral estoppel, but also sound policy

reasons for leaving a degree of separation between the civil ALR hearing and criminal DUI prosecutions." *Id.* at 544, 544 N.W.2d at 812. We explained:

> Were this court to force the State to litigate thoroughly every element of DUI at an ALR hearing, such a holding would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. . . . ALR hearings would quickly evolve into full-blown trials at which the State must fully litigate every possible issue regarding a motorist's actions, thereby losing their effectiveness in removing potentially dangerous drivers from the Nebraska highways within 1 month of their offense.

(Citation omitted.) *Id.* at 544, 544 N.W.2d at 812-13.

Our precedents make it clear that civil ALR proceedings are distinct from parallel criminal prosecutions for DUI or refusal to submit to chemical testing. See, *Young, supra*; *State v. Boyd*, 242 Neb. 144, 493 N.W.2d 344 (1992). See, also, *Hass v. Neth*, 265 Neb. 321, 329, 657 N.W.2d 11, 21 (2003) (noting " 'degree of separation' " between civil ALR hearings and criminal DUI prosecutions); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998) (concluding that ALR is civil sanction and that ALR for failure to submit to chemical test does not violate Double Jeopardy Clauses of federal or state Constitutions because it does not constitute multiple punishment for same offense). Accordingly, although a motorist who refuses to submit to testing could subsequently be acquitted of the corresponding criminal charge, this fact is irrelevant to the ALR process.

Second, the district court failed to effectively distinguish between an ALR based on a motorist's failed chemical test and an ALR based on a motorist's refusal to submit to chemical testing. We discussed this distinction in *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). We recognized that when a motorist submits to a chemical test which discloses an alcohol concentration greater than the lawful limit,

> the relevant statutes . . . provide for dismissal of the ALR proceeding or reinstatement of a license administratively revoked if there is no criminal prosecution for DUI or if such charges are dismissed or the defendant found not guilty after

> trial. § 60-498.02(4)(a). Thus, administrative revocation for DUI is contingent upon a successful prosecution of the motorist in a criminal DUI proceeding in which Fourth Amendment issues may be raised.

Chase, 269 Neb. at 887, 697 N.W.2d at 681. On the other hand, we recognized that "[t]here is no similar statutory linkage between an ALR and a criminal proceeding based upon a motorist's refusal to submit to chemical testing. The statutes permit an ALR in this circumstance regardless of whether criminal charges are filed or successfully prosecuted." *Id.* at 888, 697 N.W.2d at 681.

Furthermore, in an ALR case based on refusal to submit, a court should give more weight to the governmental interest factor of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), than it would in an ALR case involving a failed chemical test. Here, the district court considered only the government's interest in protecting the public by removing drunk drivers from the highway.

ALR is a civil remedy with a nonpunitive purpose. *Chase, supra.* ALR serves different purposes when it is imposed for refusal to submit to a chemical test than when it is imposed for failing a similar test. See *id.* In the context of failing a chemical test, the purpose of ALR is limited to protecting public health and safety. *Id.* In the context of refusal to submit to a chemical test, ALR both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose. *Id.*; *Howell, supra.*

Therefore, we hold that the due process rights of a motorist who refuses to submit to chemical testing are not violated by § 60-498.01 even though the statutory scheme does not operate to reinstate the motorist's administratively revoked driver's license if he or she is acquitted of the criminal refusal charge. The district court erred in finding otherwise.

In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The arresting officers in the instant cases completed

"Notice/Sworn Report/Temporary License" forms. Shiels and Kenley were each given a copy of this form, which included notification that their driver's licenses would be revoked in 30 days because reasonable grounds existed to believe they were driving while under the influence of alcoholic liquor or drugs and because they had refused to submit to a chemical test of blood, breath, or urine. The form also provided instruction on how to request a hearing before the DMV. Each motorist was informed that the issues at the hearing would be (1) whether the law enforcement officer had probable cause to believe the motorist was operating or in the physical control of a motor vehicle while under the influence of alcohol or drugs and (2) whether the motorist refused or failed to complete a chemical test. Once Shiels and Kenley requested hearings before the DMV, they were notified of their scheduled administrative hearings. Hearings were then held at which they had the opportunity to present evidence concerning the above-noted issues. Thus, the constitutional requirements of due process were met in these cases.

EQUAL PROTECTION

The district court ruled that the ALR provisions pertaining to motorists who refuse to submit to chemical testing violated the equal protection rights of such motorists. Employing language from *Hass*, the court found the ALR scheme unconstitutional because the distinction between motorists who submit to, but fail, a chemical test and motorists who refuse to submit was "'wholly irrelevant to the achievement of the government's objective.'" We conclude the district court's ruling as to equal protection was erroneous.

[12-14] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). The Equal Protection Clause requires the government to treat similarly situated people alike. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid. *Hass, supra.* The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Id.*

[15] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. *Id.* Absent this threshold showing, one lacks a viable equal protection claim. *Id.* Kenley asserts that motorists "who refuse to submit to a chemical test are similarly situated to those with a blood alcohol concentration of over .08" (i.e., motorists who submit to, but fail, a chemical test). See brief for appellee at 26. She argues that both types of motorists "are subject to ALR proceedings, but are subject to drastically different remedial schemes." *Id.*

[16] The question presented is whether Shiels and Kenley, who refused to submit to chemical testing, have sufficiently met the threshold requirement of showing that they are similarly situated to motorists who take, but fail, a chemical test. We conclude that these two groups of motorists are not similarly situated. One group refuses a test; the other submits. With respect to a motorist who refuses testing, law enforcement cannot determine the motorist's blood-alcohol level. With respect to a motorist who submits to testing, law enforcement can determine whether the motorist's blood-alcohol level exceeds the legal limit. Based on these distinctions, the two types of motorists are treated differently by the ALR statutory scheme. The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Atkins, supra.*

[17] Even assuming for the purpose of argument that these two groups of motorists may be considered as being similarly situated, we note that in *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999), we held that the ALR refusal-to-submit provisions do not violate the equal protection rights of motorists. The ALR scheme is analyzed through the lens of the rational relationship standard of review. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *Id.* Upon a showing that such a rational relationship exists, courts will uphold the legislation. *Id.* We have previously declared that driving is not a fundamental right and that drunk

drivers are not a suspect class. See, *id.*; *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985).

In *Schindler*, a driver appealed the administrative revocation of his driving privileges resulting from his refusal to submit to chemical testing. The driver argued that differences in treatment between persons who refused to submit to a chemical test and persons who submitted to and failed the test violated equal protection. This court held that the ALR statutes did not violate equal protection because they bore a rational relationship to legitimate state interests. We noted:

> [I]n the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. However, in the context of refusal to submit to a chemical test, administrative license revocation serves the additional purpose of facilitating the gathering of evidence. Accordingly . . . the remedial scheme imposed upon those who refuse to submit to a chemical test, although harsher than that imposed on those who take and fail the test, is not excessive and is therefore rational in relation to its purpose.

Id. at 786, 593 N.W.2d at 298 (citing *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998)).

[18] In the instant cases, the district court emphasized the distinct classifications in its equal protection analysis, but the court did not discuss the government's objectives in implementing the ALR provisions at issue. As a result, the court failed to consider that the ALR provisions governing refusal-to-submit cases advance different objectives than the provisions governing cases involving motorists who submit to and fail a chemical test. See, *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Schindler, supra*; *Howell, supra*. In addition to the interest of protecting the public by removing drunk drivers from our roadways, in the refusal-to-submit context, the State has an interest in enforcing "its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety." *Chase*, 269 Neb. at 894, 697 N.W.2d at 686.

Nebraska law provides that any person operating a motor vehicle in this state is deemed to have given his or her consent to

chemical testing of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in his or her system. See Neb. Rev. Stat. § 60-6,197 (Reissue 2004). When a motorist refuses to submit to such testing, law enforcement officials are frustrated in their investigative duty of gathering evidence. They are unable to determine whether the motorist was driving a vehicle while under the influence of alcohol or drugs or whether the motorist was operating the vehicle in a lawful manner. The ALR refusal-to-submit provisions in § 60-498.01 are rationally related to the government's legitimate interests in enforcing its implied consent law and in gathering evidence in situations in which law enforcement officers have probable cause to believe motorists are driving while under the influence of alcohol or drugs.

Accordingly, we conclude that § 60-498.01 does not violate the Equal Protection Clauses of the federal and state Constitutions by treating motorists who refuse to submit to chemical testing differently than motorists who submit to, but fail, such testing. The district court's equal protection ruling did not conform to the law and was thus erroneous.

CONCLUSION

We conclude the district court erred in ruling that the provisions in § 60-498.01 pertaining to refusal to submit to chemical testing violate drivers' due process and equal protection rights. Because we have determined the district court erred in both cases, we need not address the State's additional assignment of error in Shiels' case.

With respect to Kenley, we remand the cause to the district court with directions to reinstate the administrative revocation of Kenley's driver's license.

With respect to Shiels, the statute in effect at the time of Shiels' arrest, § 60-6,205, required an administrative license revocation to be "based on a valid arrest." See *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002). In his appeal to the district court, Shiels challenged the validity of his arrest. Due to its other holdings, the district court found it unnecessary to reach Shiels' argument concerning his arrest. Since that issue was not reached in the district court, it is not before us. We therefore remand the

cause to the district court for further proceedings consistent with this opinion with directions to determine the issue of whether Shiels' arrest was valid, as required by § 60-6,205.

CAUSE IN NO. S-04-1186 REMANDED WITH DIRECTIONS.
CAUSE IN NO. S-05-230 REMANDED FOR FURTHER PROCEEDINGS.

GAYLEN L. CATRON, APPELLANT, V.
MARVIN R. LEWIS ET AL., APPELLEES.
712 N.W.2d 245

Filed April 14, 2006. No. S-04-1212.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Actions: Negligence: Mental Distress.** In Nebraska, where there is no impact or physical injury to the plaintiff, the plaintiff seeking to bring an action for negligent infliction of emotional distress must show either (1) that he or she is a reasonably foreseeable "bystander" victim based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence or (2) that the plaintiff was a "direct victim" of the defendant's negligence because the plaintiff was within the zone of danger of the negligence in question.
3. **Negligence: Mental Distress: Liability.** Persons in the zone of danger are clearly foreseeable plaintiffs to the negligent actor insofar as they have been placed at unreasonable risk of immediate bodily harm by the actor's negligence. The fact that the harm results solely through emotional distress should not protect the actor from liability for such conduct.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed.

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

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellees Marvin R. Lewis and Skylar L. Panek.

Jon Bruning, Attorney General, Vicki L. Adams, and Frederick J. Coffman for appellee State of Nebraska.

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

MCCORMACK, J.

NATURE OF CASE

This action was brought by Gaylen L. Catron against Marvin R. Lewis, Skylar L. Panek, and the State of Nebraska (collectively the defendants). Catron was operating a motorboat on Center Lake at the Bridgeport State Recreation Area in Morrill County, Nebraska, pulling two tubes ridden by two of his daughter's friends, Samantha Rader and Aimee Stuart. Panek accidentally struck and killed Rader with a jet ski he was operating. The jet ski was owned by Lewis, and the recreation area is operated by the State.

Catron's action sought damages for emotional distress stemming from his witnessing the accident and his unsuccessful attempt to rescue Rader. Catron alleged that such distress was a proximate result of the negligent acts or omission of the defendants, specifically, the negligent operation of the jet ski by the then 14-year-old Panek, the negligent entrustment of the jet ski to Panek by Lewis, and the failure of the State to operate the Bridgeport State Recreation Area in a manner reasonably safe for foreseeable users under foreseeable conditions.

The district court granted summary judgment in favor of the defendants, and Catron appeals.

BACKGROUND

The accident in question occurred on July 5, 2002. On that day, Catron took his boat out on Center Lake to take Rader and Stuart riding on towable tubes. Rader and Stuart were friends of Catron's daughter and were not related to him. The towropes which attached the tubes that Rader and Stuart were riding to Catron's boat were approximately 61 feet long. The tubes generally stayed within 1½ feet of each other on the water. Rader and Stuart rode the tubes sitting facing away from the boat.

The lake is circular with a center island and two narrower and shallower channels connecting the two sides of the "circle." Boat traffic travels in a counterclockwise direction. After going around the lake twice, pulling the tubes in which Rader and Stuart rode, Catron decided to go onto shore, where Rader and Stuart had

camped the night before with Catron's daughter and some other girls. After having gone through one of the narrow channels, and heading counterclockwise, Catron testified that he made his customary loop maneuver to go in straight toward the shore. This involved slowing down so that the tubes did not swing to the side of the boat and making a small circle in which he briefly traveled clockwise before traveling perpendicular to the traffic flow in order to nose straight onto the beach. As he was traveling straight east toward the shore, Catron stated that he noticed two jet skis heading north (counterclockwise) toward the right side of Catron's boat. One of the jet skis was being ridden by Panek.

