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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 8, 2008 and JULY 2, 2008

IN THE

# Supreme Court of Nebraska

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# NEBRASKA REPORTS

## VOLUME CCLXXV

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PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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

---

## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

---

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

# 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 | Randall L. Rehmeier | Nebraska City |
| | | William B. Zastera | Papillion |
| | | David K. Arterburn | Papillion |
| | | Max Kelch | 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 |
| | | Robert R. Otte | 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 | 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 |
| | | William T. Wright | Kearney |
| 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 | Brian C. Silverman | Alliance |
| | | Randall L. Lippstreu | Gering |
| | | Kristine R. Cecava | Sidney |
| | | Leo Dobrovolny | Gering |

# 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 |
| | | Jeffrey J. Funke | Papillion |
| Third | Lancaster | James L. Foster | Lincoln |
| | | Gale Pokorny | Lincoln |
| | | Mary L. Doyle | Lincoln |
| | | Laurie Yardley | Lincoln |
| | | Jean A. Lovell | Lincoln |
| | | Susan I. Strong | Lincoln |
| Fourth | Douglas | 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 |
| | | Susan Bazis | 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 | Richard W. Krepela | Madison |
| | | Donna F. Taylor | Madison |
| | | Ross A. Stoffer | Pierce |
| 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 |
| | | Kent D. Turnbull | North Platte |
| | | Carlton E. Clark | Lexington |
| | | Edward D. Steenburg | Ogallala |
| | | Anne Paine | McCook |
| 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 |
| | Linda S. Porter | Lincoln |
| | Roger J. Heideman | Lincoln |
| | Reggie L. Ryder | 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 274

---

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Victoria Helen Buter
John Fitzgerald Carroll
Dean Gary Daugaard
Patrick David Davis
Candace Leigh Dick
Robert Garrett Dorton
Theresa Marie Dowling
Tammy Lillie Eigenheer
Anne Claire Ewing
Christopher Lawrence Ferretti
Dustin Allen Garrison
Edward Paul Gonzales
Kimberly Anne Guernsey
Brian Cooper Hansen
Tracy Lynn Hightower
Luke Charles Holst
Alicia Kay Hughes
Nicole Reagan Hutter
Chinedu Ifeanyi Igbokwe
Steven H. Jesser
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Mark Brigham Johnson
Jeremy Christopher Jorgenson
Christine Diane Kellogg
Jamie Elizabeth Kinkaid
Erik Charles Klutman
Matthew James Knowles
Brian Joseph Koenig
George Koons III
Jeffrey Ryan Larson
William Harvey Larson
John Houghton Longwell
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Kris D'Ann Maples
Blake Whitney McKibbin
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Jennifer L. Suedmeyer
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Kristina Marie Teague
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Penelope Laura Tvrdik
John Michael Walker
Kimberly J. Walker
Shelley Renae Whitcher
Robert James Wonnell

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## LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-06-1107: **Lovell v. Dunn**. Affirmed. Per Curiam.

No. S-06-1255: **Shirley Apartments, LLC v. City of Omaha**. Affirmed in part, and in part reversed and remanded with directions. Gerrard, J. Wright, J., not participating.

No. S-07-021: **Stauffer v. Galaxy Homes**. Reversed and remanded with directions. Stephan, J.

No. S-07-131: **Rickett v. Rickett**. Affirmed. Heavican, C.J.

No. S-07-343: **Dondlinger v. Dondlinger**. Affirmed. Gerrard, J.

No. S-07-538: **State v. Beal**. Affirmed in part, and in part vacated. Gerrard, J. McCormack, J., participating on briefs.

No. S-07-580: **State v. Hernandez**. Affirmed. Stephan, J.

No. S-07-672: **McClane v. Furlong**. Affirmed. Miller-Lerman, J.

No. S-07-684: **State on behalf of Lee v. Steel**. Affirmed. Gerrard, J.

No. S-07-781: **In re Guardianship & Conservatorship of Dunn**. Affirmed in part, and in part reversed and remanded for further proceedings. Stephan, J. McCormack and Miller-Lerman, JJ., not participating.

No. S-07-1156: **Landrum v. Landrum**. Reversed and remanded with directions. Stephan, J.

## LIST OF CASES DISPOSED OF WITHOUT OPINION

---

No. S-06-1063: **Papillion-LaVista Pub. Sch. Dist. v. Bellevue Pub. Sch. Dist**. Stipulation considered; appeal dismissed; each party to pay own costs.

No. S-06-1305: **Lytle v. Neth**. Cause not having been shown, judgment reversed, and cause remanded with directions.

No. S-06-1307: **Diaz v. Neth**. Cause not having been shown, judgment reversed, and cause remanded with directions.

No. S-07-430: **In re Estate of Cumerford**. Motion of appellee for summary affirmance sustained. See *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

No. S-07-704: **Zwiener v. Neth**. Motion of appellee for summary affirmance sustained. See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

No. S-07-772: **State v. Herrera**. Upon consideration of the appellee's suggestion of remand, the court finds that this matter should be remanded to the district court with directions to dismiss appellant's motion to withdraw plea. See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

No. S-07-939: **State v. Wetherell**. Affirmed. See, rule 7B(2); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

No. S-07-981: **Hemmingsen v. Department of Motor Vehicles**. Cause not having been shown, judgment summarily reversed, and cause remanded with direction. See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

No. S-07-1042: **Gilligan v. Neth**. Summarily affirmed. See, rule 7A(1); *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

No. S-07-1052: **State v. Zenger**. Affirmed. See, Neb. Rev. Stat. §§ 25-12,101 (Reissue 1995) and 60-6,197.03(4) (Supp. 2007); *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005).

No. S-07-1095: **Matsui v. Board of Equal. of Douglas Cty**. Affirmed. See, rule 7A(1); *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

No. S-07-1240: **State v. Drewes**. Motion considered; appeal dismissed.

No. S-07-1243: **State v. Lyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-07-1279: **Chambers v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-08-320: **State ex rel. Counsel for Dis. v. Tarvin**. Judgment of suspension; respondent suspended from the practice of law in the State of Nebraska until further order of this court.

No. S-34-080001: **In re Application of Buter**. Application for admission to Nebraska State Bar granted. See, *In re Application of Budman*, 272 Neb. 829, 724 N.W.2d 819 (2006); *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006); *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005).

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-04-068: **Widtfeldt v. Holt Cty. Bd. of Equal.**, 12 Neb. App. 499 (2004). Petition of appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-05-1226: **Kirkwood v. State**, 16 Neb. App. 459 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. A-05-1227: **Blankenship v. JRFM, Inc**. Petition of appellant for further review overruled on May 7, 2008.

No. A-05-1273: **Hubka-Randall v. Randall**. Petition of appellant for further review overruled on February 13, 2008.

No. A-05-1501: **Carpenter v. Parrella Motors**. Petition of appellant for further review overruled on March 26, 2008.

No. A-06-050: **Department of Roads v. Transcore ITS**. Petition of appellant for further review overruled on March 12, 2008.

No. A-06-321: **Villanueva v. City of South Sioux City**, 16 Neb. App. 288 (2008). Petition of appellee for further review overruled on February 21, 2008.

No. A-06-334: **State v. Tyma**. Petition of appellant for further review overruled on April 9, 2008.

Nos. A-06-340, A-06-662: **Stuck v. Michel**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-06-370: **Densberger v. State**. Petition of appellant for further review overruled on June 18, 2008.

Nos. A-06-408, A-06-409: **In re Trust of Alexis**, 16 Neb. App. 416 (2008). Petitions of appellee for further review overruled on June 4, 2008.

No. S-06-427: **Wagner v. Wagner**, 16 Neb. App. 328 (2008). Petition of appellant for further review sustained on March 12, 2008.

No. A-06-433: **Daubenmier v. Spence**, 16 Neb. App. 435 (2008). Petition of appellant for further review overruled on April 23, 2008.

No. A-06-525: **Vogt v. Neth**. Petition of appellant for further review overruled on March 12, 2008.

No. A-06-572: **Jones v. Stahr**, 16 Neb. App. 596 (2008). Petition of appellees for further review overruled on May 14, 2008.

No. A-06-630: **Ostergard v. State**, 16 Neb. App. 459 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. A-06-633: **In re Estate of Breinig**. Petition of appellant for further review overruled on May 7, 2008.

No. A-06-710: **Neilan v. Neilan**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-719: **In re Estate of Waite**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-746: **Morgan v. Super 8 Motel**. Petition of appellant for further review overruled on January 31, 2008.

No. A-06-748: **MBNA America Bank v. Hansen**, 16 Neb. App. 536 (2008). Petition of appellant for further review overruled on June 11, 2008.

No. A-06-774: **Restorations & Renovations v. Feddin**. Petition of appellant for further review overruled on June 11, 2008.

Nos. S-06-800, S-07-414: **Marcovitz v. Rogers**. Petitions of appellant for further review sustained on May 22, 2008; cases to be submitted without oral argument pursuant to rule 11B(1).

No. A-06-814: **Engert v. Levitt**. Petition of appellee for further review overruled on April 16, 2008.

No. A-06-815: **Guerrero v. Guerrero**. Petition of appellant for further review overruled on April 10, 2008, as untimely filed.

No. A-06-858: **City of Omaha v. Tract No. 1**. Petition of appellee for further review overruled on May 14, 2008.

No. A-06-951: **In re Estate of Hue**. Petition of appellee for further review overruled on February 13, 2008.

No. A-06-985: **Brock v. Smith**. Petition of appellant for further review overruled on June 18, 2008.

No. A-06-1004: **Rubloff Hastings v. Nash Finch Co**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1022: **Neujahr v. Western Hills Ltd. Partnership**. Petition of appellant for further review overruled on January 31, 2008.

No. A-06-1054: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on May 7, 2008.

No. A-06-1065: **Tolbert v. Omaha Housing Authority**, 16 Neb. App. 618 (2008). Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1093: **State v. Warren**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-1099: **BCB Petroleum v. Kurtenbach**. Petition of appellee for further review overruled on June 11, 2008.

No. A-06-1162: **Romo v. Ameriquest Mortgage Co**. Petition of appellant for further review overruled on February 13, 2008.

No. S-06-1163: **Wooden v. County of Douglas**, 16 Neb. App. 336 (2008). Petition of appellant for further review sustained on March 19, 2008.

No. A-06-1171: **State v. Arredondo**. Petition of appellant for further review overruled on March 12, 2008.

Nos. A-06-1186, A-06-1202: **Hagedorn v. Lierman**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-06-1199: **Colling v. Price**. Petition of appellee for further review overruled on March 26, 2008.

No. A-06-1275: **Larsen v. Union Pacific RR. Co**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1280: **In re Trust of Barger**. Petition of appellant for further review overruled on February 27, 2008.

No. A-06-1281: **State ex rel. Linder v. Long**. Petition of appellee for further review overruled on March 12, 2008.

No. A-06-1283: **Nielsen v. Department of Motor Vehicles**. Petition of appellant for further review overruled on May 22, 2008.

No. A-06-1284: **Puskarich v. Nichols**. Petition of appellees for further review overruled on June 18, 2008.

No. A-06-1285: **Rainforth v. Rainforth**. Petition of appellant for further review overruled on June 11, 2008.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-06-1350: **Edwards v. Edwards**, 16 Neb. App. 297 (2008). Petition of appellant for further review overruled on April 16, 2008.

No. S-06-1363: **Ord, Inc. v. AmFirst Bank**. Petition of appellants for further review sustained on June 11, 2008.

No. A-06-1386: **State v. Herek**. Petition of appellant for further review overruled on May 6, 2008, as untimely filed.

No. A-06-1463: **State v. Pavon**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-018: **Meints v. City of Beatrice**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-037: **State v. Freeman**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-068: **In re Estate of Gibreal**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-080: **Kacin v. Bel Fury Investments**. Petition of appellee for further review overruled on June 4, 2008.

No. A-07-090: **Wilmot v. Snelling**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-102: **Gebhardt v. Gebhardt**, 16 Neb. App. 565 (2008). Petition of appellant for further review overruled on June 11, 2008.

No. A-07-103: **State v. Blakeman**, 16 Neb. App. 362 (2008). Petition of appellant for further review overruled on May 7, 2008.

No. A-07-142: **Barnes v. Barnes**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-151: **Worley v. Houston**, 16 Neb. App. 634 (2008). Petition of appellee for further review overruled on June 18, 2008.

No. A-07-154: **Mengedoht v. Robinson**. Petition of appellant for further review overruled on April 23, 2008.

No. S-07-165: **Trump v. Trump**. Petition of appellant for further review sustained on May 14, 2008.

No. A-07-190: **State v. Hatt**, 16 Neb. App. 397 (2008). Petition of appellee for further review overruled on April 9, 2008.

No. A-07-223: **State v. Harden**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-232: **State v. Shannon**. Petition of appellant for further review overruled on April 16, 2008.

No. A-07-290: **State v. Kitchens**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-320: **State v. Shannon**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-351: **Guider v. Anderson**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-365: **Heppler v. Omaha Cable**, 16 Neb. App. 267 (2007). Petition of appellant for further review overruled on February 27, 2008.

No. A-07-424: **Doremus v. Doremus**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-440: **Calta v. Allstate Ins. Co**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-457: **State v. Antoniak**, 16 Neb. App. 445 (2008). Petition of appellant for further review overruled on April 9, 2008.

No. S-07-464: **State v. Head**. Petition of appellee for further review sustained on March 19, 2008.

No. A-07-467: **In re Interest of Michael S.**, 16 Neb. App. 240 (2007). Petition of appellee State for further review overruled on February 13, 2008.

No. A-07-473: **Waite v. Carpenter**. Petition of appellant for further review overruled on February 13, 2008.

No. A-07-506: **State v. Rodwell**. Petition of appellant for further review overruled on February 13, 2008.

No. A-07-521: **Stehlik v. Stehlik**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-550: **Holmes v. Chief Indus.**, 16 Neb. App. 589 (2008). Petition of appellee for further review overruled on May 14, 2008.

No. A-07-567: **Yelli v. Neth**, 16 Neb. App. 639 (2008). Petition of appellant for further review overruled on May 22, 2008.

No. S-07-572: **In re Interest of Markice M**. Petition of appellant for further review sustained on February 27, 2008.

No. A-07-573: **State v. Clayton**. Petition of appellant for further review overruled on June 4, 2008.

Nos. A-07-604, A-07-605: **In re Interest of Hailey M**. Petitions of appellant for further review overruled on March 26, 2008.

No. A-07-606: **State on behalf of Bivans v. Bivans**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-630: **Halac v. Girton**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-634: **State v. Ormesher**. Petition of appellant for further review overruled on February 13, 2008.

No. S-07-648: **Timmerman v. Neth**. Petition of appellant for further review sustained on March 12, 2008.

No. A-07-656: **Norby v. Farnam Bank**. Petition of plaintiffs-appellees for further review overruled on April 23, 2008.

No. A-07-657: **Mengedoht v. Samuelson**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-680: **Grange v. Grange**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-703: **Weyers v. Peters**. Petition of appellant for further review overruled on April 23, 2008.

No. A-07-715: **State v. Truesdale**. Petition of appellant for further review overruled on April 23, 2008.

No. A-07-719: **In re Interest of Brittany M. et al**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-719: **In re Interest of Brittany M. et al**. Petition of appellee Shane S. for further review overruled on June 4, 2008.

No. A-07-739: **Melgar v. Divercon Construction**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-743: **State v. Sledge**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-752: **Ginter v. Ginter**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-761: **Shemwell v. Hawk, Inc**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-771: **State v. McConkey**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-777: **State v. Colby**, 16 Neb. App. 644 (2008). Petition of appellant for further review overruled on May 30, 2008, as untimely filed.

No. A-07-786: **State v. Roark**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-819: **State v. Hansen**. Petition of appellant for further review overruled on March 19, 2008.

No. A-07-821: **State v. Riddle**. Petition of appellant for further review overruled on February 29, 2008. See rule 1F(1).

No. A-07-833: **State v. Blankenfeld**. Petition of appellant for further review overruled on February 27, 2008.

No. A-07-846: **State v. Davis**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-859: **Alvarez v. Carpetland**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-861: **Mengedoht v. Newton**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-867: **Breinig v. Breinig**. Petition of appellant for further review overruled on February 21, 2008.

No. A-07-871: **In re Interest of Daniel V. & Julia V**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-878: **In re Interest of Justyce J**. Petition of appellant for further review overruled on April 16, 2008.

No. A-07-890: **In re Interest of Dakota S. et al**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-894: **In re Interest of Hunter A**. Petition of appellant for further review overruled on April 9, 2008.

Nos. A-07-897, A-07-898: **State v. Moreno**. Petitions of appellant for further review overruled on May 7, 2008.

No. A-07-907: **In re Interest of Raven M**. Petition of appellant for further review overruled on February 13, 2008.

No. A-07-908: **State v. Callahan**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-912: **State v. McCarthy**. Petition of appellant for further review overruled on April 23, 2008.

No. A-07-925: **Scott v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-941: **Shiers v. Luff**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-974: **State v. Streebin**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-983: **In re Interest of BritanyAnn B. et al**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-994: **McNamee v. Marriott Reservation Ctr.**, 16 Neb. App. 626 (2008). Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1001: **Fulmer v. H & S Enterprises**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-1002: **State v. Waegli**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-1003: **State ex rel. Linder v. Dahlgren Cattle Co**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1018: **State v. Coleman**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-1023: **State v. Fuller**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-1058: **In re Interest of Justin S**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1077: **State v. Herman**. Petition of appellant for further review overruled on April 9, 2008.

No. A-07-1081: **In re Interest of Amanda F. et al**. Petition of appellant for further review overruled on April 28, 2008.

No. A-07-1097: **State v. Vigil**. Petition of appellant for further review overruled on March 10, 2008, as filed out of time. See rule 2F(1).

No. A-07-1101: **State v. Gill**. Petition of appellant for further review overruled on June 4, 2008.

No. A-07-1107: **State v. Ross**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1120: **State v. Benoit**. Petition of appellant for further review overruled on May 22, 2008.

No. A-07-1122: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of petitioner-appellant for further review overruled on February 27, 2008.

No. A-07-1122: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of petitioner-appellant for further review denied on June 6, 2008, for lack of jurisdiction.