Catron estimated that when he first saw them, the jet skis were 75 yards away going approximately 35 to 40 miles per hour. Catron then looked back behind his boat to confirm that the tubes were traveling straight behind his boat. Stuart confirmed in her deposition testimony that right before the accident, the ropes pulling the tubes were taut and that the tubes were traveling directly behind the boat, inside the wake.

In his deposition, Catron indicated that he feared for his safety "[j]ust when [the jet skis were] aiming at my boat." He subsequently explained during a psychiatric examination that he was not really afraid that the jet skis were going to hit his boat; he just did not know for sure what they were going to do. He was able to make eye contact with Panek and the other boy riding the jet skis before they turned, and he assumed they would either shut down or turn to avoid hitting his boat. Catron did not make any evasive maneuvers. When the jet skis turned, Catron became afraid they were going to hit the tubes Rader and Stuart were on.

Panek did in fact run into Rader, killing her. Catron testified that he saw Panek's jet ski hit the tube Rader was on and then saw Rader lying face down in the water "in a pool of blood." Catron jumped in, swam over to her, and floated her back to the boat. Rader was nonresponsive. With assistance, Catron was able to get Rader to shore.

Panek also testified by deposition as to the events immediately preceding the accident. He stated that after coming out (counterclockwise) from the narrow channel, he saw Catron's boat coming in his general direction and then turning in front of him. In order to avoid the boat, Panek stated that he turned to his left

toward the rear of Catron's boat. Panek testified that he did not see the tubes trailing behind the boat until he was upon them.

Panek's description of the accident differs from Catron's in that Panek testified that he first saw Catron's boat as it was heading east and Panek was heading north to northwest. He then stated that the boat turned north to northeast toward shore, as Panek was turning west, effectively swinging the tubes in front of him.

Both Panek's and Catron's versions of the event, however, place the accident at least 61 feet from the rear of Catron's boat.

After the accident, Catron sought help coping with the mental injuries he suffered from witnessing Rader's death. Prior to the accident, Catron had no history of depression, anxiety, emotional problems, or psychiatric treatment. A psychiatrist treating Catron shortly after the accident diagnosed him with major depression, anxiety disorder, and adjustment disorder. The severity of Catron's symptoms was such that it warranted the psychiatrist's certification to Catron's employer that Catron was temporarily disabled from performing his regular occupation as a result of his "major depressive disorder and anxiety/adjustment disorder." Catron accordingly was unable to work for approximately 3 months following the accident. Catron was eventually diagnosed with posttraumatic stress disorder and continues to take antidepressants.

Following the filing of Catron's action against the State, the State raised the affirmative defense that it was immune from suit pursuant to Neb. Rev. Stat. § 81-8,219(1), (7), and (8) (Reissue 2003), and made a motion for summary judgment. Panek and Lewis also moved for summary judgment, arguing that no claim could be had against them for emotional distress because Catron did not fear for himself but was in fear for the people on the tubes. They also argued that Catron did not qualify as a "bystander" because he was not related to the victim. Panek and Lewis also argued that the evidence failed to show distress sufficiently severe to be recoverable. The State argued at the summary judgment hearing that in addition to its claims of lack of negligence and sovereign immunity, Catron was precluded from recovery because, given the distance of over 60 feet, he was not within the zone of danger. As Catron's counsel acknowledged at

the hearing, "elements of proof are that we have to prove negligence by the defendant, we have to prove that the plaintiff was in the zone of danger."

The summary judgment order filed October 1, 2004, granted summary judgment as to Catron's action against the defendants. The district court reasoned that Catron's allegations against the State fell under the discretionary function exception to the State Tort Claims Act and were therefore barred by sovereign immunity. In addition, without specifically rejecting the parties' argument that Catron was neither a bystander nor within the zone of danger, the court reasoned that summary judgment was proper as to all the defendants because Catron's emotional distress did not rise to the standard of being " 'so severe that no reasonable person could have been expected to endure it.' "

ASSIGNMENT OF ERROR

Catron assigns that the district court erred in sustaining the defendants' motions for summary judgment.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

ANALYSIS

[2] In Nebraska, where there is no impact or physical injury to the plaintiff, the plaintiff seeking to bring an action for negligent infliction of emotional distress must show either (1) that he or she is a reasonably foreseeable "bystander" victim based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence or (2) that the plaintiff was a "direct victim" of the defendant's negligence because the plaintiff was within the zone of danger of the negligence in question. See, *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). In addition, such plaintiffs whose only injury is an emotional one must show that their emotional distress is medically diagnosable and significant

and is so severe that no reasonable person could have expected to endure it. See *Hamilton v. Nestor, supra.*

The evidence is undisputed that Catron suffered no physical impact or injury from the accident which he attributes to the negligence of the defendants. Furthermore, Catron makes no argument that he had an intimate familial relationship with the fatally injured victim of the accident, Rader. The defendants argue that regardless of whether Catron's alleged emotional distress is of sufficient severity to be legally compensable, he cannot recover for such emotional distress because he was not within the zone of danger of the accident. We agree that viewing the evidence in a light most favorable to Catron, he was clearly not within the zone of danger, and we affirm the district court's grant of summary judgment in favor of the defendants on that basis. See *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991) (this court may affirm grant of summary judgment on any ground available to trial court, even if it is not same reasoning relied upon below).

In *James v. Lieb, supra*, in differentiating "bystanders" from "direct victims," we described the fact that bystanders are not "immediately threatened with physical injury." 221 Neb. at 49, 375 N.W.2d at 111. See, also, *Nielson v. AT & T Corp.*, 597 N.W.2d 434 (S.D. 1999) (zone of danger includes all parties who are placed in immediate risk of physical harm by defendant's negligent conduct); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983) (to be in zone of danger, party must have been in such proximity to accident in which direct victim was physically injured that there was high risk to him of physical impact).

[3] The zone of danger has been described as a complement to the basic requirement that persons exercise reasonable care to protect others from injury. "Those who breach their basic duty of care to others will be required to compensate those who are injured, even when the injuries are not caused by direct impact, but by the operation of foreseeable emotional distress." *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236, 240-41 (Utah 1992). Persons in the zone of danger are clearly foreseeable plaintiffs to the negligent actor insofar as they have been placed at unreasonable risk of immediate bodily harm by the actor's negligence.

The fact that the harm results solely through emotional distress should not protect the actor from liability for such conduct. See, *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003); *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990); Restatement (Second) of Torts § 436 (1965).

In *Zea v. Kolb*, 204 A.D.2d 1019, 613 N.Y.S.2d 88 (1994), the court held that an action for negligent infliction of emotional distress should have been dismissed because the plaintiff was never in any danger from the vehicle that struck and killed the victim. The plaintiff saw the vehicle while standing in a driveway and feared for the victim who was riding her bicycle on the opposite shoulder of the road. The plaintiff immediately ran after the vehicle, but remained on the opposite shoulder of the road and never overtook it. When the vehicle struck the victim, the plaintiff was 12 to 15 feet away. The plaintiff admitted she was never in any danger from the defendant's vehicle.

Similarly, in *Iacona v. Schrupp*, 521 N.W.2d 70 (Minn. App. 1994), the court affirmed summary judgment in favor of the defendants on the ground that the plaintiff was not within the zone of danger of a truckdriver's negligent conduct. The plaintiff sought damages for emotional distress resulting from witnessing his friend get run over by the truck that was backing up alongside the road to assist the plaintiff who was lying in the grass disorientated. Since the plaintiff was not actually in the road at the time the truckdriver was backing up, the court found he was not in danger of physical injury. Stating that a defendant has no duty to avoid injury to those not placed in peril by his conduct, the court concluded that to hold the truckdriver liable for the plaintiff's distress would "impose on a negligent tortfeasor liability out of proportion to his culpability." *Id.* at 73. Compare *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003) (as operator of one of vehicles involved in collision, motorist was clearly within zone of danger).

Here, it is clear that Catron was not immediately threatened with physical injury as a result of the alleged negligence which resulted in Rader's death. While Catron described the jet skis at one point as coming directly toward him at a rapid speed, Catron admitted he was not in immediate danger. Rather, at that point, the jet skis were approximately 75 yards away, and Catron

assumed the jet skis would either stop or turn in order to avoid a collision with the boat. This is what apparently happened, resulting in the collision with Rader, who was riding in the tube some 61 feet away from the rear of Catron's boat.

While it might be argued that others outside the zone of danger are also foreseeable victims, no jurisdiction allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another. *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). This is true because "there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act," and thus, to allow recoverability for all such injuries "holds out the very real possibility of nearly infinite and unpredictable liability for defendants." 512 U.S. at 545-46.

This court has extended the class of potential plaintiffs to "bystanders" outside the zone of danger who have a close familial relationship with a seriously injured victim because, as the court in *Migliori v. Airborne Freight Corporation*, 426 Mass. 629, 637, 690 N.E.2d 413, 418 (1998), explained, "[p]ersons bearing close 'familial or other relationship' to the directly injured third person comprise a discrete and well-defined class, membership in which is determined by preexisting relationships." For witnesses having no such close relationship with the victim, however, we limit recoverability to those persons who are within the zone of danger of the negligent conduct which resulted in the incident in question.

CONCLUSION

Catron was clearly neither a bystander nor a direct victim of the alleged acts which resulted in Rader's death. As a result, Catron cannot recover for the emotional distress allegedly caused by the negligence of the defendants. We, therefore, need not address any alternative grounds for affirmance argued by the parties. Although our reasoning differs from that of the district court, we affirm the district court's grant of summary judgment as to all the defendants.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. STEVEN M. JACOB, APPELLANT, V. SUZANNE E. BOHN ET AL., APPELLEES.

711 N.W.2d 884

Filed April 14, 2006. No. S-04-1410.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, 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.
5. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
6. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
7. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
8. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (2000), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States.
9. **Declaratory Judgments.** Neb. Rev. Stat. § 25-21,154 (Reissue 1995) indicates discretionary rather than mandatory power, and whether to entertain an action for declaratory judgment is within the discretion of the trial court.

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

Steven M. Jacob, pro se.

Jon Bruning, Attorney General, and Maureen Hannon for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Steven M. Jacob filed an action in the district court for Lancaster County against Suzanne E. Bohn, Harold Clarke, and Frank Hopkins (collectively the Appellees). Jacob was identified as an inmate at the Nebraska State Penitentiary, Bohn was identified as the mental health administrator for the Nebraska Department of Correctional Services (DCS), Clarke was identified as the director of DCS, and Hopkins was identified as the assistant director of DCS. Jacob sought a writ of mandamus requiring Bohn to provide him with copies of certain of his mental health records. Jacob also sought judgment against the Appellees pursuant to 42 U.S.C. § 1983 (2000) for having denied him access to his mental health records. Finally, Jacob sought a declaratory judgment requiring Clarke to promulgate and file certain administrative regulations. The district court granted the Appellees' motion to dismiss Jacob's action for failure to state a claim for relief. Jacob appeals. We affirm.

STATEMENT OF FACTS

In 1991, Jacob underwent certain mental health evaluations conducted by DCS as a part of the inmate classification procedure. The records of such tests were maintained by Bohn as the mental health administrator for DCS. On August 7, 2003, Jacob made a written request of Bohn for a copy of such mental health records. Having received no response, on September 3, Jacob filed an informal grievance and was told that Bohn had received his request and was in the process of responding to it. Jacob subsequently filed grievances as part of DCS' formal appeal process. Jacob filed a "step one" grievance on September 17 and a "step two" grievance on September 26. In response to the step two grievance, Hopkins, on behalf of Clarke, stated on October 22 that "[y]our comments regarding [DCS'] policies for providing inmates with access to their mental health records are noted."

On November 20, 2003, Jacob filed his initial action for writ of mandamus in district court seeking an order requiring Bohn to provide him a copy of his mental health records. Jacob alleged

that he was not being treated by any physician, psychologist, or mental health practitioner at the time he had requested his records on August 7 or at the time he filed his action. Jacob alleged that he had a right to a copy of his records pursuant to Neb. Rev. Stat. § 83-178 (Cum. Supp. 2004), Neb. Rev. Stat. § 71-8403 (Reissue 2003), and DCS' administrative regulation No. 115.23 (AR 115.23), dated November 11, 2002. Jacob alleged that such statutes and regulation gave him a right to obtain a copy of his records, and he sought mandamus ordering Bohn to provide a copy of the requested records or to show cause why she should not provide such copy.

Jacob also included a "Second Cause of Action" pursuant to 42 U.S.C. § 1983 in which he sought judgment against the Appellees for violating his civil rights. Jacob alleged that § 71-8403(2) created in him a property interest in the requested records. He alleged that Bohn had violated his property interest and that Clarke and Hopkins had given tacit approval to her failure to provide the records to Jacob. For relief, Jacob sought nominal damages and costs of the action.