No. A-07-1123: **State v. Bernhardt**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-1133: **Sutton v. Killham**. Petition of appellant for further review overruled on May 7, 2008.

No. A-07-1149: **Harper v. Houston**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1159: **Hitchcock v. Neth**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1168: **State v. Carstens**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1175: **Thompson v. Thompson**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1218: **Evers v. Bayer**. Petition of appellant for further review overruled on April 21, 2008, as untimely filed.

Nos. A-07-1233, A-07-1234: **State v. Turco**. Petitions of appellant for further review overruled on June 18, 2008.

No. A-07-1252: **State v. Greuter**. Petition of appellant for further review overruled on June 11, 2008.

No. A-07-1254: **State v. Decoteau**. Petition of appellant for further review overruled on May 14, 2008.

No. A-07-1259: **In re Interest of Madison S**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1267: **Onuachi v. Meylan Enters**. Petition of appellant for further review overruled on March 12, 2008.

No. A-07-1269: **Thompson v. Thompson**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1274: **Harmon v. Irby Constr. Co**. Petition of appellant for further review overruled on March 26, 2008.

No. A-07-1293: **State v. Thomas**. Petition of appellant for further review overruled on June 18, 2008.

No. A-07-1296: **In re Interest of Ethan M**. Petition of appellant for further review overruled on June 25, 2008.

No. A-07-1331: **State v. Petersen**. Petition of appellant for further review overruled on May 7, 2008, as untimely filed.

No. A-07-1375: **State v. Sell**. Petition of appellant for further review overruled on June 18, 2008.

No. A-08-014: **Preister v. Robert's Pool & Spa**. Petition of appellee for further review overruled on April 16, 2008.

No. A-08-060: **Hawks v. Collicott**. Petition of appellant for further review overruled on March 14, 2008, as untimely filed.

No. A-08-222: **Tyler on behalf of Tyler v. Nightengale**. Petition of appellant for further review overruled on June 11, 2008.

No. A-08-234: **Blake v. Hessler**. Petition of appellant for further review overruled on May 22, 2008.

No. A-08-246: **Lake Swanson Country Estates v. Hawks**. Petition of appellant for further review overruled on June 11, 2008.

No. A-08-253: **State v. Siefker**. Petition of appellant for further review overruled on June 4, 2008.

No. A-08-362: **Lewis v. Kazo**. Petition of appellant for further review overruled on June 11, 2008.

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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STATE OF NEBRASKA, APPELLEE, V.
RAYMOND MATA, JR., APPELLANT.

745 N.W.2d 229

Filed February 8, 2008. No. S-05-1268.

1. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
2. **Jurisdiction: Appeal and Error.** If the district court lacked jurisdiction, an appellate court acquires no jurisdiction.
3. ____: ____. When a jurisdictional question does not involve a factual dispute, an appellate court determines the issue as a matter of law.
4. **Pleadings: Convictions: Sentences: Appeal and Error.** A plea in bar is not a proper procedure after a defendant's conviction has been affirmed on appeal and the cause is remanded only for resentencing.
5. **Courts: Appeal and Error.** When an appellate court remands a cause with specific directions, the lower court has no power to do anything but to obey the mandate.
6. **Constitutional Law: Criminal Law: Sentences.** Mere procedural changes to comply with new constitutional rules do not disadvantage a defendant or impose additional punishment even if the procedures in effect when the defendant committed the offense are later declared unconstitutional.
7. **Constitutional Law: Homicide: Aggravating and Mitigating Circumstances.** The U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), is not a substantive change in Sixth Amendment requirements and did not make aggravating circumstances essential elements of capital murder.
8. **Constitutional Law: Notice.** The Sixth Amendment to the U.S. Constitution requires states to give defendants sufficient notice to ensure that they have an opportunity to defend against the charges.
9. **Constitutional Law: Homicide: Sentences: Aggravating and Mitigating Circumstances: Notice: Proof.** In a defendant's resentencing for capital murder necessitated by a new constitutional rule of procedure, the State was not required to file a statutory notice of aggravators in a charging instrument when the defendant had actual notice of the aggravators the State would seek to prove at the resentencing hearing.

10. **Appeal and Error.** An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.
11. **Constitutional Law: Criminal Law: Sentences.** Challenges under the U.S. Supreme Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), are limited to statutory schemes that allow a defendant to completely avoid the punishment that a jury could impose.
12. **Constitutional Law: Sentences: Death Penalty.** The 8th Amendment, made applicable to the states through the 14th Amendment, requires states authorizing the death penalty to adopt procedures that will avoid imposing it in an arbitrary and capricious manner.
13. ____: ____: ____. In death penalty cases, the Eighth Amendment requires that (1) a state rationally narrow those eligible for the death penalty and (2) the sentencer consider the individual circumstances of the defendant and his or her crime.
14. **Constitutional Law: Juries: Sentences.** The U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), has not altered the Court's determination that jury sentencing is not required for Eighth Amendment purposes.
15. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
16. **Sentences: Death Penalty.** In death penalty cases, the key inquiry in examining eligibility and selection factors is whether they are neutral and principled.
17. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** In determining whether an aggravating circumstance is unconstitutionally vague, a court should consider whether it creates an unacceptable risk of randomness, the mark of an arbitrary and capricious sentencing process.
18. **Homicide: Sentences: Aggravating and Mitigating Circumstances.** An aggravating factor must be sufficiently narrow so that it does not apply to everyone convicted of first degree murder.
19. **Constitutional Law: Sentences: Death Penalty: Appeal and Error.** Because the proper degree of definition of eligibility and selection factors in death penalty cases often is not susceptible of mathematical precision, a vagueness review is quite deferential.
20. **Constitutional Law: Sentences: Death Penalty: Jurors.** In death penalty cases, an eligibility or selection factor is not unconstitutional if it has some commonsense core of meaning that a juror can understand.
21. **Jury Instructions: Sentences: Death Penalty.** A juror would clearly understand that the term "apparently relished" in the Supreme Court's five-factor test under Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002) refers to his or her own perception of the defendant's conduct.
22. **Jurors: Sentences: Death Penalty.** Jurors are not required to unanimously agree on the means by which a capital defendant manifests exceptional depravity under Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002).
23. **Sentences: Death Penalty: Appeal and Error.** Under Neb. Rev. Stat. § 29-2521.03 (Reissue 1995), the Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review.

24. ____: ____: ___. Proportionality review requires the Supreme Court to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty to ensure that the sentence imposed is no greater than those imposed in other cases with the same or similar circumstances.
25. **Constitutional Law: Death Penalty.** The death penalty, when properly imposed by a state, does not violate either the 8th or the 14th Amendment to the U.S. Constitution or Neb. Const. art. I, § 9.
26. **Death Penalty.** Capital punishment must not involve the unnecessary and wanton infliction of pain.
27. ____. A method of execution violates the prohibition against cruel and unusual punishment if there is a substantial foreseeable risk, inherent in the method, that a prisoner will suffer unnecessary pain.
28. ____. A court must evaluate claims that punishment is cruel and unusual in the light of contemporary human knowledge.
29. ____. A penalty of death must accord with the dignity of man, which is the basic concept underlying the prohibition against cruel and unusual punishment.
30. ____. Barbarous punishments include those that mutilate the prisoner's body even if they do not cause conscious pain.
31. **Death Penalty: Words and Phrases.** In a method of execution challenge, "wanton" means that the method itself is inherently cruel.
32. **Constitutional Law: Death Penalty: Legislature: Intent.** Whether the Legislature intended to cause pain in selecting a punishment is irrelevant to a constitutional challenge that a statutorily imposed method of punishment violates the prohibition against cruel and unusual punishment.
33. **Death Penalty.** The relevant legal standards in deciding whether electrocution is cruel and unusual punishment are whether the State's chosen method of execution (1) presents a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution, (2) violates the evolving standards of decency that mark a mature society, and (3) minimizes physical violence and mutilation of the prisoner's body.
34. **Constitutional Law: Death Penalty: Judgments: Evidence: Appeal and Error.** In challenges to the constitutionality of a method of execution, the Nebraska Supreme Court determines whether the trial court's conclusions are supported by substantial evidence.
35. **Death Penalty.** Whether a method of inflicting the death penalty inherently imposes a significant risk of causing pain in an execution is a question of fact.
36. **Constitutional Law: Death Penalty.** The ultimate issue, whether electrocution violates the constitutional prohibition against cruel and unusual punishment, presents a question of law.
37. **Criminal Law: Legislature: Sentences.** Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime.
38. **Constitutional Law: Death Penalty: Legislature.** The prohibition against cruel and unusual punishment in the federal and state Constitutions is a restraint upon the exercise of legislative power.

39. **Constitutional Law: Death Penalty: Legislature: Appeal and Error.** The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review.
40. **Constitutional Law: Criminal Law: Statutes: Presumptions: Appeal and Error.** When an appellate court reviews challenges to criminal statutes, it presumes that the statutes are constitutional.
41. **Constitutional Law: Statutes: Proof.** The burden to clearly show that a statute is unconstitutional rests upon the challenger.
42. **Death Penalty.** Electrocution will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain in a judicial execution by electrocution.
43. **Constitutional Law: Death Penalty.** Death by electrocution as provided in Neb. Rev. Stat. § 29-2532 (Reissue 1995) violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9.
44. **Statutes: Sentences: Death Penalty.** Nebraska's statutes specifying electrocution as the mode of inflicting the death penalty are separate, and severable, from the procedures by which the trial court sentences the defendant.
45. **Sentences: Death Penalty.** That a method of execution is cruel and unusual punishment bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself.
46. **Courts: Sentences: Death Penalty.** The Nebraska Supreme Court is charged with the duty to administer and supervise the implementation of the death penalty by appointing the day for execution of the sentence and issuing a death warrant.

Appeal from the District Court for Keith County: ROBERT O. HIPPE, Judge. Sentence affirmed, and execution stayed.

James R. Mowbray, Jerry L. Soucie, and Jeff Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

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## I. INTRODUCTION

A jury convicted Raymond Mata, Jr., of first degree murder and kidnapping. A three-judge panel sentenced Mata to death for the first degree premeditated murder of 3-year-old Adam Gomez. The presiding judge sentenced him to life imprisonment for kidnapping. Between his sentencing and our decision in his first direct appeal, the U.S. Supreme Court decided *Ring v. Arizona*,[1] which required juries to find whether aggravating circumstances exist in death penalty cases. In *State v. Mata* (*Mata I*),[2] we affirmed both of Mata's convictions, but,

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[1] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[2] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

applying *Ring*, we vacated his death sentence and remanded the cause for resentencing. After a jury found the existence of an aggravating circumstance, a three-judge panel resentenced Mata to death.

In this appeal, Mata argues that this court and the trial court erred in numerous respects regarding his resentencing. He also argues that electrocution is cruel and unusual punishment prohibited by the U.S. and Nebraska Constitutions.

## II. BACKGROUND

In June 2000, a three-judge panel sentenced Mata to death for premeditated murder. The three-judge panel found the existence of an aggravating circumstance, exceptional depravity, under Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002). While Mata's direct appeal was pending, the U.S. Supreme Court promulgated a new constitutional rule and the Nebraska Legislature responded by amending Nebraska's capital sentencing statutes.

### 1. Events Preceding Mata's Direct Appeal

In June 2002, the U.S. Supreme Court decided *Ring*.[3] The Court determined, under the Sixth Amendment, that Arizona's aggravating circumstances in capital cases are the functional equivalent of elements that expose a defendant to greater punishment. Therefore, it determined that they must be found by a jury. In November, the Governor signed into law L.B. 1,[4] emergency legislation that reassigned responsibility for determining the existence of aggravating factors from judges to juries, as required by *Ring*, for any capital sentencing proceeding occurring on or after November 23, 2002.

In March 2003, this court decided *State v. Gales*.[5] We stated that new constitutional rules apply to pending direct appeals. Therefore, under *Ring*, we vacated the defendant's death sentence because the sentencing judge, not a jury, had determined the existence of aggravating circumstances. We remanded the

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[3] *Ring, supra* note 1.

[4] 2002 Neb. Laws, L.B. 1.

[5] *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

cause for resentencing and set out a new procedural rule for capital cases in the wake of *Ring*. We recognized that L.B. 1 had amended Neb. Rev. Stat. § 29-1603 (Reissue 1995) to require that when the State seeks the death penalty, the information must contain a "notice of aggravation which alleges one or more aggravating circumstances." But we concluded that the notice requirement did not apply to the defendant's resentencing because it is a procedural rule that has no retroactive effect.[6] We limited, however, the aggravating circumstances the State could seek to prove at the resentencing hearing to those "which were determined to exist in the first trial, and as to which [the defendant] is therefore on notice."[7]

### 2. Mata's Direct Appeal and Order of Resentencing

In September 2003, this court affirmed Mata's convictions and his sentence of life imprisonment for kidnapping in his direct appeal.[8] Although Mata had not raised the constitutionality of Nebraska's capital sentencing scheme at trial, we vacated his death sentence. We found plain error because a sentencing panel had found the existence of a statutory aggravating circumstance. We recognized that double jeopardy concerns attach to capital sentencing hearings in Nebraska. But we decided that Mata's resentencing would not violate the Double Jeopardy Clause because the three-judge panel had not acquitted him of the death penalty. There was no acquittal because the evidence was sufficient to (1) find under § 29-2523 the existence of aggravator (1)(d) and (2) conclude that the aggravating factor outweighed the mitigating factors. Under *Gales*, we directed that on remand, the State could attempt to prove only whether aggravator (1)(d) existed because that was the only aggravator proved at the first trial.

### 3. Resentencing Proceedings

On remand, before the jury trial on the aggravating circumstance, there were three hearings on defense motions. Mata

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[6] *Id.*

[7] *Id.* at 636, 658 N.W.2d at 631.

[8] *Mata I, supra* note 2.

first moved to prohibit a trial on the existence of aggravator (1)(d) because (1) the original information did not allege any aggravators; (2) *Ring* had rendered unconstitutional the capital sentencing procedures in effect in 1999, when Mata was originally charged by information; and (3) L.B. 1 had repealed the death penalty statutes in effect in 1999 and now mandated that the State allege aggravators in the information. Mata argued that because the prosecutor had not alleged essential elements of capital murder, the information was fatally defective and the district court lacked jurisdiction. He also alleged that the Double Jeopardy Clause prohibited jury factfinding on aggravating circumstances because the jury had already convicted him of noncapital murder.

In addition, Mata alleged that this court's attempt to correct the new capital sentencing proceedings had invaded the Legislature's province by creating special procedures contrary to L.B. 1. Mata also alleged that our directions for resentencing (1) invaded the prosecutor's discretionary charging authority, (2) violated his due process right to rely on the State's compliance with a sentencing scheme, and (3) violated his Eighth Amendment right to be free from arbitrary sentencing proceedings.

The court overruled that motion and ordered the State to file a verified notice of aggravation. After the State filed the notice, Mata filed a plea in bar, making many of the same allegations. The court determined it lacked jurisdiction to accept that plea. It determined that a plea in bar was not an authorized procedure in a resentencing proceeding after the conviction had become final. Mata then filed a notice of appeal.

While his appeal was pending, Mata filed motions to (1) declare Nebraska's death penalty statutes at the time of the murder unconstitutional under *Ring*; (2) declare that the statutes at the time of the murder had been repealed; (3) demand the imposition of a life sentence; (4) prohibit any further death penalty proceedings under L.B. 1 as ex post facto legislation because there was no constitutionally valid crime of capital murder in 1999; (5) declare the death penalty statutes unconstitutional and aggravator (1)(d) unconstitutional, facially and as

applied; and (6) stay the aggravation trial pending his appeal on the denial of his plea in bar.

After hearing these motions, the court denied the stay because Mata had not been acquitted of the death penalty. Thus, no grounds existed for his plea in bar. It also ruled that it was bound by the law of the case regarding his other motions.

Mata then moved that the court instruct the jury that if it unanimously found the existence of aggravator (1)(d), it must make written findings of all facts that supported the aggravating circumstance. The court did not give that instruction.

After the aggravation trial in January 2005, the jury returned a verdict unanimously finding the existence of the exceptional depravity aggravator. This court dismissed Mata's appeal regarding his plea in bar for lack of jurisdiction under Neb. Ct. R. of Prac. 7B(1) (rev. 2001).[9]

In March 2005, the trial court heard a joint motion from Mata and Jeffrey Hessler, another death row inmate, to declare electrocution as the method of inflicting death unconstitutional. After receiving evidence at a hearing, the court overruled the motion in an extensive order, which we will discuss later in addressing his claim that electrocution is cruel and unusual punishment. It concluded that it was bound by appellate decisions holding that electrocution did not constitute cruel and unusual punishment.

In June 2005, a three-judge panel heard evidence on mitigation and sentencing disproportionality. The panel found no statutory mitigating circumstances. It also considered five nonstatutory mitigating circumstances but concluded that they did not approach or exceed the weight of the exceptional depravity circumstance. After also concluding that the penalty was not excessive or disproportionate to the penalty imposed in similar cases, the panel sentenced Mata to death.

## III. ASSIGNMENTS OF ERROR

Mata assigns, renumbered and restated, that the district court erred in resentencing him to death because (1) the court did not have jurisdiction over the aggravation hearing pending

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[9] See *State v. Mata*, 269 Neb. xxii (No. S-04-1332, Jan. 20, 2005).

his appeal regarding his plea in bar, (2) the new sentencing procedures could not be used when the information failed to allege aggravating circumstances, (3) his death sentence violated prohibitions against double jeopardy and ex post facto legislation, (4) the "exceptional depravity" aggravator could not be rationally applied because this court has not sufficiently defined it, (5) the role assignment of factfinding by the jury and weighing by the three-judge panel violates the 8th and 14th Amendments, and (6) his right to a jury trial was prejudiced because the sentencing scheme gives greater procedural protections to defendants who waive their right to a jury.

In addition, Mata assigns that the court erred by (1) instructing the jury on alternative theories to prove the exceptional depravity aggravator without requiring that the jurors unanimously agree on a theory and state which facts they unanimously found to support that theory and (2) giving the jury an instruction on alternative theories when one of them was unconstitutionally vague. Finally, Mata assigns that the district court erred in failing to hold that electrocution as the sole method of judicial execution under Neb. Rev. Stat. § 29-2532 (Reissue 1995) is unconstitutional.