On April 5, 2004, Jacob sought leave to amend his complaint. He asserted that he had recently learned that AR 115.23 had not been promulgated or filed with the Secretary of State. He therefore sought leave to amend to set forth a cause of action for declaratory judgment in which he would seek a declaration that he had a right pursuant to Neb. Rev. Stat. §§ 83-4,111 and 83-4,112 (Reissue 1999) to have AR 115.23, titled "Mental Health Services," and administrative regulation No. 116.01 (AR 116.01), dated December 12, 1994, titled "Inmate Rights," promulgated. Jacob was given leave to amend. On May 7, 2004, Jacob filed an amended complaint including a third cause of action for declaratory judgment. This amended complaint is the operative complaint on appeal.

On May 21, 2004, the Appellees filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). Following a hearing, on June 25, the court entered an order sustaining the motion on the basis that Jacob had failed to state a cause of action. The court determined that the language of § 83-178(2) made the release of mental health records of an inmate discretionary and that therefore, mandamus was not

available to obtain such records. The court further determined that because there was no mandatory duty under § 71-8403(1) to provide mental health records, Jacob had no protected interest at stake and therefore no cause of action under 42 U.S.C. § 1983. Finally, the court determined that because AR 115.23 contained virtually the same language as § 71-8403(1), Jacob's request for a declaratory order requiring the promulgation of AR 115.23 and AR 116.01 was "pointless." The court therefore ordered that the Appellees' motion to dismiss be sustained, but gave Jacob 21 days to file a second amended complaint. Jacob did not file a second amended complaint. On November 4, the court entered an order dismissing Jacob's action. Jacob appeals the dismissal.

ASSIGNMENTS OF ERROR

Jacob asserts that the district court erred in (1) finding that Bohn had no duty to provide him a copy of his mental health records, (2) finding that he had no protected interest in his mental health records and therefore no cause of action under 42 U.S.C. § 1983, and (3) dismissing his action for declaratory judgment.

STANDARDS OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[3,4] Whether to entertain an action for declaratory judgment is within the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). 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. *Id.*

ANALYSIS

Jacob Was Not Entitled to Mandamus.

Jacob asserts that the district court erred in concluding that because Bohn had no absolute duty to provide him a copy of his mental health records, he was not entitled to mandamus. We determine that neither § 83-178(2), § 71-8403, nor AR 115.23 creates in Jacob a clear right to access to his mental health records or a clear duty on the part of Bohn to provide such records, and we therefore conclude that the district court did not err in determining that Jacob was not entitled to mandamus.

[5-7] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

Jacob sought mandamus against Bohn. Jacob alleged that pursuant to §§ 83-178(2) and 71-8403 and AR 115.23, he had a right to obtain, and Bohn had a duty to provide to him, a copy of his mental health records. In order to obtain mandamus, Jacob needed to show clearly and conclusively that under such statutes and regulation or otherwise, he was entitled to access his mental health records and that Bohn was legally obligated to provide such records. Section 83-178(2) provides in part:

> An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual [DCS] file. [DCS] retains the authority to withhold mental health and psychological records of the inmate when appropriate.

Section 71-8403 provides in part:

> (1) A patient may request a copy of the patient's medical records or may request to examine such records. Access to such records shall be provided upon request pursuant to sections 71-8401 to 71-8407, except that mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. The request and any authorization shall be in writing and shall be valid for one hundred eighty days after the date of execution by the patient.
>
> (2) Upon receiving a written request for a copy of the patient's medical records under subsection (1) of this section, the provider shall furnish the person making the request a copy of such records not later than thirty days after the written request is received.

AR 115.23 provides in part:

> Access to the Mental Health Care Records shall be controlled by the Director of Mental Health or designee and shall not be granted without a court order except as stated below.
>
> . . . .
>
> . . . An inmate may request access to his/her psychological and Mental Health Care Record, and [DCS] will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their [sic] professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. (Neb. Rev. Stat. §71-8403).

We conclude that the above-quoted statutes and regulation do not entitle Jacob access to the records in this case, nor do they legally obligate Bohn to provide such records. Section 83-178(2) provides that inmates may obtain access to their medical records, but because DCS "retains the authority to withhold mental health and psychological records of the inmate when appropriate," the statute is discretionary in nature. The statute did not obligate Bohn to provide the mental health records requested by Jacob

without exception. Instead, § 83-178(2) allowed Bohn the discretion to withhold the records if it was determined such withholding was appropriate.

Section 71-8403 and AR 115.23 also generally provide that medical records are to be provided; however, both provisions also allow discretionary exceptions when the records at issue involve mental health and psychological matters. Section 71-8403(1) provides that "mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient." AR 115.23 similarly provides that DCS "will allow inmates access to their psychological and mental health records upon request unless any treating physician, psychologist, or mental health practitioner determines in their [sic] professional opinion that release of the records would not be in the best interest of the patient." Because both § 71-8403(1) and AR 115.23 provide that "any treating physician, psychologist, or mental health practitioner" may determine that the release of mental health records would not be in the best interests of the patient, the release of mental health records under these provisions is discretionary.

Jacob argues that the withholding exceptions in § 71-8403 and AR 115-23 do not apply in this case because he was not being "treated" at the time he made the request for his mental health records and that therefore, there was no "treating" professional and no patient. Brief for appellant at 8. We do not read the phrases "any treating physician, psychologist, or mental health practitioner" and "best interest of the patient" in either § 71-8403 or AR 115.23 to exclude Bohn as a person currently eligible to determine whether release of mental health records was indicated or to exclude Jacob as a patient. "Patient" is defined in Neb. Rev. Stat. § 71-8402(3) (Reissue 2003) as including a patient or former patient. By seeking the records, Jacob has alleged in effect that he was a former patient and that Bohn was the mental health administrator for DCS who had control of the mental health records at the time Jacob sought their release. Giving § 71-8403 and AR 115.23 a sensible reading, under both provisions, Bohn was the current health professional who was able to determine whether release of the records of the former

patient was in the patient's best interests. In the present case, it was within Bohn's discretion to determine whether release of the mental health records would be in Jacob's best interests under § 71-8403 and AR 115.23.

We determine that Jacob did not show clearly and conclusively under the statutes and regulation cited or otherwise that he was entitled to access to the requested mental health records or that Bohn was legally obligated to provide such records. We therefore conclude that the district court did not err in determining that Jacob was not entitled to mandamus and in dismissing Jacob's action for mandamus. Jacob's first assignment of error is without merit.

Jacob Was Not Entitled to Relief Under 42 U.S.C. § 1983.

Jacob next asserts that the district court erred in concluding that he had no protected interest in the requested records and therefore no cause of action under 42 U.S.C. § 1983. As his second cause of action, Jacob alleged that § 71-8403(2) created in him a property interest in his mental health records and that the Appellees violated his property interest when they denied him access to the records. Jacob sought damages pursuant to 42 U.S.C. § 1983. We conclude that the district court did not err in dismissing this cause of action.

[8] In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States. See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). Jacob argues that he had a property interest protected by federal due process. However, in order to have a protected property interest, one must have a legitimate claim of entitlement. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law. *Id.*

As discussed above, Jacob had no entitlement under state law to the mental health records he sought and, therefore, he had no constitutionally protected interest. As a result, Jacob failed to

allege that he had been deprived of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States, and we conclude that he failed to state a cause of action under 42 U.S.C. § 1983. The district court did not err in so concluding and dismissing this cause of action. Jacob's second assignment of error is without merit.

The District Court Did Not Err in Denying Declaratory Judgment.

Finally, Jacob asserts that the court erred in dismissing his request for declaratory judgment. In his amended complaint, Jacob requested a declaration that he had a right to have AR 115.23 and AR 116.01 promulgated and filed pursuant to the Administrative Procedure Act. We conclude that the district court did not abuse its discretion in dismissing Jacob's action for declaratory judgment.

Jacob argued that if AR 115.23 did not create an enforceable right because the regulation had not been promulgated, then he was entitled to a declaration that this regulation and AR 116.01 must be promulgated. We note that the district court did not dismiss Jacob's action for mandamus because the regulations had not been promulgated. Instead, the court found that AR 115.23 and AR 116.01 contained "virtually the exact language" as the statutes upon which Jacob was relying and that such statutes were unavailing. With regard to Jacob's request for declaratory judgment, the court determined that because the regulations did not create any greater right in Jacob than existed under the statutes, Jacob's action seeking a declaration that both regulations must be promulgated was "pointless."

[9] Under Neb. Rev. Stat. § 25-21,154 (Reissue 1995), a 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 stated that § 25-21,154 indicates discretionary rather than mandatory power and that whether to entertain an action for declaratory judgment is within the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004).

As noted in part above, the language of the regulations, like the language of the statutes, does not create a mandatory duty to

release mental health records, but instead provides for discretion to withhold such records. Therefore, whether or not the regulations ought to have been filed and promulgated, the regulations would not have given Jacob an absolute right of access to the records that he sought. Therefore, a declaration that the regulations ought to have been filed and promulgated would not have terminated the uncertainty or controversy in these proceedings where the ultimate issue involving release of the mental health records nevertheless remained discretionary. The district court did not abuse its discretion by dismissing Jacob's action for declaratory judgment. Jacob's final assignment of error is without merit.

CONCLUSION

We conclude that the district court did not err in determining that Jacob was not entitled to mandamus, relief under 42 U.S.C. § 1983, or declaratory judgment. We therefore affirm the court's dismissal of Jacob's action.

AFFIRMED.

WRIGHT, J., not participating.

TROY CARRUTH, APPELLANT, V. STATE OF NEBRASKA, DOING BUSINESS AS UNIVERSITY OF NEBRASKA MEDICAL CENTER, A POLITICAL SUBDIVISION, ET AL., APPELLEES.
712 N.W.2d 575

Filed April 21, 2006. Nos. S-04-1305, S-04-1422.

1. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004).
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.

4. **Malpractice: Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
5. **Limitations of Actions: Negligence: Torts.** It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.
6. **Limitations of Actions: Malpractice.** For claims alleging medical malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed.
7. ____: ____. The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) is inapplicable when a plaintiff discovers his or her cause of action while the statute of limitations period is still running.
8. **Tort Claims Act.** Tort claims against a state agency must be brought under the State Tort Claims Act.
9. **Tort Claims Act: Public Officers and Employees: Limitations of Actions.** Neb. Rev. Stat. §§ 81-8,213 and 81-8,227 (Reissue 2003) have been interpreted to require a claimant to file his or her claim with the State Claims Board within 2 years of the accrual of the claim and to provide that the suit must be filed in court within 6 months after the claims board provides written notice to the claimant of final disposition if the 2-year limitations period would otherwise expire before the end of the 6-month period.
10. **Limitations of Actions.** The discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) is a tolling provision which permits the filing of an action after the 2-year statute of limitations only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period.
11. **Statutes: Words and Phrases.** Under Neb. Rev. Stat. § 25-213 (Reissue 1995), a person is within the age of 20 years until he or she becomes 21 years old.
12. **Limitations of Actions: Negligence.** The beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, an injury within the initial period of limitations running from the wrongful act or omission.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Phillip G. Wright, and, on brief, David M. Handley, of Wright & Associates, for appellant.

Earl G. Greene III, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee State of Nebraska, doing business as University of Nebraska Medical Center.

Michael G. Monday, of Sodoro, Daly & Sodoro, for appellees University Medical Associates and Debra Sudan, M.D.

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

HANNON, Judge, Retired.

NATURE OF CASE

These consolidated appeals concern the time limit within which a plaintiff must bring an action for alleged malpractice under the statutes of limitation for professional negligence, Neb. Rev. Stat. § 25-222 (Reissue 1995), and for the State Tort Claims Act, Neb. Rev. Stat. § 81-8,227 (Reissue 2003), when the alleged negligent act occurred during the plaintiff's minority but was not discovered (or reasonably discoverable) until after the plaintiff's 21st birthday but within 2 years of that birthday. The plaintiff in this action, Troy Carruth, maintains that Neb. Rev. Stat. § 25-213 (Reissue 1995), which tolls the applicable statutes of limitation when a plaintiff is under the age of 21 years at the time the cause of action accrued, does not apply in this case because the professional negligence was not discovered until he was 22 years old, and hence, he claims his causes of action did not accrue when he was under the age of 21 years. We conclude that because of the interplay of these statutes, as previously interpreted, when a plaintiff is under the age of 21 years at the time his or her claim accrues, the statute of limitations period runs from the plaintiff's 21st birthday, and that when the injury is discovered within the 2-year limitations period, the discovery principle does not apply to toll the applicable statutes of limitation. Therefore, Carruth's claims in these cases were not timely filed.

STANDARD OF REVIEW

The defendants raised the statute of limitations issue by filing motions to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted. See *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Harris v. Omaha Housing Auth., supra.*

[1] In this case, the record shows that Carruth did not allege his date of birth in his complaints, and therefore, the complaints did

not contain a pertinent fact. That fact was placed in the record by stipulation of the parties. Rule 12 provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004). The district court's order was couched in terms of the granting of motions to dismiss, and the court dismissed the cases as it would have under the old procedure. However, substantively the same result was accomplished, and therefore, we shall treat the orders appealed from as orders granting the defendants' motions for summary judgment and dismissing the complaints.