## IV. STANDARD OF REVIEW

[1] Except for Mata's claim that electrocution constitutes cruel and unusual punishment, all Mata's assignments of error present questions of law. When we review questions of law, we resolve the questions independently of the lower court's conclusions.[10] We discuss our standard of review for challenges to a method of execution in section V8(c)(*i*) below.

## V. ANALYSIS

### 1. Jurisdiction

[2,3] Initially, we address Mata's jurisdictional argument. If the district court lacked jurisdiction, we acquire no jurisdiction.[11]

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[10] *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

[11] See *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

When a jurisdictional question does not involve a factual dispute, we determine the issue as a matter of law.[12]

Mata contends that the district court lacked jurisdiction to conduct an aggravation hearing or impose the death sentence. He argues the court lacked jurisdiction while the appeal from his plea in bar was pending. The district court determined that the plea in bar statute, Neb. Rev. Stat. § 29-1817 (Reissue 1995), only permits a defendant to file a plea in bar before entering a plea to the general issues. Because the jury had already convicted Mata and this court had affirmed his convictions, the district court concluded that the statute did not authorize a plea in bar for a resentencing proceeding. Mata, however, argues that because the district court required the State to file a notice of aggravating circumstances, it effectively allowed the State to amend the original information to charge the crime of capital murder. So, he contends that he was required to file a plea in bar and appeal to preserve the issues.

Mata argues that in *State v. Kula*,[13] this court recognized that a defendant could file a plea in bar after a direct appeal. That case, however, is distinguishable. In *Kula*, we had previously reversed the defendant's convictions because we concluded that the trial court erred in failing to grant the defendant a new trial for prosecutorial misconduct. On remand, the defendant filed a plea in bar regarding the retrial. In contrast, in *Mata I*, we affirmed Mata's convictions. Moreover, we rejected Mata's double jeopardy argument that the State had convicted him of the lesser-included offense of noncapital murder and that the State could not convict him of capital murder in a resentencing proceeding.[14] Thus, Mata's convictions were final after this court's decision in his first direct appeal. We remanded the cause only for resentencing.

[4,5] The district court correctly determined that a plea in bar was not a proper procedure under these circumstances. It was bound by the law of the case; our order limited its authority.

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[12] See *State v. Merrill*, 273 Neb. 583, 731 N.W.2d 570 (2007).

[13] *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

[14] See *Mata I, supra* note 2.

It did not have authority to enter a judgment or order different from, or in addition to, this court's directions for resentencing. When we remand a cause with specific directions, the lower court has no power to do anything but to obey the mandate.[15]

Moreover, a plea in bar was not necessary to preserve these issues. The district court had previously addressed Mata's motion to prevent an aggravation hearing, in which motion Mata raised the same arguments. The court overruled that motion and apparently, out of an abundance of caution, ordered the State to file a verified notice of aggravation. But the notice was not required under our directions for resentencing. We explicitly stated in *Mata I* that the notice requirement was a procedural statute that was not applicable to steps already taken in Mata's first capital sentencing hearing. And we limited the State's case to the aggravating circumstance that the three-judge panel had previously found to exist in Mata's first sentencing hearing, of which Mata was on notice. But our conclusion that the further notice was not required does not establish that we ordered Mata to be tried for capital murder on an information that failed to allege the essential elements of capital murder.

### 2. Arguments That This Court Erred in Ordering Mata's Resentencing Under L.B. 1

Mata argues that his original death sentence was void ab initio because *Ring* invalidated Nebraska's capital sentencing statutes that were in effect when he committed the murder. From this premise, he advances a garden of arguments, claims, and contentions. He argues that under the original statutes, the State could not sentence him to death because those statutes did not provide a constitutionally valid procedure for imposing a death sentence and because the Legislature had repealed the statutes since he committed the offense. Therefore, he argues that the jury had already convicted him of noncapital murder. He further argues that L.B. 1 has created two substantive categories of first degree murder: noncapital first degree murder, for which the punishment is life imprisonment when a county attorney does not allege aggravating circumstances, and capital first degree

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[15] See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

murder, for which the punishment is potentially death when the county attorney alleges aggravating circumstances.

So, Mata contends that when the county attorney filed notice of an aggravator, it increased the charge to capital murder, which violated the prohibition against double jeopardy.[16] In the same vein, Mata argues that resentencing him under the new capital sentencing procedures exposed him to greater punishment—death—than he could have received under the original statutes. He contends that this exposure to greater punishment violated the prohibition against ex post facto legislation.[17] Also, Mata argues that in our opinion in *Mata I*, we did not have authority to order the State to prosecute him for capital murder when the information initially failed to allege aggravating circumstances. Finally, he contends that due process required the State to allege the aggravating circumstances in the information. These arguments sprout from the same soil—that under L.B. 1, aggravating circumstances are essential elements of a newly created offense of capital first degree murder. We plowed that ground in *Gales* and *Mata I*.

In *Gales*, the defendant's appeal was pending when *Ring* was decided. We recognized that new constitutional rules apply to all state or federal cases which are pending on direct review or are not yet final when the rule is announced.[18] We therefore concluded that *Ring* required us to vacate the defendant's death sentence and remand the cause for resentencing under the new procedures in L.B. 1. We held that the reassignment in L.B. 1 from judges to juries to decide whether aggravating circumstances exist is a procedural change that does not violate ex post facto principles.

We further recognized that the "aggravation hearing" under Neb. Rev. Stat. § 29-2520 (Cum. Supp. 2006) was triggered by a notice of aggravation, which had not been filed. But the

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[16] See, *Mata I, supra* note 2 (explaining double jeopardy prohibitions); *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[17] See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999) (explaining ex post facto prohibitions).

[18] See *Mata I, supra* note 2, citing *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

aggravation notice requirement in L.B. 1 was a new procedure. We therefore held it did not apply to the defendant's resentencing because there was no requirement of such notice when the State initially filed the information or at any time before the defendant's trial or first sentencing hearing. Nonetheless, we held that the State could "seek to prove only those aggravating circumstances which were determined to exist in the first trial, and as to which [the defendant] is therefore on notice."[19]

In *Mata I*, we rejected Mata's argument that we had erred in holding that the new "notice of aggravation" provision under L.B. 1 was not applicable to resentencing proceedings. We further rejected his argument that this holding amounted to our overruling the Legislature. We reasoned that our procedural rule—limiting the aggravating circumstances the State could attempt to prove at resentencing to those that it proved in the first trial—gave effect to the Legislature's intent to give the defendant notice of the aggravating factors that the State would seek to prove.

Mata contends that we incorrectly analyzed the ex post facto issue because we failed to consider that *Ring* rendered unconstitutional the death penalty statutes in effect when he committed the murder. We disagree. Our conclusion that the State could resentence Mata under the new capital sentencing statutes would not have been different if we had specifically held that Nebraska's original sentencing statutes were unconstitutional. The Arizona and Idaho Supreme Courts have rejected Mata's "void ab initio" argument, despite holding that *Ring* invalidated their capital sentencing statutes.[20] Both courts relied upon the U.S. Supreme Court's decision in *Dobbert v. Florida*,[21] which dealt with similar issues and arguments.

In *Dobbert*, at the time the defendant murdered his children, Florida's capital sentencing statutes mandated death unless the jury recommended mercy. After the defendant committed

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[19] *Gales, supra* note 5, 265 Neb. at 636, 658 N.W.2d at 631.

[20] See, *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003); *State v. Lovelace*, 140 Idaho 53, 90 P.3d 278 (2003).

[21] *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

the murders, but before the State tried him, a new constitutional rule led to the amendment of Florida's capital sentencing statutes. First, the U.S. Supreme Court struck down capital sentencing schemes that gave the jury complete discretion whether to impose a death sentence.[22] Then, the Florida Supreme Court held that the state's capital sentencing statute was unconstitutional, and the Florida Legislature amended the statutes. The new statutes provided for the jury to render an advisory recommendation of a life sentence or death and for the judge to impose the actual sentence. The judge sentenced the defendant to death despite the jury's recommendation of a life sentence.[23]

[6] The U.S. Supreme Court concluded that the amendment "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."[24] It also concluded that the statutory shift in sentencing from the jury to the judge did not make a death sentence any more probable.[25] Like Mata, the defendant in *Dobbert* argued that the State could not have sentenced him to death under the original statutes because the Florida Supreme Court later declared them unconstitutional and that therefore, the procedural changes increased his punishment. But the U.S. Supreme Court concluded that "this sophistic argument mocks the substance of the *Ex Post Facto* Clause."[26] Because Florida's statutes permitted the death penalty for his offense at the time it was committed, the defendant knew his crime was a capital offense.[27] Moreover, the procedural change did not reflect a legislative intent to target any specific persons or classes of persons.[28] Therefore, mere

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[22] See *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[23] See *Dobbert, supra* note 21.

[24] *Id.*, 432 U.S. at 293-94.

[25] See *id.*

[26] *Id.*, 432 U.S. at 297.