[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. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005).

[3,4] The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *Id.*

FACTS

The parties have stipulated that Carruth was born on February 2, 1980. Carruth has alleged that on January 31, 1997, at the age of 16 years, he underwent a liver transplant at the University of Nebraska Medical Center (UNMC) under the direction and supervision of defendant Dr. Debra Sudan, who was employed by defendant University Medical Associates. On February 1, as part of Carruth's postoperative treatment, medical staff inserted a nasogastric (NG) catheter and a gastric pH monitor. He was discharged from UNMC on February 6.

In October 2002, Carruth, then 22 years old, began to experience severe pain in his abdomen. He underwent surgery on October 30, and surgeons discovered in his small intestine a piece of either the NG catheter or the gastric pH monitor, which

Carruth alleges became separated during his treatment at UNMC in 1997 and eventually lodged in his intestine.

On September 23, 2003, Carruth filed a claim against UNMC with the State Claims Board. On October 28, 2003, he filed a complaint against the defendants in the district court for Lancaster County, but because he did not serve UNMC, UNMC was dismissed without prejudice in that case. The case was eventually transferred to the district court for Douglas County due to venue considerations. On June 9, 2004, Carruth filed another complaint against the defendants in the district court for Douglas County. In this second action, however, Carruth served UNMC, but not the other defendants. Thus, although Carruth's cases in district court were captioned identically, Sudan and University Medical Associates were the defendants of record in the proceedings below in case No. S-04-1422, while UNMC was the defendant of record in case No. S-04-1305.

The district court granted the defendants' motions to dismiss. Carruth filed a motion for new trial, which the court treated as a motion to alter or amend the judgment, and the court overruled his motion. The appeals were consolidated, and this court moved them to its docket on its own motion pursuant to the court's statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Carruth has assigned six errors, but they may be fairly summarized as alleging that the district court erred in determining that Carruth's cause of action accrued on February 6, 1997; in determining that the applicable statutes of limitation were tolled until Carruth reached 21 years of age; and in failing to find that the cause of action accrued on October 30, 2002, when Carruth discovered the medical malpractice.

ANALYSIS

[5,6] Carruth's claims are based upon professional negligence. It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002); *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997). This

principle has been referred to as "the occurrence rule." See, e.g., *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996). In medical malpractice actions, Nebraska has adopted the continuing treatment doctrine and has merged it with the occurrence rule. See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001). For claims alleging medical malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed. See, *id.*; *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

The statute of limitations applicable to professional negligence, § 25-222, provides in pertinent part:

> Any action to recover damages based on alleged professional negligence . . . in rendering or failure to render professional services *shall be commenced within two years next after the alleged act or omission* in rendering or failure to render professional services providing the basis for such action; *Provided, if the cause of action is not discovered* and could not be reasonably discovered *within such two-year period*, then the action may be commenced within *one year from the date of such discovery or from the date of discovery* of facts which would reasonably lead to such discovery, whichever is earlier . . . .

(Emphasis supplied.)

[7] This court has held that the 1-year discovery exception of § 25-222 is inapplicable when plaintiffs discover their causes of action while the statute of limitations period is still running. In *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989), the defendant surgeon operated on the plaintiff in February 1981 and continued to treat her through December 1982. In August 1984, another physician discovered facts which amounted to the discovery of possible malpractice in the 1981 surgery. The statute of limitations was deemed to have commenced to run in December 1982. The plaintiff filed her action June 11, 1985, a date more than 2 years after treatment had ended but within 1 year of the date the possible malpractice was discovered. This court held that the running of the 2-year statute of limitations barred the plaintiff's action, even though she discovered the cause of action just 4 months before the expiration of the limitations period. This ruling has been followed in *Egan v. Stoler*,

265 Neb. 1, 653 N.W.2d 855 (2002), and in *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998).

[8,9] The case at hand is somewhat complex because a separate statute of limitations applies to Carruth's claim against UNMC. UNMC is operated by the Board of Regents of the University of Nebraska, which is a state agency, and tort claims against a state agency must be brought under the State Tort Claims Act. See *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988). The applicable statute of limitations under the State Tort Claims Act, § 81-8,227, provides in pertinent part as follows:

> (1) Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. . . .
>
> . . . .
>
> (4) This section and section 25-213 shall constitute the only statutes of limitations applicable to the State Tort Claims Act.

Section 81-8,227 and Neb. Rev. Stat. § 81-8,213 (Reissue 2003) have been interpreted to require a claimant to file his or her claim with the State Claims Board within 2 years of the accrual of the claim and to provide that the suit must be filed in court within 6 months after the claims board provides written notice to the claimant of final disposition if the 2-year limitations period would otherwise expire before the end of the 6-month period. See *Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002).

[10] In *Weaver*, the plaintiff was treated by the defendant physician for liver problems in 1991 and was last treated by him as late as July 1992. The plaintiff learned of possible negligence by the defendant in February 1994. Although she learned of the possible malpractice action within the initial 2-year statute of limitations period, she waited to file her action until January 1995, within 1 year of the date of discovery but more than 2 years after the defendant had last treated her. The applicable statute of limitations in *Weaver* was Neb. Rev. Stat. § 44-2828 (Reissue 2004), which provided the same 2-year limitations period and the same discovery rule as found in § 25-222. In concluding the statute of

limitations had run, this court said: "The discovery exception is a tolling provision which permits the filing of an action after the 2-year period only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period." *Weaver v. Cheung*, 254 Neb. at 354, 576 N.W.2d at 777.

[11] Carruth was under the age of 21 years when the claimed negligent act or omission occurred, that is, when part of either the NG catheter or the gastric pH monitor allegedly separated and was left in Carruth's body. Therefore, the limitations periods in §§ 25-222 and 81-8,227 were subject to the tolling provision found in § 25-213. That statute provides in pertinent part:

> [I]f a person entitled to bring any action mentioned in this chapter . . . or the State Tort Claims Act . . . is, at the time the cause of action accrued, within the age of twenty years . . . every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

Id. Under § 25-213, a person is within the age of 20 years until he or she becomes 21 years old. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

The defendants argue that Carruth's claims accrued when the alleged negligent act or omission occurred, i.e., in 1997. They admit that the cause of action was not discovered (and could not reasonably have been discovered) until October 30, 2002. They argue, however, that under § 25-213, the 2-year limitations period did not begin to run until Carruth's 21st birthday on February 2, 2001, and that the 2-year period had not yet expired when Carruth discovered the alleged negligent act on October 30, 2002. On this basis, the defendants maintain that the discovery rule is not applicable and that the claims were barred by the applicable statutes of limitation because Carruth failed to file suit on or before February 2, 2003.

Carruth relies on the discovery rule in his assertion that the applicable limitations periods did not begin to run until October 30, 2002, the date on which the foreign material was found in his small intestine. If the discovery rule applied, his claims would have been timely filed. However, Carruth misapprehends

the operation of the discovery rule. It does not apply in this case because discovery was made before the 2-year period of the applicable statutes of limitation had run.

As support for his argument, Carruth relies upon *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), in which a medical doctor left a foreign object in the plaintiff nearly 9 years before it was discovered. This court held in the plaintiff's favor and stated that "the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body." *Id.* at 43, 115 N.W.2d at 585. *Spath* differs from the case at hand in two respects. First, the plaintiff in *Spath* was not under the age of 21 years when the foreign object was left in her body. Second, the application of the discovery rule has since been restricted, both by statute, as this court pointed out in *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996), and by later case law.

Berntsen involved alleged professional negligence by an accounting firm. The plaintiffs maintained the statute of limitations period did not begin to run until the negligent act was discovered or in the exercise of reasonable diligence should have been discovered—a position identical to Carruth's position in this case. The plaintiffs in *Berntsen* relied upon *Spath* to support their position. The *Berntsen* court explained that *Spath* was decided in 1962, before the discovery rule was codified in § 25-222 by the Legislature in 1972. The *Berntsen* court then explained why the statement upon which Carruth relies is no longer correct. In so doing, this court reaffirmed the long-held occurrence rule by stating:

> Importantly, § 25-222 does not alter our long-held approach to when a cause of action accrues. We continue to abide by the occurrence rule in actions arising in tort and in malpractice actions . . . . Under that rule, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.

Berntsen, 249 Neb. at 911, 546 N.W.2d at 314-15.

[12] Later, this court summarized the application of the discovery rule in *Shlien v. Board of Regents*, 263 Neb. 465, 640

N.W.2d 643 (2002) (holding that discovery rule is applicable to State Tort Claims Act). The court stated:

> [T]he beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act or omission. However, in a case where the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.

Shlien, 263 Neb. at 473, 640 N.W.2d at 650.

These cases did not specifically consider a situation such as Carruth's, where the plaintiff was under 21 years of age when the alleged professional negligence occurred. Clearly, under § 25-213, Carruth's right to bring this lawsuit was extended until 2 years after he reached his 21st birthday on February 2, 2001. Section 25-213 reads as follows: "[I]f a person entitled to bring any action . . . is, at the time the cause of action accrued, within the age of twenty years . . . such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed." This statute does not purport to change the occurrence rule, but tolls the running of the statute of limitations period. The statute, then, allowed Carruth to bring these actions within the time limited for the actions (i.e., 2 years) after his 21st birthday on February 2, 2001. In other words, he had until February 2, 2003, to file his claims, but he failed to do so.

CONCLUSION

Carruth's claims accrued on February 6, 1997, when he was discharged from UNMC following his liver transplant. Because he was under the age of 21 years at that time, § 25-213 tolled the running of the applicable 2-year limitations period until February 2, 2001, the date on which he became 21 years old. Accordingly, Carruth had until February 2, 2003, to file his claims against the defendants. Carruth did not file any claim until September 2003. Because the foreign material was found in his small intestine in

October 2002, within the limitations period, the discovery rule is inapplicable. Therefore, the district court did not err in dismissing Carruth's complaints based on the fact that his claims were barred by the applicable statutes of limitation.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

C. RONALD LAMBERT AND CHARLOTTE K. LAMBERT, APPELLANTS, AND SANITARY AND IMPROVEMENT DISTRICT NO. 5, APPELLEE, V. JAMES J. HOLMBERG AND MARY LOU HOLMBERG, APPELLEES.

712 N.W.2d 268

Filed April 21, 2006. No. S-04-1334.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an 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 of the conclusion reached by the trial court.
2. **Trespass: Title.** To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed.
3. **Trespass: Liability.** Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or a third person to do so.
4. **Trespass: Words and Phrases.** An actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land. It is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.
5. **Trespass.** A trespass can be committed on, above, or beneath the surface of the land.
6. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
7. **Trespass: Injunction.** When simple acts of trespass are involved, equity generally will not act. However, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.
8. ____: ____. Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

9. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
10. **Trespass: Injunction: Equity.** A continuous and repeated trespass does not automatically demand injunctive relief, because an action for injunction sounds in equity.
11. **Equity.** Equity is not a rigid concept, and its principles are not applied in a vacuum. Rather, equity is determined on a case-by-case basis when justice and fairness so require.
12. **Injunction.** The writ of injunction is not a "writ of right," and, particularly when the interests of the public are involved, may be withheld when it is likely to inflict greater injury than the grievance complained of.

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

James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellants.

Kristopher J. Covi, Mark F. Enenbach, and Thomas O. Kelley, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees James J. Holmberg and Mary Lou Holmberg.

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

STEPHAN, J.

This is an equitable action seeking injunctive relief for a repeated and continuous trespass involving a private sewerline. The district court for Platte County determined that James J. Holmberg and Mary Lou Holmberg committed an indirect trespass when they connected the sewerline from their home to a public sewer system which ultimately connected to a private sewerline owned by C. Ronald Lambert and Charlotte K. Lambert. The court determined, however, that the Lamberts were not entitled to injunctive relief because they failed to prove substantial damages. Although we determine on de novo review that a direct or traditional trespass occurred, we conclude that the Lamberts have an adequate remedy at law and are not entitled to injunctive relief.

FACTS

The Holmbergs are the owners of a residence located in Columbus, Platte County, Nebraska. Sanitary Improvement

District No. 5 (SID 5) is located to the east of the Holmberg residence, across 48th Avenue. In approximately 1973, the Lamberts developed the Hillside Estates subdivision, which is located south of SID 5 and southeast of the Holmberg residence. The Lamberts also own undeveloped property located to the south of Hillside Estates. When developing Hillside Estates, the Lamberts constructed roads and laid sewerlines in the subdivision.

In 1973, the Lamberts dedicated the Hillside Estates subdivision and 60th Street located therein. In the deed of dedication, the Lamberts specifically dedicated to the perpetual use and benefit of the public each of the strips set out and designated in the subdivision as public roads, and further granted perpetual easements as shown on the plat for the installation and maintenance of utilities to serve the owners of the subdivision lots. The dedication was accepted by Platte County and the city of Columbus. Neither the deed of dedication nor the resolutions of acceptance provided the Lamberts any exclusive rights to the sewers or other utilities and roads dedicated to the use and benefit of the public.

A sanitary sewerline located beneath the dedicated streets of the Hillside Estates subdivision crosses the southern boundary of the subdivision and then extends east across the undeveloped property owned by the Lamberts. The line running across this undeveloped Lambert property extends 1,872 feet before connecting with the sewerline maintained by the city of Columbus. This 1,872-foot section of "private" sewerline is the site of the alleged trespass.

In 1980, the Lamberts entered into a perpetual hookup agreement which authorized SID 5 to connect its system of sewers to the sewerline running across the Lamberts' private property for the purpose of conveying SID 5 sewage to the sewer main owned by the city. SID 5 paid the Lamberts $16,280 and agreed to be proportionately responsible for future maintenance of the Lamberts' sewerline. In 1987, the Lamberts entered into a similar perpetual hookup agreement with Sanitary Improvement District No. 9 (SID 9), which permitted that district to also run its sewage through the Lambert line prior to connecting with the sewer main owned by the city. SID 9 is located north of the Holmberg residence and northwest of SID 5. Under the agreement, SID 9 paid

the Lamberts $16,000 and agreed to be proportionately responsible for future maintenance of the sewerline.

The Lamberts also developed an area directly north of SID 5 known as Country Shadows. In 1994, the Lamberts connected the Country Shadows sewer system to the SID 5 sewer system without first securing the permission of SID 5. As a result of negotiations, the Lamberts subsequently paid $14,070 for the right to connect the Country Shadows sewer system to that of SID 5.

In October 2000, the Holmbergs notified SID's 5 and 9 and the Lamberts of their desire to connect to an existing sewerline located beneath 48th Avenue, which lies to the east of the Holmberg residence and to the west of SID 5, Hillside Estates, and the undeveloped Lambert property. Sewage entering at this connection point would necessarily pass through the Lamberts' private sewerline prior to entering the city's sewage system. The Holmbergs expressed a willingness to pay fees similar to those paid by other homeowners in the area. The Lamberts refused to grant permission to use the private line.

In November 2000, the Holmbergs received a permit from the city of Columbus allowing them to connect to the city sewer system. The Holmbergs also acquired a permit from Platte County allowing them to construct their sewer hookup across 48th Avenue. The Holmbergs then hired a contractor and, at their own expense, connected to the existing sewerline located beneath 48th Avenue. The point of connection is beneath a public roadway and is not within the geographic boundaries of SID 5 or any property owned by the Lamberts. However, sewage entering at this connection point eventually and necessarily passes through the segment of private sewerline owned by the Lamberts before it reaches the city sewer system.

The Lamberts brought this action alleging that the Holmbergs' use of the Lamberts' private sewerline constitutes a repeated and continuous trespass entitling the Lamberts to injunctive relief. SID 5 later joined in the petition. After conducting an evidentiary hearing, the district court concluded that because the sewer connection was not on property owned by either the Lamberts or SID 5, there was no direct trespass committed. The court reasoned that the action was instead one for indirect trespass and

refused relief after concluding that the Lamberts failed to prove they suffered substantial damages. The Lamberts filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). SID 5 has not joined in the appeal.

ASSIGNMENTS OF ERROR

The Lamberts assign that the trial court erred in (1) finding that the Holmbergs' use of the Lamberts' sewerline is not a case of direct trespass, (2) adopting the doctrine of indirect trespass and requiring the Lamberts to prove substantial damages, (3) applying the doctrine of indirect trespass to a case which bears no relation to the line of cases out of which the doctrine arose, and (4) determining that the Lamberts did not prove substantial damages.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an 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 of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

TRADITIONAL OR INDIRECT TRESPASS?

[2] The Lamberts assert that the district court erred in finding that an indirect trespass occurred. They argue that the action is instead based upon a direct or traditional trespass theory as defined by our case law and the Restatement (Second) of Torts § 157 et seq. (1965). To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). It is undisputed that the Lamberts have legal possession of the private sewerline. However, the district court concluded that the possession requirement was not established by the Lamberts in the instant case because the geographic point at which the Holmbergs connected to the sewer was not on the Lamberts' property and was instead beneath a

public street. See Neb. Rev. Stat. § 39-1404 (Reissue 2004) (no private party may acquire interest in any part of city street).

[3,4] The geographic point of connection is not outcome determinative because liability for trespass exists if an actor intentionally "enters land in the possession of [another], or *causes a thing* or a third person to do so." (Emphasis supplied.) Restatement, *supra*, § 158(a) at 277. The Holmbergs' connection to the sewerline beneath 48th Avenue clearly and necessarily causes sewage to enter and pass through the privately owned sewerline beneath the undeveloped Lambert property. Although the entry was not direct and immediate, it nevertheless amounted to a trespass because an "actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land." Restatement, *supra*, § 158, Comment on Clause (a)*i.* at 278. Further, "it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.* at 278-79.

Without expressly stating these principles, we have applied them in analogous situations. In *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954), the plaintiffs constructed ditches in order to divert water from two lakes. Although the ditches were constructed entirely on the plaintiffs' land, they caused the lake water to drain over the defendants' land. The trial court found a trespass had occurred and entered an injunction requiring the plaintiffs to fill the ditches, and we affirmed. Similarly, in *Faught v. Platte Valley Public Power & Irri. District*, 147 Neb. 1032, 25 N.W.2d 889 (1947), we affirmed a decision ordering an irrigation district to increase the carrying capacity of a canal located on the district's property after the negligent design of the canal caused floodwaters to trespass onto a farmer's land.

In a case involving facts similar to those of this case, the Supreme Court of Alabama applied a traditional trespass analysis and found that the repeated dumping of sewage into a private line by way of a separate private line was a continuous trespass. *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959). Other jurisdictions have similarly applied

a traditional trespass theory, even when the act alleged to constitute a trespass occurred away from the complaining landowner's premises. See, *Miller v. Carnation Company*, 33 Colo. App. 62, 68, 516 P.2d 661, 664 (1973) (interpreting Restatement (Second) of Torts § 158 (1965) and finding that "landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property"); *Western Union Telegraph Co. v. Bush*, 191 Ark. 1085, 1090, 89 S.W.2d 723, 725 (1935) ("[i]t is sufficient if the wrongdoer actually set in motion some dangerous agency which in itself, though far distant from the wrongdoer, inflicts a wrong, such is a 'breaking of the close,' and for such trespass relief is granted").

The Holmbergs rely on *Cornwall v. Garrison*, 59 Idaho 287, 81 P.2d 1094 (1938), in support of their argument that the instant case involves only an indirect trespass. In that case, the court held that one who constructs a sewer beneath a city street is not the owner of the sewer and thus cannot enjoin its use by another. This holding is factually inapplicable to the instant case because it is undisputed that the Lamberts do have a private ownership interest in at least one portion of the sewer system through which the Holmbergs are emitting waste material. Moreover, the Lamberts' private sewerline is not located beneath a public street. The rationale of *Cornwall* thus does not aid us in resolving the instant dispute.

[5] This court has never considered whether to recognize the doctrine of indirect trespass. We need not do so here because we conclude that the record establishes that the Holmbergs' act of connecting to the sewer system beneath 48th Avenue constituted a trespass on the Lamberts' property under traditional trespass principles. Sewage released by the Holmbergs at the connection point necessarily passes through the Lamberts' private sewerline before reaching the city sewer system, and thus it is more than a "substantial certainty" that the connection will ultimately result in a trespass on the Lamberts' private line. See Restatement, *supra*. When the sewage emitted from the Holmberg residence ultimately enters the Lamberts' private sewerline, it constitutes a continuous and repeated trespass on that segment of sewerline located beneath the Lamberts' undeveloped property, inasmuch

as a trespass can be committed on, above, or beneath the surface of the land. See Restatement, *supra*, § 159.

PROPRIETY OF INJUNCTIVE RELIEF

[6] An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[7-9] When simple acts of trespass are involved, equity generally will not act. See *Harders, supra*. However, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Id.* Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954). In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Id.* An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N.W. 467 (1931).

In other cases involving continuous and repeated trespasses, we have concluded that injunctive relief was proper without requiring the landholder to show anything other than nominal damages. *Harders, supra* (adjacent landowners properly enjoined from using farm lane even though use did not harm landholder); *Thomas v. Weller*, 204 Neb. 298, 281 N.W.2d 790 (1979) (injunction proper where one repeatedly moved sand in duck-blind, even though no evidence of damage or irreparable harm); *Van Donselaar v. Conkey*, 177 Neb. 169, 128 N.W.2d 390 (1964) (injunction proper to prevent repeated trespass on farmland); *Jurgens v. Wiese*, 151 Neb. 549, 554, 38 N.W.2d 261, 264 (1949) ("[e]quity will interfere by injunction to prevent destruction of a

hedge . . ."); *Fenster v. Isley*, 143 Neb. 888, 11 N.W.2d 822 (1943) (injunction proper against one who continually trespassed upon land to harvest).

Case law from other jurisdictions also generally supports the award of injunctive relief in situations involving repeated trespasses into sewer systems. For example, in *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959), the homeowner's action in connecting to a private sewerline was held to be a continuous trespass for which there was no adequate remedy at law, entitling the owner of the sewer system to injunctive relief. See, also, *Newport Manor v. Carmen Land Co.*, 82 So. 2d 127 (Fla. 1955) (builder of private sewer can compel unauthorized user to disconnect); *Atkinson Trust & Sav. Bank v. DeRoo*, 332 Ill. App. 251, 75 N.E.2d 46 (1947) (injunction proper to prevent tap into a private drain where connection would cause overload); *Kittrell v. Angelo*, 170 Ark. 982, 282 S.W. 363 (1926) (same).

[10-12] However, a continuous and repeated trespass does not automatically demand injunctive relief, because an action for injunction sounds in equity. See, *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). Equity is not a rigid concept, and its principles are not applied in a vacuum. Rather, equity is determined on a case-by-case basis when justice and fairness so require. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Moreover, the writ of injunction is not a "'writ of right,'" and, particularly when the interests of the public are involved, may be withheld "'when it is likely to inflict greater injury than the grievance complained of.'" *McCubbin v. Village of Gretna*, 174 Neb. 139, 145, 116 N.W.2d 287, 291 (1962). Stated another way,

> [a] court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.

McCann v. Chasm Power Co., 211 N.Y. 301, 305, 105 N.E. 416, 417 (1914).

The function of the sewerline at issue in this action is a matter of significant public concern because proper disposition of sewage is "an absolute essential." *City of Omaha v. Matthews*, 197 Neb. 323, 326, 248 N.W.2d 761, 763 (1977). See, also, *Bedford Township v Bates*, 62 Mich. App. 715, 233 N.W.2d 706 (1975) (generally discussing importance of sewer systems to public health). The relationship between a private sewer system and nearby public systems is a factor which other courts have weighed in deciding whether to grant injunctive relief for a continuous and repeated trespass involving sewerlines. Although the court in *Underwood* ultimately concluded that injunctive relief was proper, it expressly considered the public interest, noting that there was no indication in the record that the landowner's sewage system was "so effected with a public interest as to entitle all property owners in the vicinity who are willing to pay a reasonable fee to connect with it." 270 Ala. at 118, 116 So. 2d at 578. Similarly, the court in *Atkinson Trust & Sav. Bank* noted that there was no evidence that the private sewer at issue was "an integral part of the public sewer system of the village." 332 Ill. App. at 255, 75 N.E.2d at 49. In *Bradley v. Schwab*, 3 Ohio App. 359 (1914), the court refused to enjoin a connection to a private sewer, specifically finding that there was no showing that the tap resulted in an overburden on the system.

Thus, although the trespass in this case was repeated and continuous, we conclude that equity requires a balancing of the degree to which it impaired the Lamberts' property rights against the public interest in proper disposition of sewage in order to determine whether the trespass should be enjoined. The trespass, while real, was largely imperceptible. Unlike the circumstances in *Atkinson Trust & Sav. Bank* and *Kittrell*, there is no proof that the infusion of the Holmbergs' sewage commingled with that originating in the two sanitary and improvement districts would overload or even threaten the capacity of the private sewerline. Also, the record reflects that the Holmbergs have always stood ready to pay connection fees and a proportionate share of future maintenance costs on the same basis as homeowners in SID's 5 and 9, a pledge repeated by their counsel during oral argument of this appeal. Thus, the nature of the trespass at issue here results in

only minimal interference with the Lamberts' possessory interest in their property.

Unlike the complainant in *Underwood v. West Point Manufacturing Company*, 270 Ala. 114, 116 So. 2d 575 (1959), the Lamberts do not operate a private sewage disposal system. Their sewerline connects at both ends to public sewerlines and is, therefore, a conduit through which sewage flows from public sewers to the sewage system of the city of Columbus. The record thus establishes that the Lamberts' private sewerline has become an integral part of a public sewer system. All of the sewer systems in the area of the Holmberg residence ultimately connect to the Lamberts' private line prior to connecting to the city's sewer system. The public interest would not be served, and indeed could be harmed, if the Holmbergs were prevented from connecting to a public sewer system having a privately owned segment, where they are willing to pay for the privilege of using that segment on the same terms as other users and their use would not overload or otherwise harm the system. Thus, while permitting the Holmbergs' connection will nominally impede the Lamberts' exclusive rights to possession of their sewerline, we conclude that such impediment is outweighed by the public interest in efficient and safe disposal of sewage. Neither equity nor the public interest is served by permitting the owner of a private sewerline connecting public sewer systems to unreasonably deny access.