[27] See *id.*

[28] *People v. District Court*, 834 P.2d 181 (Colo. 1992).

procedural changes to comply with new constitutional rules do not disadvantage a defendant or impose additional punishment even if the procedures in effect when the defendant committed the offense are later declared unconstitutional. Under *Dobbert*, Mata's argument that his punishment was increased by the enactment of L.B. 1 fails.

Similarly, Mata incorrectly argues that L.B. 1 created a new substantive crime of capital first degree murder, for which aggravators are essential elements. The Legislature intended L.B. 1 to comply with the U.S. Supreme Court's decision in *Ring*. It specifically stated that aggravating circumstances "are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution."[29] The U.S. Supreme Court rejected in *Schriro v. Summerlin*[30] the "elements" argument that Mata makes here.

In *Summerlin v. Stewart*,[31] the Ninth Circuit had concluded that *Ring* announced a substantive rule that applied retroactively. The Ninth Circuit reasoned that because *Ring* treated aggravating circumstances as "'the functional equivalent of . . . element[s],'" the decision "reintroduced 'capital murder' as a separate substantive, offense."[32] Thus, the court concluded that *Ring* redefined the substantive elements of capital murder. The U.S. Supreme Court reversed the decision of the Ninth Circuit and held that *Ring* was a procedural, not a substantive, decision. As we discussed in *State v. Hessler*,[33] the Court clarified in *Schriro* that aggravating circumstances are not elements for Sixth Amendment purposes.[34]

[7] We reaffirm our holding in *Gales* that *Ring* is not a substantive change in Sixth Amendment requirements and did not make aggravating circumstances essential elements of capital

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[29] See Neb. Rev. Stat. § 29-2519 (Cum. Supp. 2006).

[30] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[31] *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003).

[32] *Id.* at 1105-06.

[33] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[34] See *Schriro, supra* note 30.

murder. Instead, *Ring* extended Sixth Amendment jury protections to the finding of aggravating circumstances.[35] Because the Legislature intended that aggravating circumstances not be considered elements unless constitutionally required, L.B. 1 also did not create new elements for first degree murder.

The federal courts of appeals' decisions that Mata relies on are distinguishable. Those courts held that in federal prosecutions, aggravating factors must be included in a grand jury indictment.[36] But those decisions are based on the grand jury clause of the Fifth Amendment, and this provision has not been made applicable to the states.[37]

[8,9] The Sixth Amendment requires states to give defendants sufficient notice to ensure that they have an opportunity to defend against the charges.[38] But other state courts have specifically held that resentencing necessitated by the new rule of procedure in *Ring* does not violate either the defendant's due process rights or the defendant's Sixth Amendment right to notice.[39] Like this court, they concluded that the State was not required to file a statutory notice of aggravators in a charging instrument when the defendant had actual knowledge of the aggravators the State would seek to prove at the resentencing hearing.

Constitutionally sufficient notice was not an issue for Mata's resentencing. We specifically limited the State's cause on remand to attempting to prove the aggravator of which Mata had full notice. The State had already proved the exceptional depravity aggravator at his first sentencing hearing and, additionally, filed a notice of aggravation before the resentencing

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[35] See *Hessler, supra* note 33.

[36] See, *U.S. v. Quinones*, 313 F.3d 49 (2d Cir. 2002); *U.S. v. Higgs*, 353 F.3d 281 (4th Cir. 2003); *U.S. v. Allen*, 406 F.3d 940 (8th Cir. 2005).

[37] See, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Alexander v. Louisiana*, 405 U.S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972).

[38] *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

[39] See, *Terrell v. State*, 276 Ga. 34, 572 S.E.2d 595 (2002); *Lovelace, supra* note 20; *State v. Glass*, 136 S.W.3d 496 (Mo. 2004); *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003).

hearing. Thus, Mata's due process and Sixth Amendment rights to notice were not violated.

Further, because aggravating circumstances are not essential elements of a new substantive crime of capital murder, the county attorney did not increase the charge by filing an aggravation notice. For the same reason, this court's holding that the notice of aggravation in L.B. 1 was not applicable to Mata's resentencing did not invade the Legislature's province to define crime or the county attorney's authority to charge crimes. We reject Mata's arguments that we erred in ordering his resentencing.

### 3. The Exceptional Depravity Aggravator Is Not Unconstitutional

[10] Mata assigns that the exceptional depravity prong of § 29-2523(1)(d) is unconstitutional, facially and as applied to his case. In one sentence, he contends that neither the statute nor our previous interpretations of it have sufficiently defined this aggravator so that it can be rationally and consistently applied. The Eighth Circuit Court of Appeals has held that this court's definition of the exceptional depravity definition under § 29-2523(1)(d) is constitutional.[40] Mata does not explain why aggravator (1)(d) has not been sufficiently narrowed in the face of this authority. An argument that does little more than to restate an assignment of error does not support the assignment, and this court will not address it.[41]

### 4. Capital Sentencing Statutes Did Not Prejudice Mata's Right to a Jury Trial

The jury instruction on exceptional depravity provided three alternative theories that would prove the existence of aggravator (1)(d). Under Neb. Rev. Stat. § 29-2521(b)(2) (Cum. Supp. 2006), if Mata had waived his right to a jury trial, the members of the three-judge panel would have been required to make written findings of the facts that they unanimously found to

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[40] See *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999), citing *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996).

[41] See *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

exist in support of an aggravating circumstance. The statutory procedures do not also require the jury to unanimously find the existence of an alternative theory showing exceptional depravity. Thus, Mata argues, the statutes have a chilling effect on his right to choose a jury trial under the Sixth Amendment. Mata relies on the U.S. Supreme Court's decision in *United States v. Jackson*.[42]

In *Jackson*, the Court declared that the death sentence provision of a criminal statute was unconstitutional. Under the statute, a court could sentence a defendant to death only if the jury recommended death in its verdict. A defendant could therefore completely avoid a death sentence by pleading guilty or waiving a jury trial, which needlessly coerced defendants to give up these constitutional rights. But "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[43]

[11] For example, the U.S. Supreme Court held that *Jackson* did not invalidate New Jersey's capital sentencing statute.[44] That statute allowed the judge, in accepting a no contest plea, to impose a term less than the mandatory life sentence required if a jury convicted the defendant of first degree murder. Because the judge could also impose the maximum punishment, the defendant could not avoid that punishment by pleading no contest. The Court held that his right to a jury trial was not unconstitutionally burdened.[45] Therefore, *Jackson* challenges are limited to statutory schemes that allow a defendant to completely avoid the punishment that a jury could impose.

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[42] *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

[43] *Chaffin v. Stynchcombe*, 412 U.S. 17, 30, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

[44] See *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978).

[45] See *id.*

We rejected a *Jackson* challenge in *Hessler*.[46] The defendant argued that Nebraska's capital sentencing scheme violated the Sixth Amendment. He claimed that it forces a defendant to waive his right to a jury's determination of aggravating circumstances if the defendant prefers to have the same fact finder determine both the aggravating circumstances and the sentence. We concluded that *Jackson* was not applicable because the defendant could not avoid the risk of death by waiving his right to a jury. We reasoned that there was no clear advantage to forgoing a jury. We stated that while a sentencing panel might be more versed if it had also found the aggravating circumstances, this does not mean that its sentence would necessarily be more favorable to the defendant.[47]

The same reasoning applies here. Requiring three judges to unanimously agree on any fact supporting an aggravating circumstance does not necessarily make a favorable sentence more likely than requiring 12 jurors to unanimously agree under alternative theories. Because Mata could not avoid the risk of death by waiving his right to a jury, we conclude that his *Jackson* challenge fails.

### 5. The Division of Roles Between the Jury and the Three-Judge Panel Does Not Violate the 8th and 14th Amendments

Under Nebraska's capital sentencing scheme, a jury, if not waived, only determines the existence of aggravating circumstances.[48] A three-judge panel determines the existence of mitigating circumstances, weighs aggravating and mitigating circumstances, and determines the sentence.[49] Mata contends that a three-judge panel cannot properly weigh aggravating and mitigating circumstances. He argues the panel has no guidance from the jury as to the weight to apply to aggravators compared to mitigators. He contends that the sentencing scheme

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[46] *Hessler, supra* note 33.

[47] See *id.*

[48] See § 29-2520.

[49] See § 29-2521.

is therefore arbitrary and capricious and violates the 8th and 14th Amendments.

[12] The 8th Amendment, made applicable to the states through the 14th Amendment,[50] requires states authorizing the death penalty to adopt procedures that will avoid imposing it in an arbitrary and capricious manner.[51]

In *Gales*,[52] we determined that for Sixth Amendment purposes, *Ring* did not require jury sentencing in capital cases, as long as the jury determined the existence of aggravating circumstances. But we also discussed Eighth Amendment challenges to capital sentencing schemes. We pointed out in *Gales* that the U.S. Supreme Court had upheld Florida's capital sentencing scheme against Eighth Amendment arbitrary and capricious challenges twice.[53] Nebraska's and Florida's sentencing schemes are similar in the limited role that juries play in sentencing capital defendants.[54]

Before the Legislature enacted L.B. 1 in response to *Ring*, juries in Nebraska had no participation in capital sentencing procedures. The jury's role was limited to determining whether the defendant was guilty of first degree murder.[55] Under Florida's sentencing scheme, the jury's verdict regarding whether a court should sentence the defendant to death is only advisory. "[T]he actual sentence is determined by the trial judge."[56] In *Proffitt v. Florida*,[57] an Eighth Amendment

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[50] See *Gales, supra* note 5.