On the unique facts of this case, we conclude on de novo review that injunctive relief for the continuous and repeated trespass is not proper. Any failure of the Holmbergs to pay connection fees and a proportionate share of future maintenance costs can be adequately remedied by an action at law. The same is true with respect to the Lamberts' allegations that the Holmbergs' connection reduces by one the number of currently undeveloped lots which can eventually be connected to the sewer system. Here, the legal remedy available to the Lamberts is at least as "plain and complete and as practical and efficient to the ends of justice and its prompt administration" as the remedy of injunctive relief. *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 93, 239 N.W. 467, 469 (1931).

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court denying injunctive relief.

AFFIRMED.

WRIGHT, J., not participating.

METROPOLITAN UTILITIES DISTRICT OF OMAHA, A NEBRASKA POLITICAL SUBDIVISION AND MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AQUILA, INC., APPELLEE, A DELAWARE CORPORATION, AND THE NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLANT.

712 N.W.2d 280

Filed April 21, 2006. No. S-05-127.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Administrative Law: Final Orders: Appeal and Error.** A final order entered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
5. **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.
6. **Statutes: Jurisdiction.** Jurisdictional statutes are strictly construed.
7. **Public Service Commission: Statutes: Jurisdiction.** Neb. Rev. Stat. § 57-1306 (Reissue 2004) specifically gives the Nebraska Public Service Commission jurisdiction to determine whether extensions or enlargements are in the public interest.
8. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
9. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.

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

Paul M. Schudel and Krista L. Kester, of Woods & Aitken, L.L.P., and Susan E. Prazan for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

L. Steven Grasz, Megan Sebastian Wright, and Michael J. Mullen, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee Aquila, Inc.

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

CONNOLLY, J.

Metropolitan Utilities District of Omaha (MUD) appeals the district court's order affirming a decision of the Nebraska Public Service Commission (PSC). The PSC ordered MUD to cease and desist construction of a gas main extension. Aquila, Inc., MUD's competitor, filed a formal complaint with the PSC for a determination that MUD's proposed extension was not in the public interest as required by Neb. Rev. Stat. § 57-1303 (Reissue 2004). The PSC found that MUD's extension was not in the public interest and ordered MUD to cease and desist construction. Applying the factors set out in § 57-1303, the court found that the proposed extension was not in the public interest and affirmed the PSC's order. On appeal, MUD contends that the PSC lacked jurisdiction over the matter or, in the alternative, that the extension is in the public interest. Because the record reflects competent evidence to support the district court's finding, we affirm.

I. BACKGROUND

1. TERMS AND GENERAL BACKGROUND

MUD is a political subdivision operating as a natural gas and water utility in the city of Omaha and in Sarpy County, Nebraska. Aquila, an investor-owned natural gas utility, operates in areas of Sarpy County. Aquila and MUD are distributors of natural gas and have contracts with Northern Natural Gas (Northern), which supplies natural gas to distributors in the area.

Northern transfers the natural gas to each of its distributors at a servicing town border station (TBS). Each TBS serves only one distributor and is designed to supply a specific amount of natural gas. TBS's operate independently of each other and are designed and used by MUD, but are owned by Northern.

According to MUD, urban encroachment around a TBS can create safety issues. MUD prefers to have its TBS's equally spaced around the perimeter of its service area and in undeveloped areas. When it builds a TBS, it considers the current customer load and the potential for new customers. According to MUD, it oversizes its TBS's so that the zones of influence of each TBS overlap if there is a loss of service from any particular TBS.

2. Disputed Issue

At issue is a new TBS built at 174th Street and Fairview Road in Sarpy County (Fairview TBS) for extension of three separate gas mains to connect MUD's southwest service area to the Fairview TBS. MUD has added 8,000 customers in the area in the past 3 years and expects to add about 3,000 more each year.

In 2002, MUD's board of directors authorized the extension of its gas mains along U.S. Highway 50 from 1,500 feet south of U.S. Highway 370 to Fairview Road and along Fairview Road from Highway 50 to 174th Street. It also authorized the construction of the Fairview TBS. MUD decided on the site for the Fairview TBS because it is located 5½ miles south of MUD's existing service border. MUD previously considered six other areas, but they were rejected for varying reasons, such as objections by Aquila, proximity to a school, proximity to a planned business park, and future grade changes to the road.

MUD and Northern then entered into a contribution agreement which provided, among other things: (1) a contribution by Northern of $4.35 million in aid of construction to MUD payable in September 2002, with Northern retaining ownership of the branch line; (2) realignment of an amount of natural gas flow from a TBS located at 84th and Center Streets (Center Street TBS) to other mutually agreed-upon MUD delivery points to give Northern the ability to lower the branch line pressure; and (3) reimbursement to Northern for the cost of the Fairview TBS up to $500,000 by MUD. Because of the contribution agreement, the amount of natural gas per day at the Center Street TBS was reduced and a portion moved to a TBS located at 175th and Center Streets.

In May 2003, Aquila filed a formal complaint with the PSC seeking an order that MUD's proposed gasline extension under the contribution agreement violated Neb. Rev. Stat. §§ 57-1301 to 57-1307 (Reissue 2004) because it was not in the public interest. The PSC ultimately determined that the extension was not in the public interest and entered an order to cease and desist additional construction. MUD appealed to the district court and made the PSC a party to the appeal. The PSC unsuccessfully sought to be dismissed from the action.

The district court affirmed. The court first rejected an argument that it lacked jurisdiction. The court next applied the public interest factors under § 57-1303 and concluded that MUD failed to show that the extension was in the public interest. MUD appeals, and the PSC cross-appeals.

II. ASSIGNMENTS OF ERROR

MUD assigns, rephrased and consolidated, that the district court erred by (1) determining that it had jurisdiction and (2) affirming the cease and desist order. On cross-appeal, the PSC assigns that the district court erred by not dismissing it from the action.

III. STANDARD OF REVIEW

[1,2] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005). In addition, the meaning of a statute is a question of law. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[3] A final order entered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002).

[4] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

IV. ANALYSIS

1. JURISDICTION

MUD first argues that the PSC lacked jurisdiction over the dispute because the extension's purpose was operationally driven to maintain and enhance MUD's subsystem reliability and capacity and was not for the extension of service to new customers. According to MUD, § 57-1303 applies only to extensions of services to new customers. We disagree.

Section 57-1303 provides in part:

> No investor-owned natural gas utility or metropolitan utilities district may extend or enlarge its natural gas service area or extend or enlarge its natural gas mains or natural gas services unless it is in the public interest to do so.

Under § 57-1306, the PSC is given power to determine whether an extension or enlargement is in the public interest:

> If the investor-owned natural gas utility or the metropolitan utilities district disagrees with a determination by an investor-owned natural gas utility or a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing and determination in the county where the extension or enlargement is proposed . . . . In making a determination whether a proposed extension or enlargement is in the public interest, the commission shall consider the factors set forth in sections 57-1303 and 57-1304. The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307.

[5,6] 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. *McCray v. Nebraska State Patrol, ante* p. 1, 710 N.W.2d 300 (2006). Further, we strictly construe jurisdictional statutes. See *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[7] The plain language of § 57-1303 states that it applies to extensions or enlargements of a natural gas service area or extensions or enlargements of natural gas mains or natural gas

services. Section 57-1306 specifically gives the PSC jurisdiction to determine whether extensions or enlargements are in the public interest. The statute does not limit the determination to only extensions of service to new customers. Instead, it specifically includes enlargement of natural gas mains or services without reference to new customers. Under the plain language of §§ 57-1303 and 57-1306, the PSC had jurisdiction.

2. Public Interest Determinations

MUD contends that its extension is in the public interest.

Section 57-1303 provides five factors to be considered when determining whether an extension or enlargement is in the public interest. Under § 57-1303:

> In determining whether or not an extension or enlargement is in the public interest, the district or the utility shall consider the following:
>
> (1) The economic feasibility of the extension or enlargement;
>
> (2) The impact the enlargement will have on the existing and future natural gas ratepayers of the metropolitan utilities district or the investor-owned natural gas utility;
>
> (3) Whether the extension or enlargement contributes to the orderly development of natural gas utility infrastructure;
>
> (4) Whether the extension or enlargement will result in duplicative or redundant natural gas utility infrastructure; and
>
> (5) Whether the extension or enlargement is applied in a nondiscriminatory manner.

In addition, Neb. Rev. Stat. § 14-2117 (Reissue 1997) provides in part:

> No metropolitan utilities district may extend or enlarge its service area unless it is economically feasible to do so. In determining whether or not to extend or enlarge its service area, the district shall take into account the cost of such extension or enlargement to its existing ratepayers.

We note that no one single factor may be dispositive to any particular case. Cases may vary, and whether an extension is in the public interest depends on the facts and circumstances of each case.

The district court found that the extension was not in the public interest because MUD (1) failed to prove it was economically feasible, (2) failed to consider the impact on ratepayers, and (3) did not take orderly development into consideration. The court found that the extension was not redundant and that there was no evidence of discriminatory purpose or effect.

(a) Economic Feasibility

MUD argues that it has shown the economic feasibility of the extensions. According to MUD, the project was subjected to its budget review and was determined to be economically feasible. It also argues that any further analysis was not required because the extensions are for increasing system performance and safety instead of growth.

According to MUD, it has shown economic feasibility for the following reasons: (1) It considered expanding the capacity of existing TBS's, but believed that would not be feasible because of area growth and because the reduction in pressure at the Center Street TBS required a new TBS to meet demand; (2) the Fairview TBS location presented the best way to shore up and maintain the system's reliability in that section of the service area; and (3) the extension required only slight grade changes in the road, the area was not well populated, and the site location was near a landfill, which site would likely not face future urban encroachment.

Although the extensions were included in MUD's budget process for determining feasibility of the budgeted items, MUD stated in its answers to interrogatories that because Northern provided money to MUD that it used for the project, "no further economic feasibility analysis was needed." At a hearing before the PSC, a MUD employee admitted that an independent economic feasibility study was not completed, but that a "ballpark number" or analysis was performed. Also, MUD's argument that it failed to do an economic feasibility study because the extension was for enhanced system reliability is undermined by the testimony of MUD's senior gas designer. He testified that the Fairview TBS was sized for future growth. In addition, the record reflects that Northern plans to apply to the Federal Energy Regulatory Commission (FERC) to seek recovery of $4.35 million from its

ratepayers. The court found that "if Northern is successful in its application, ratepayers of MUD and Aquila will be required to pay a portion of the payment through their rates."

The district court found that MUD did not complete a before-the-fact economic feasibility analysis of the extension. The court noted that although the extensions were intended in part to make up for loss of capacity at the Center Street TBS, the extension's primary purpose was for growth. The court discounted MUD's argument that it considered economic feasibility as part of the budget process. The court stated: "Section 57-1303(1) requires a specific economic feasibility analysis of a proposed extension or enlargement, not a generic representation that, through the general course of doing business, economic feasibility is considered for each project for which there is capital expenditure authorization through normal budgetary process."

The court noted that it was possible for costs to get passed to ratepayers if Northern were successful in its application to the FERC to recover the $4.35 million paid under the contribution agreement and if the cost reimbursed to Northern for the Fairview TBS were passed to ratepayers. The court also concluded that before MUD extended or enlarged its service area, it had to comply with § 14-2117, which requires a determination of economic feasibility, taking into account the effect of the extension or enlargement on ratepayers.

We determine that the district court's findings are supported by competent evidence. The record shows that an economic feasibility study was not completed before the extension was started. The record contains evidence that when the extension was considered in the budget process, MUD failed to consider that it would have to reimburse Northern up to $500,000 for the Fairview TBS. Further, although MUD contends that the extension was for an upgrade to system reliability and safety, the record contains competent evidence to support the district court's conclusions that the primary purpose for the extension was for growth. Yet, MUD did not consider the system's growth as a factor when considering economic feasibility of the extension. Thus, there was competent evidence to support the conclusion of the district court that MUD failed to determine economic feasibility before it began the extension and, thus, violated § 14-2117.

Accordingly, we determine that the district court's finding that MUD failed to show that the extension was economically feasible was supported by competent evidence.

(b) Impact on Ratepayers

MUD argues that the district court wrongly determined that it failed to consider the impact on ratepayers. MUD argues that any rate increase would be offset by increased reliability and improvement to its system and that the extension would resolve the safety and capacity issues at the Center Street TBS. According to MUD, it would cost more to make changes at the Center Street TBS to fix the safety and capacity concerns.

Because the Fairview TBS was designed to accommodate projected use 5 years into the future, the court found that the primary purpose of the Fairview TBS was to accommodate future growth that could affect ratepayers. In addition, the court found that although the Fairview TBS was developed to meet future capacity, the evidence failed to show when it would require full capacity. The court found that if Northern were successful in its application to the FERC to recover the $4.35 million paid to MUD under the contribution agreement, a percentage of those costs would be passed to MUD and Aquila ratepayers. Likewise, it found that ratepayers would be responsible for the cost of MUD's reimbursement to Northern.

As previously stated, MUD failed to consider the potential effect on ratepayers. The record reflects that the Fairview TBS was constructed with growth in mind and is designed to be oversized for at least 5 years. Although MUD states that it needs to consider future customers and oversizes TBS's to cover for loss of service, MUD was still required to consider the effect of such items on ratepayers. In addition, such determinations were required before MUD undertook construction. Despite MUD's arguments that it determined there was no effect on ratepayers, the record supports the court's determinations that the extension's purpose was to accommodate MUD's growth and that how the growth impacted its ratepayers was not properly considered. Accordingly, we find there was competent evidence to support the court's factual findings concerning the impact on ratepayers.

(c) Orderly Development of Infrastructure

MUD contends that the court erred when it determined that the extension did not contribute to the orderly development of the natural gas infrastructure. MUD argues it considered evidence of safety concerns and that it considered and rejected a number of alternate TBS sites.

The court found that although the Fairview TBS would provide some relief at the Center Street TBS and MUD provided reasons for its location, the location was established for the primary purpose of establishing a foothold in an area fertile for future customers. The court stated that although such a decision might be good business acumen, it did not consider whether the extension promoted orderly development of the infrastructure.

As in the sections regarding feasibility and impact, the record contains evidence that MUD chose to place the Fairview TBS near the edge of its existing borders and in a location that would place it in an area of high future growth. The record also supports the conclusion that although relief for the Center Street TBS was a factor, the goal of growth was a primary factor. The district court's findings that MUD failed to show that the extension contributed to orderly development were supported by competent evidence. Because we find that the court's factual findings in all respects were supported by competent evidence, we affirm.

3. Cross-Appeal

The PSC contends that it was not a required party to the appeal under Neb. Rev. Stat. § 84-917 (Reissue 1999) because its main role in the action was to act as a neutral factfinding body.

Since August 2003, appeals of PSC orders are in accordance with the Administrative Procedure Act. Neb. Rev. Stat. § 75-136 (Reissue 2003). Section 84-917(2)(a) provides in part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

[8,9] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). However, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party. *In re Application of Metropolitan Util. Dist., supra.* See *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

We recently noted that the overall power of the PSC concerning natural gas utilities gave the PSC the authority to set conditions on certifications, resolve disputes, investigate complaints, and issue and enforce orders. *In re Application of Metropolitan Util. Dist., supra*, citing Neb. Rev. Stat. § 66-1804(1) (Reissue 2003). In that case, MUD submitted an application seeking certification as a competitive natural gas provider. We determined that under the authority given to the PSC, the PSC was not acting as a neutral factfinding body and was a proper party to the action.

Here, the PSC jurisdiction extends to §§ 57-1301 to 57-1307. Section 57-1306, however, limits the role of the PSC, providing in part as follows:

> If the investor-owned natural gas utility or the metropolitan utilities district disagrees with a determination by an investor-owned natural gas utility or a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing and determination in the county where the extension or enlargement is proposed and shall be subject to the applicable procedures provided in sections 75-112, 75-129, and 75-134 to 75-136. In making a determination whether a proposed extension or enlargement is in the public interest, the commission shall consider the factors set forth in sections 57-1303 and 57-1304. *The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307.*

(Emphasis supplied.)

Here, the PSC was not acting as a certifying agency or the primary civil enforcement agency. Nor was the PSC acting in the role of an adversarial party or enforcing a previous order. Instead, the PSC was acting as a factfinding body to determine the validity of Aquila's complaint seeking a cease and desist order. In this circumstance, we determine that the PSC was not a necessary party to the action. Therefore, the district court should have dismissed the PSC from the appeal.

V. CONCLUSION

We determine that the PSC and the district court had jurisdiction over the action. We further determine that the record contains competent evidence to support the district court's factual determination that the extension was not in the public interest. On cross-appeal, we agree that the PSC was not a necessary party to the appeal. Accordingly, we affirm the cease and desist order, but direct that the PSC be dismissed from the action.

AFFIRMED WITH DIRECTION.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MICHAEL G. REILLY, RESPONDENT.

712 N.W.2d 278

Filed April 21, 2006. No. S-05-1035.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This is an attorney reciprocal discipline case in which the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for reciprocal discipline against respondent, Michael G. Reilly.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 3, 1982. On January 13, 2006, the Iowa Supreme Court revoked respondent's license to practice law in the State of Iowa. See *Iowa Supreme Ct. Atty. Disc. Bd. v. Reilly*, 708 N.W.2d 82 (Iowa 2006). The Iowa Supreme Court's opinion reflects that as a result of an "uncontrollable gambling habit that left him constantly in need of funds," respondent misappropriated from his law firm's trust account over $96,000 belonging to one client. *Id.* at 85. Respondent later repaid certain of the misappropriated moneys by writing a check on his personal bank account, but the bank account from which he paid those moneys had insufficient funds, and the bank that had cleared the check "was saddled with a $96,000 overdrawn account," which was not repaid for more than 1 year. *Id.* at 83. The Iowa Supreme Court revoked respondent's license due to respondent's "misappropriation of client funds [and a] check-kiting scheme undertaken in an effort to replace the [misappropriated] funds." See *id.* at 85.

On or about August 30, 2005, relator, through the chairperson of the Committee on Inquiry of the Second Judicial District, moved this court to temporarily suspend respondent from the practice of law in the State of Nebraska pending an investigation into the disciplinary charges then pending against respondent in Iowa. On October 19, this court entered an order temporarily suspending respondent from the practice of law. On January 17, 2006, relator filed a motion for reciprocal discipline, based upon the Iowa Supreme Court's revocation of respondent's license to practice law in Iowa. On February 15, this court entered a show cause order directing the parties to show cause why this court should or should not enter an order imposing the identical discipline, or greater or lesser discipline, as the court deemed appropriate, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001). Respondent filed a response to our show cause order, in effect admitting the essential facts that resulted in the revocation of his license to practice law in Iowa.

ANALYSIS

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. Jones,* 270 Neb. 471, 478, 704 N.W.2d 216, 223 (2005). In a reciprocal discipline proceeding, "a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction." *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 177, 672 N.W.2d 637, 638 (2004). We therefore determine that the imposition of discipline is appropriate in this case.

With respect to the type of discipline appropriate in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 771, 708 N.W.2d 606, 609 (2005). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. 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. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). We apply these factors to the instant reciprocal discipline case.

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Hart, supra.* Respondent urges as a mitigating factor his "addiction to gambling." We have taken this into account; however, any mitigating effect that might have resulted from this condition is overshadowed by the facts in the instant case. We agree with the Iowa Supreme Court, which stated that "[u]nfortunately, [respondent's gambling] is a matter which, although regrettable and cause for sympathy, does not obviate the seriousness of the improper attorney conduct that has occurred." *Iowa Supreme Ct. Atty. Disc. Bd. v. Reilly*, 708 N.W.2d 82, 85 (Iowa 2006).

We have considered the case file and the applicable law. Upon due consideration, the court finds that respondent should be

disbarred from the practice of law in the State of Nebraska, effective immediately.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is hereby disbarred from the practice of law in the State of Nebraska, and we therefore order him disbarred from the practice of law, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, 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. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN A. LISTON, APPELLANT.
712 N.W.2d 264

Filed April 21, 2006. No. S-05-1046.

1. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
2. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge.
3. **Constitutional Law: Criminal Law: Statutes: Demurrer.** In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer.
4. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.
5. **Statutes: Legislature: Intent.** A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Casey J. Quinn for appellant.

Jon Bruning, Attorney General, and Corey O'Brien for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Steven A. Liston, was found guilty by a jury of "on-line enticement of a child." He appeals from the district court's order of conviction. Liston has asserted constitutional challenges to the charging statute, Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2004). This appeal raises the issue of whether these challenges were waived by Liston's failure to request a withdrawal of his not guilty plea before filing a motion to quash asserting these challenges.

BACKGROUND

In January 2005, the State filed an information against Liston, charging him with the following count, pursuant to § 28-320.02:

> [O]n or about the 1st day of July, 2004, STEVEN A. LISTON . . . did then and there knowingly or intentionally solicit, coax, entice or lure a peace officer who is believed by such person to be a child sixteen (16) years of age or younger, by means of a computer, to engage in first degree sexual assault and/or sexual assault of a child.

Liston and his counsel signed a form entitled "Written Arraignment and Waiver of Physical Appearance," which was filed with the court on January 25, 2005. The form provides in relevant part:

> Pursuant to Neb.Rev.Stat. [§] 29-4206, I _____, Defendant in the above-entitled action, waive my right to physically appear for arraignment in District Court and ask the Court to enter a plea of not guilty on my behalf subject to the following pretrial motion(s) (if applicable) filed or to be filed pursuant to Statute:
>
> ___ plea in abatement
> ___ demurrer
> ___ motion to quash

___ plea in bar
___ other: _____

Liston marked an "X" beside "plea in abatement" and "motion to quash." The district court's journal entry for February 3, 2005, shows that pursuant to this waiver, the court entered Liston's not guilty plea "subject to any pretrial motions noted therein."

On May 31, 2005, Liston filed a motion to quash the information, asserting three constitutional challenges to § 28-320.02. He alleged that the statute was facially vague, a violation of his right of free speech, and an impermissible regulation of an instrumentality of interstate commerce. The district court overruled his motion to quash without comment. A jury trial was conducted on June 13 through 15, after which the jury returned a verdict of guilty.

On June 17, 2005, Liston filed a notice of appeal from the district court's overruling of his motion to quash. The Nebraska Court of Appeals, however, summarily dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). *State v. Liston*, 13 Neb. App. lxxii (No. A-05-752, July 27, 2005), citing *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000) (holding that overruling of motion to quash does not affect substantial right and is therefore not final, appealable order). On August 31, Liston was sentenced to 3 years' probation and required to register as a sex offender. He also appealed from this order and filed a notice of constitutional issues pursuant to Neb. Ct. R. of Prac. 9E (rev. 2001) with his brief. This court granted Liston's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

Liston assigns that the district court erred in overruling his motion to quash because § 28-320.02 is unconstitutionally vague, a violation of the right of free speech, a violation of the Equal Protection Clause, and an unconstitutional regulation of interstate commerce.

STANDARD OF REVIEW

[1] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004).

ANALYSIS

[2] Liston contends that § 28-320.02 is facially unconstitutional on four different grounds. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

[3,4] In order to bring a constitutional challenge to the facial validity of a criminal statute, the proper procedure is to file a motion to quash or a demurrer. See *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002). Pursuant to Neb. Rev. Stat. § 29-1812 (Reissue 1995), this court has held that once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

Indisputably, Liston did not seek to withdraw his plea of not guilty before filing a motion to quash over 4 months after he had filed his written arraignment with the court. Liston contends that he was not required to do so because the written arraignment form that he signed authorized the district court to enter his plea subject to his motion to quash. We therefore review the district court's authority to accept a conditional plea of not guilty.

[5] As noted, the form that Liston signed referenced Neb. Rev. Stat. § 29-4206 (Cum. Supp. 2004). Section 29-4206 does not, however, authorize district courts to accept pleas of not guilty on a conditional basis. Moreover, such an interpretation would be inconsistent with the Legislature's statement of intent in Neb. Rev. Stat. § 29-4201 (Cum. Supp. 2004). A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Section 29-4201 provides: "It is the intent and purpose of sections 29-4201 to 29-4207 to authorize . . . certain district court arraignments by writing in criminal proceedings *consistent with the statutory and constitutional rights* guaranteed by the Constitution of the United States and the Constitution of Nebraska." (Emphasis supplied.)

The language of § 29-4201 demonstrates that the Legislature did not intend to allow written arraignments to supersede Nebraska's criminal procedure statutes. Relevant here, the waiver of defects statute, § 29-1812, specifically provides: "The accused *shall be taken to have waived* all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." (Emphasis supplied.)

A defendant's waiver of defects under § 29-1812 is mandatory and does not permit a district court to entertain his or her facial challenge to a statute raised in a motion to quash so long as the defendant's plea to the general issue still stands. Nothing in § 29-4206 contravenes the language of § 29-1812, nor did the Legislature alter § 29-1812 at the time that Neb. Rev. Stat. §§ 29-4201 to 29-4207 (Cum. Supp. 2004) were enacted. Thus, the Legislature is presumed to have retained the requirement under § 29-1812 that a defendant must withdraw his or her plea to the general issue before filing a motion to quash, even if the defendant's plea is entered pursuant to a written arraignment. See *State v. Neiss*, 260 Neb. 691, 701, 619 N.W.2d 222, 229-30 (2000) ("where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent").