[51] See *id.*, citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

[52] *Gales, supra* note 5.

[53] See, *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

[54] See *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977) (discussing capital sentencing procedures), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409.

[55] See *id.*

[56] *Proffitt, supra* note 53, 428 U.S. at 249.

[57] *Id.*, 428 U.S. at 252.

case involving Florida's statutes, the U.S. Supreme Court commented on jury sentencing:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function . . . but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Relying on *Proffitt*, this court has held that the absence of jury sentencing in Nebraska's sentencing scheme does not violate the Due Process Clause.[58]

[13] Later, in *Spaziano v. Florida*,[59] the U.S. Supreme Court rejected a challenge that a Florida trial judge's imposition of the death penalty after the jury had recommended a life sentence violated the Eighth Amendment. The Court's statement in *Spaziano* emphasizes that judicial sentencing does not violate the Eighth Amendment's twin procedural requirements in death penalty cases that (1) a state rationally narrow those eligible for the death penalty and (2) the sentencer consider the individual circumstances of the defendant and his or her crime.

> "[*T*]*he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge*." . . .
>
> ". . . [W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."[60]

Similarly, the Court rejected a challenge that Alabama's sentencing scheme violated the Eighth Amendment.[61] At that time, Alabama's statutes required the jury to fix the punishment at death if it convicted the defendant of a specified aggravating

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[58] See *Simants, supra* note 54.

[59] *Spaziano, supra* note 53.

[60] *Gales, supra* note 5, 265 Neb. at 612-13, 658 N.W.2d at 616 (emphasis in original), quoting *Spaziano, supra* note 53.

[61] See *Baldwin v. Alabama*, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985).

circumstance. But the trial judge could refuse to accept the jury's death penalty and impose a life sentence instead. After the conviction, the judge received evidence of aggravating and mitigating circumstances and independently determined whether the aggravating circumstances outweighed the mitigating circumstances. The jury's sentence would have been unconstitutional if dispositive, and the Court clearly questioned the wisdom of the scheme and pointed out that Alabama had abandoned it. Nonetheless, it held that the scheme did not violate the Eighth Amendment because the trial judge was the true sentencing authority and was not required to give any deference to the jury's sentence.

[14] Since *Ring*, of course, the Sixth Amendment requires that juries determine the existence of aggravating circumstances before a defendant can be considered eligible for the death penalty. But this role change in Nebraska's sentencing procedures is not significantly different from the advisory role that juries play under the Florida scheme or the jury's mandatory death sentence under the Alabama scheme. In both cases, the jury effectively determined that the defendant was death eligible. The trial judge, who was the actual sentencing authority, considered the individual circumstances of the defendant and his crime.[62] *Ring* has not altered the Court's determination that jury sentencing is not required for Eighth Amendment purposes. As we pointed out in *Gales*, one justice in *Ring* concurred in the decision that juries must determine the existence of aggravators because he believed that the Eighth Amendment requires jury sentencing.[63] But no other justice joined this concurrence.

The U.S. Supreme Court has recognized that not all experts agree jury sentencing is desirable in capital cases.[64] It has explicitly stated that judicial sentencing could lead to greater consistency in the imposition of capital punishment.[65] But "[w]hatever the relative merits of sentencing by a judge or

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[62] See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

[63] See *Ring, supra* note 1 (Breyer, J., concurring in judgment).

[64] See *Chaffin, supra* note 43.

[65] See *Proffitt, supra* note 53.

jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions."[66]

Absent any authority to the contrary, we conclude that judicial sentencing is an acceptable means of ensuring that this state does not sentence defendants to death in an arbitrary and capricious manner. We have already held that neither due process nor the Sixth Amendment requires jury sentencing.[67] We conclude that the Eighth Amendment similarly does not require jury sentencing.

### 6. Jury Was Properly Instructed

Mata assigns that the district court improperly instructed the jury in two respects. First, he argues the court should have required jurors to reach a unanimous decision on the State's alternative theories of exceptional depravity. Second, he contends that the wording of one of the alternative theories was unconstitutionally vague. We reject both arguments.

#### (a) Use of the Term "Apparently Relished" Did Not Render Aggravator Instruction Unconstitutionally Vague

Mata contends that the district court erred in instructing the jury that the State can satisfy the "exceptional depravity" aggravator in § 29-2523(1)(d) by proving that "the defendant *apparently relished* the murder." (Emphasis supplied.) He argues that the use of the term "apparently relished" rendered the instruction unconstitutionally vague. He contends it is not clear whether the term refers to the juror's perception or the defendant's mental state. Mata cites no authority for this argument.

[15-20] Whether jury instructions given by a trial court are correct is a question of law.[68] In death penalty cases, the key inquiry in examining eligibility and selection factors is whether

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[66] *Simants, supra* note 54, 197 Neb. at 559, 250 N.W.2d at 888.

[67] See, *Gales, supra* note 5; *Simants, supra* note 54.

[68] See *Hessler, supra* note 33.

they are neutral and principled.[69] In determining whether an aggravating circumstance is unconstitutionally vague, the court should consider whether it "creates an unacceptable risk of randomness, the mark of [an] arbitrary and capricious sentencing process."[70] An aggravating factor must be sufficiently narrow so that it does not apply to everyone convicted of first degree murder.[71] But "[b]ecause 'the proper degree of definition' of eligibility and selection factors often 'is not susceptible of mathematical precision,' [a] vagueness review is quite deferential."[72] "[A] factor is not unconstitutional if it has some 'common-sense core of meaning'" that a juror can understand.[73]

Jury instruction No. 2, in relevant part, provided:

> The State of Nebraska has alleged the following aggravating circumstance existed at the time the defendant committed the crime of first degree murder:
>
> "That the murder manifested exceptional depravity by ordinary standards of morality and intelligence"
>
> The aggravating circumstance is presumed not to exist. That means you may not return a verdict that it does exist unless you unanimously decide the state has proved its existence beyond a reasonable doubt.
>
> . . . .
>
> The essential elements necessary to prove the alleged aggravating circumstance of exceptional depravity are either that:
>
> 1. the defendant apparently relished the murder; or
> 2. the defendant inflicted gratuitous violence on the victim; or
> 3. the defendant needlessly mutilated the victim.

These three alternative theories come directly from this court's five-factor test for applying the "exceptional depravity"

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[69] *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

[70] *Id.*, 512 U.S. at 974.

[71] *Tuilaepa, supra* note 69.

[72] *Id.*, 512 U.S. at 973 (citations omitted).

[73] *Id.*

aggravator.[74] As noted, the Eighth Circuit has held these five factors are constitutional.[75] In addition, we have previously concluded that the phrase "apparent effort to conceal" in aggravator (1)(b) of the earlier version of § 29-2523 referred to the fact finder's perspective of the defendant's conduct.

Before 1998, aggravator (1)(b) provided: "The murder was committed in an *apparent effort* to conceal the commission of a crime . . . ." In *State v. Reeves*,[76] we agreed with the federal district court that "'apparent'" means "'readily perceptible'" and further agreed that aggravator (1)(b) "'cannot be applied in speculative situations or where a strained construction is necessary to fulfill it.'" After the Legislature removed "apparent" from aggravator (1)(b) in 1998, the defendant in *State v. Lotter*[77] argued that the change had narrowed this aggravator's application, which necessitated resentencing. Thus, we considered the effect that change had on what the sentencing panel must conclude to find the existence of this aggravator.[78] We first considered the meaning of the phrase "apparent effort" before the amendment. We noted that "readily perceptible" means easily capable of being noticed. We stated that before the amendment, "apparent effort" meant that "for the sentencing panel to conclude that [the defendant] murdered . . . in an '"apparent effort to conceal the commission of a crime,"' it must have been obvious *to the panel* that that was [the defendant's] purpose."[79] We concluded that "apparent" had no substantive meaning and was an obtuse way of stating that the aggravator must be proved beyond a reasonable doubt.

[21] Although the challenge in *Lotter* was different, we concluded that "apparent" clearly refers to the fact finder's perception. By analogy, we conclude that a juror would have

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[74] See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[75] See *Palmer, supra* note 40, citing *Joubert, supra* note 40. See, also, *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005).

[76] *Reeves, supra* note 54, 234 Neb. at 754, 453 N.W.2d at 386.

[77] *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[78] *Id.*

[79] *Id.* at 521-22, 586 N.W.2d at 635 (emphasis supplied).

clearly understood that the term "apparently relished" in our five-factor test under § 29-2523(1)(d) referred to his or her own perception of Mata's conduct. The instruction was therefore not unconstitutionally vague.

(b) Jury Was Not Required to Unanimously Agree on Alternative Theories of Exceptional Depravity

Mata contends that the district court erred in instructing the jury on three alternative theories that would prove the aggravating circumstance of "exceptional depravity." He contends that the court should have required the jury to unanimously agree on a theory and to state the facts and theory it had unanimously found.