We conclude that a district court does not have authority to permit a defendant to file a motion to quash challenging the facial validity of a statute unless the defendant first obtains leave to withdraw his or her plea of not guilty.

Liston also argues that even if the district court did not have authority to make his plea subject to a motion to quash to be filed in the future, he should still be allowed to challenge the statute's constitutionality because he detrimentally relied on a court-provided form. Liston focuses on the phrase "subject to" in the following sentence of the written arraignment: "I . . . ask the Court to enter a plea of not guilty on my behalf *subject to* the following pretrial motion(s) (if applicable) filed or to be filed pursuant to Statute." (Emphasis supplied.) He contends that "subject to" in this context means that his plea was "contingent or dependent"

upon his motion to quash to be filed in the future. Supplemental brief for appellant at 3.

We reject Liston's interpretation of the form. The same sentence that Liston relies upon also specifies that a defendant's pretrial motions have been filed or will be filed "pursuant to Statute." Pursuant to § 29-1812, once a defendant enters a plea to the general issue, or the court enters a plea on behalf of the defendant, he or she must withdraw the plea before filing a motion to quash. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002). Similarly, the form specifies that Liston's plea of not guilty was subject only to *applicable* pretrial motions, and a motion to quash is not applicable after a defendant enters a plea to the charge unless the plea is first withdrawn. Read with Nebraska's criminal procedure statutes, this form cannot alter the statutory requirement as set forth in § 29-1812.

CONCLUSION

We conclude that Liston's constitutional arguments on appeal are procedurally barred because Liston's motion to quash was not filed until almost 4 months after the court entered a plea of not guilty on his behalf. He has therefore waived any defects alleged in the motion.

AFFIRMED.

WRIGHT, J., not participating.

THE LAMAR COMPANY OF NEBRASKA, L.L.C., DOING BUSINESS AS LAMAR OUTDOOR, AND MERCY ROAD LIMITED PARTNERSHIP, APPELLANTS, V. OMAHA ZONING BOARD OF APPEALS, CITY OF OMAHA, ET AL., APPELLEES, AND WAITT OUTDOOR, LLC, AND ROBERT MILLER PROPERTIES, INC., INTERVENORS-APPELLEES.

713 N.W.2d 406

Filed April 27, 2006. No. S-04-1300.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.

2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.
3. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
4. **Statutes.** The meaning of a statute is a question of law.
5. **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.
6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

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

Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, for appellants.

Donald P. Dworak, of Gross & Welch, P.C., for intervenors-appellees.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and HANNON, Judge, Retired.

MCCORMACK, J.

NATURE OF CASE

Following the denial by the Omaha Zoning Board of Appeals (Board) of its application for a sign permit and request for variance, The Lamar Company of Nebraska, L.L.C., doing business as Lamar Outdoor (Lamar), along with Mercy Road Limited Partnership, its lessor (collectively Appellants), appealed to the Douglas County District Court. Waitt Outdoor, LLC (Waitt), and Robert Miller Properties, Inc. (Miller), filed a motion to intervene, which was sustained. The district court affirmed the decision of the Board denying the permit and variance. Appellants timely filed this appeal.

BACKGROUND

The underlying facts are undisputed. Lamar maintained an off-premises advertising sign, a billboard, on property leased from

Miller and located at 6801 Mercy Road in Omaha, Nebraska. The lease between Lamar and Miller was set to expire on August 31, 2003. Lamar and Miller attempted to renegotiate the lease but were unable to reach an agreement. The terms of the lease required Lamar to remove the billboard at 6801 Mercy Road within 30 days of the expiration of its lease.

After failing to reach an agreement with Lamar, Miller entered into a lease agreement with Waitt for the construction and maintenance of a new billboard, to be located at approximately the same location as Lamar's sign. On May 19, 2003, Waitt applied to the city planning department for a sign permit. On May 29, Waitt requested from the Board certain variances, which were necessary because the new billboard would be located within 150 feet of a recreational trail which was in an area zoned for residential use. A hearing was scheduled on Waitt's application on July 17, but was held over due to a determination that Waitt also needed a variance regarding the size of the sign planned for the site. At its August 21 hearing, the Board considered Waitt's application, granted the necessary variances, and issued the sign permit.

Lamar, meanwhile, entered into a lease agreement on June 12, 2003, with Mercy Road Limited Partnership to construct and maintain a billboard at 6855 Mercy Road, which is a parcel of property adjacent to 6801 Mercy Road. The record establishes that the proposed billboard locations on these two parcels were within 700 feet of each other. On June 12, Lamar also applied to the city planning department for a sign permit. In that application, Lamar noted that it currently maintained a sign at 6801 Mercy Road and promised to remove that sign within 60 days of the issuance of a permit for 6855 Mercy Road. Lamar's application was denied, and in a letter dated June 24, 2003, explaining the denial, the city planning department noted that "Omaha Municipal Code section 55-826(a)(3) requires 700 feet of spacing between advertising sign locations. Waitt . . . has previously applied for a billboard location at 6801 Mercy Road which is pending before the . . . Board . . . ." Lamar appealed to the Board on June 30. Its appeal was scheduled to be heard at the same July 17 meeting scheduled for Waitt's application, but was held over due to Waitt's request for further variances made earlier at that

meeting. Lamar's appeal was ultimately heard and denied on August 21. At that same August 21 hearing, Lamar alternatively argued that it was entitled to a variance due to a "practical difficulty or an unnecessary hardship" because of the Board's prior approval of Waitt's permit. That request was also denied.

Appellants filed an appeal in the district court. Waitt and Miller (collectively Intervenors) motioned to intervene. That motion was sustained by the district court. After a hearing on appeal, the district court affirmed the decision of the Board. Appellants then filed this appeal. We moved this 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

Appellants assign, consolidated and restated, that the district court erred in (1) sustaining Intervenors' motion to intervene, (2) affirming the denial of Lamar's application for a sign permit, and (3) affirming the Board's decision with respect to Waitt's permit application.

STANDARD OF REVIEW

[1,2] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Id.*

ANALYSIS

Intervention of Waitt and Miller

Appellants first assign that the district court erred in sustaining Intervenors' motion to intervene. The statutory right to intervention is governed by Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004), which provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in

> any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Appellants argue that intervention is inappropriate because (1) the Board adequately represents the interests of Intervenors; (2) Intervenors have failed to allege facts sufficient to show a direct and legal interest affected by the appeal before the district court; (3) Intervenors intervened at the intermediate appellate level, rather than prior to trial as required by § 25-328; and (4) Intervenors failed to appear in opposition to Lamar's appeal before the Board.

[3] A review of the record shows that Intervenors offered no evidence at the hearing before the district court. While counsel for Intervenors did present oral argument to the district court at that hearing, such argument was essentially a reiteration of the Board's argument. Moreover, in its brief before this court, the arguments made by Intervenors are the same as those made by the Board. We conclude that, even assuming the district court erred in allowing Intervenors leave to intervene at the intermediate appellate level, Appellants were not prejudiced by that error. Error without prejudice provides no ground for appellate relief. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004). Accordingly, we need not address Appellants' arguments with respect to intervention.

Whether Board Erred in Denying Lamar's Application

In their second assignment of error, Appellants assign that the district court erred in affirming the Board's denial of Lamar's application for a sign permit. Appellants argue first that Lamar's "[a]pplication complied with all requirements of the [Omaha Municipal] Code and Lamar was entitled to a permit as a matter of right." Brief for appellants at 26. In support of their argument, Appellants direct us to the definition of "advertising sign location," found at Omaha Mun. Code, ch. 55, art. XVIII, § 55-822(b)

(1980), and contend that Waitt's pending application had no effect on Lamar's application because an "advertising sign location" was "considered established upon issuance of a valid sign permit." § 55-822(b).

The Board, however, argues that (1) Neb. Rev. Stat. § 14-410 (Reissue 1997) required that Lamar's application be denied due to Waitt's pending application and request for variances; (2) the city planning department had a "first in time, first in right" policy to handle applications, thus Waitt's application and request for variances had to be resolved before Lamar's application could be acted upon; and (3) due process dictated that Waitt's application and request for variances be resolved before Lamar's application could be acted upon.

[4,5] The meaning of a statute is a question of law. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

[6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005).

Section 14-410 provides in relevant part that "[a]n appeal stays all proceedings in furtherance of the action appealed from . . . ." A stay is defined as "[t]he postponement or halting of a proceeding, judgment, or the like." Black's Law Dictionary 1453 (8th ed. 2004). A plain reading of § 14-410, then, provides that when Waitt filed its request for variances on May 29, 2003, all proceedings in furtherance of that action were halted.

Appellants argue, however, that § 14-410 is inapplicable, as that statute only stays proceedings during an appeal, but that, rather than filing an appeal, Waitt simply requested certain variances. Alternatively, Appellants argue that § 14-410 only operates to stay proceedings " 'in furtherance of the action appealed from' " and that any appeal by Waitt had no effect on Lamar's application. Brief for appellants at 28.

To begin, we disagree with Appellants' contention that Waitt did not file an appeal, but instead only requested certain variances. According to the record, Waitt filed with the city planning department an application for a sign permit on May 19, 2003. Due to the sign's location adjacent to an area which was zoned for residential use, the city planning department informed Waitt that it could not issue the permit. On May 29, Waitt filed with the Board an application for a variance, requesting a waiver of Omaha Mun. Code, ch. 55, art. XVIII, § 55-826(a)(4) (1980), which provided that a billboard could not be erected within 150 feet of an area zoned for residential use. In addition, Waitt subsequently requested other variances. Though the request for variances was not termed an "appeal," a review of the record indicates that the request was in response to the city planning department's action in initially denying Waitt's application for a sign permit.

Moreover, Neb. Rev. Stat. § 14-411 (Reissue 1997) sets forth a zoning board's power to grant variances and provides in relevant part:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power *in passing upon appeals*, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

(Emphasis supplied.)

A plain reading of § 14-411 provides that a zoning board's power to grant variances exists as the board "pass[es] upon appeals." Given this language, we conclude that a zoning board's variance power is appellate in nature. See 4 Kenneth H. Young, Anderson's American Law of Zoning § 22.05 (4th ed. 1997). Even if we were to assume that Waitt's request for variances was not considered an appeal, an assumption which is not supported by the record, we conclude that in granting those variances, the Board was exercising appellate jurisdiction. Accordingly, Appellants' contention that Waitt's application for variances was

not an appeal and thus did not implicate § 14-410 is without merit.

We also disagree with Appellants' argument that Lamar's application was not "in furtherance" of Waitt's appeal. The zoning ordinances at issue make it clear that, notwithstanding the zoning board's power to grant variances, there can be only one billboard in a 700-foot area. See § 55-826(a)(3). If Lamar's application was to be approved and a permit issued while Waitt's appeal was pending, it would effectively deny Waitt its right of appeal. It would make little sense for § 14-410 to stay proceedings with respect to an appeal if another party was permitted to render that appeal moot by altering the circumstances upon which the appeal is based. The right to appeal from the denial of an application for a sign permit cannot be protected unless the statutory stay extends not only to the application at issue, but to other applications that would affect an appellant's ability to obtain relief upon a successful appeal. Thus, we agree with the Board that under the circumstances of this case, § 14-410 gave the Board the authority to deny Lamar's application until such time as Waitt's application was resolved.

Appellants also argue that the Board should have granted Lamar's request for a variance of the 700-foot rule. Appellants contend that the Board created the hardship faced by Lamar when it granted Waitt's requests for variances.

As noted, § 14-411 grants to zoning boards the discretion "to vary or modify the application of any of the regulations or provisions of such ordinance" in the event of "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance." In *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 979, 628 N.W.2d 677, 684 (2001), this court held that

> administrative boards such as the board of zoning appeals provide "expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary."

Quoting *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

Our review of this issue is limited to the question of whether the district court abused its discretion or made an error of law. Given the discretion granted to the Board as outlined in *Eastroads*, we cannot conclude that the district court either abused its discretion or made an error of law in affirming the Board's decision to deny Lamar's requested variance.

Appellants' second assignment of error is without merit.

DISTRICT COURT'S PURPORTED AFFIRMANCE OF WAITT APPLICATION

In their third and final assignment of error, Appellants argue that the district court erred when it found that "[t]he decisions of the . . . Board . . . '*in granting Waitt's application* and denying Lamar's application on August 21, 2003, were not illegal; were supported by the evidence; and were not arbitrary, unreasonable or clearly wrong.'" (Emphasis supplied.) In support of their argument, Appellants, citing *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996), argue that the district court's review extended only to issues which were brought up for review from the Board and that the granting of Waitt's application was not properly before the district court.

Although we agree with Appellants that the district court would have lacked jurisdiction to determine any issues related to Waitt's application, we do not read the district court's order as doing so. Rather, we read the district court's reference to the Waitt application as merely the court's recognition of the interrelatedness of the two applications and not an attempt by the district court to rule on the merits of Waitt's application. Appellants' third and final assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.