A jury need not be unanimous on which theory it relies on to convict a defendant of first degree murder, as long as each juror is convinced beyond a reasonable doubt that the defendant committed the crime.[80] In *State v. White*,[81] we stated that a plurality of the U.S. Supreme Court had agreed the mens rea element of first degree murder could be satisfied by proving that the defendant committed either premeditated murder or felony murder. Mata contends that although we have referred to this plurality opinion, we have not applied its test. He further contends that instructing on alternate theories of exceptional depravity was improper under this test because the theories do not carry equal weight of culpability.

In *Schad v. Arizona*,[82] the plurality adopted a due process "fundamental fairness" test for determining whether a court should treat alternative theories as separate offenses. Under that test, if a jury could never reasonably consider alternative theories as moral equivalents, then the jury must unanimously agree on a theory. Even if we applied this test, the question would be whether the alternative theories of exceptional depravity *may ever* be treated as moral equivalents.[83]

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[80] See, e.g., *id.*; *White, supra* note 16.

[81] *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991), citing *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

[82] *Schad, supra* note 81, 501 U.S. at 637.

[83] See *Schad, supra* note 81.

More recently, however, in *Richardson v. United States*,[84] the U.S. Supreme Court, citing *Schad*, stated: "[T]his Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." The Court explained that juries need not unanimously agree on

> which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. . . . Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.[85]

[22] These U.S. Supreme Court decisions are dealing with elements of crimes, and we have determined aggravators are not elements of the crime of capital murder. Our five-factor test may be analogous to the "means" by which the State can establish the aggravator of exceptional depravity. But it nonetheless makes no difference whether the jurors divided on whether the State proved Mata apparently relished the murder, inflicted gratuitous violence on the victim, or needlessly mutilated the victim. Under *Richardson*, the jurors were not required to unanimously agree on the means by which Mata manifested exceptional depravity under § 29-2523(1)(d). We conclude that this assignment of error is without merit.

### 7. Proportionality Review

[23,24] Under Neb. Rev. Stat. § 29-2521.03 (Reissue 1995), we are required, upon appeal, to determine the propriety of a

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[84] *Richardson v. United States*, 526 U.S. 813, 820, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999).

[85] *Id.*, 526 U.S. at 817.

death sentence by conducting a proportionality review.[86] This review requires us to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. This is to ensure that the sentence imposed here is no greater than those imposed in other cases with the same or similar circumstances.[87]

Both a three-judge panel after Mata's trial, and a jury after we remanded for resentencing, have unanimously found that the State proved the exceptional depravity aggravator beyond a reasonable doubt. At his resentencing, after the jury returned its verdict on aggravator (1)(d), the three-judge panel received evidence of aggravating and mitigating circumstances and sentence proportionality. The evidence from the trial is set forth in more detail in *Mata I*.[88] For proportionality review, it is sufficient to say that the evidence at the aggravation hearing showed Adam's skull had been fractured by multiple blows of blunt force trauma at or near the time of death and that Mata had dismembered Adam's body and disposed of it in pieces. Experts were unable to determine the cause or time of Adam's death. The sentencing panel concluded the evidence showed that Mata had relished killing Adam with gratuitous violence and unnecessary mutilation. The panel concluded that Mata did this to affect Adam's mother because he believed she was pushing him out of her life in favor of Adam's father.

The sentencing panel found that the aggravating circumstance under these facts was sufficient to justify the death penalty. It further concluded that the weight of the nonstatutory mitigating circumstances it considered did not approach or exceed the weight of the exceptional depravity circumstance. The sentencing panel stated that "[t]he depravity shown from these facts stands out and sets this case apart from [other Nebraska cases where the death sentence was not imposed]. It shows a mind so bereft of redemption that justice demands a sentence of death."

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[86] See *Hessler, supra* note 33.

[87] See, *id.*; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[88] *Mata I, supra* note 2.

We have reviewed our relevant decisions on direct appeal from other cases in which a district court found aggravating circumstances and imposed the death penalty.[89] We take particular notice of cases involving gratuitous violence inflicted upon young children.[90] Having reviewed the relevant cases, we find that the imposition of the death sentence is proportional to that in the same or similar circumstances.

### 8. Constitutionality of Electrocution

Mata contends that the district court erred in failing to find that death by electrocution under § 29-2532 unconstitutionally imposes cruel and unusual punishment. The State, however, contends that Mata has failed to carry his burden of proof that electrocution is cruel and unusual punishment. It further contends no precedent exists to support Mata's position because neither this court nor the U.S. Supreme Court has ever held that a method of inflicting death is unconstitutional.

[25] We pause to clarify what this case is not about. Mata does not argue that the death penalty, in any form, violates the U.S. and Nebraska Constitutions, nor could he. "[T]he death penalty, when properly imposed by a state, does not violate either the eighth or [the] fourteenth amendment [to] the United States Constitution or Neb. Const. art. [I], § 9."[91] So the issue before us is not whether Mata will be executed, but only whether the current statutory method of execution is constitutional.

We have affirmed Mata's conviction and death sentence; we have affirmed the jury's finding that his crime was exceptionally depraved; and we have determined that the imposition of the death sentence in this case is proportional to that in the same or similar circumstances. But this court's finding that Mata's crime was heinous does not negate our duty to safeguard our state Constitution.

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[89] See, e.g., *Gales, supra* note 87 (and cases cited therein).

[90] See, e.g., *id.*; *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *Simants, supra* note 54.

[91] *State v. Anderson and Hochstein*, 207 Neb. 51, 71-72, 296 N.W.2d 440, 453 (1980).

Obviously, all capital offenses involve heinous crimes. The people of Nebraska, through the Legislature, have determined that in some circumstances, the State may impose the death penalty. And we may not interfere unless the State's procedures in executing the prisoner violate constitutional requirements.

We limit our analysis to whether the State may constitutionally execute a sentence of death by electrocution. We must decide whether electrocution is prohibited by the Nebraska Constitution's proscription against inflicting cruel and unusual punishment. That determination, however, does not affect Mata's sentence of death.

(a) Nebraska Constitution Governs the Issue

It is correct that we have held that electrocution does not constitute cruel and unusual punishment within the meaning of the U.S. or Nebraska Constitution.[92] But we have not previously had the opportunity to review a factual record showing electrocution's physiological effects on a prisoner, nor have we relied on any case in which such evidence was reviewed. Instead, we have relied on U.S. Supreme Court decisions. As explained below, those cases contain factual assumptions that some of the Court's more recent cases have called into question.

Unlike other recent cases where we declined to revisit this issue, Mata's constitutional challenge to electrocution is not procedurally barred[93] and the parties have presented us with a full evidentiary record.[94] We also declined to address the issue in Mata's first appeal because we remanded the cause for resentencing. "[T]he possibility remain[ed] that Mata [would] not be resentenced to death, or that the Nebraska Legislature [would] address this issue prior to the conclusion of Mata's resentencing."[95] But the Legislature did not address the issue. In this appeal, we have a full evidentiary record. We conclude

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[92] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746 (1967).

[93] See *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

[94] See *Gales, supra* note 87.

[95] See *Mata I, supra* note 2, 266 Neb. at 702, 668 N.W.2d at 479.

that evolving standards of decency are applicable to method-of-execution challenges. Those standards require that we now review the evidence presented in this case in the light of modern scientific knowledge.

At the trial level, Mata moved for a declaration that electrocution is cruel and unusual punishment under both the federal and state Constitutions. The issue was developed and tried as a challenge under both Constitutions. Although in his brief, Mata assigned that electrocution violates the U.S. Constitution, he did not specifically cite to the Nebraska Constitution's prohibition against cruel and unusual punishment. Under our court rules, this oversight could preclude us from considering the state constitutional issue. However, because of the death penalty's severity and irrevocability, we have not strictly enforced briefing rules on capital defendants.[96]

Moreover, for reasons explained below, we conclude that the Nebraska Constitution governs this issue. We have already decided that we have a constitutional responsibility to determine whether electrocution is lawful. We stayed the execution of Carey Dean Moore, another death row inmate, pending the outcome of that determination.[97] Also, three other cases on our docket have raised the constitutionality of electrocution under the Nebraska Constitution.[98] We conclude that it is imperative for this court to resolve this issue. In fulfilling our responsibility and in the interest of judicial economy, we excuse the technical omission in Mata's brief.

The Nebraska Constitution, article I, § 9, mirrors the U.S. Constitution's Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[99] Obviously, we cannot, under the U.S. Constitution, declare that electrocution violates its cruel and unusual punishment provision because the U.S. Supreme Court has held otherwise. And we have stated that the Nebraska

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[96] See *Ryan, supra* note 92.

[97] *State v. Moore*, 273 Neb. 495, 730 N.W.2d 563 (2007).

[98] *State v. Galindo*, case No. S-04-1326; *State v. Sandoval*, case No. S-05-142; *State v. Vela*, case No. S-07-138.

[99] U.S. Const. amend. VIII; Neb. Const. art. I, § 9.

Constitution's cruel and unusual punishment provision "'does not require more than does the [Eighth Amendment to the] U.S. Constitution.'"[100] But as we will explain, we now believe this issue should be resolved by this court.

Like this court, the U.S. Supreme Court has never reviewed objective evidence regarding electrocution's constitutionality. The Supreme Court based its holdings on state courts' factual assumptions, which, in turn, relied on untested science from 1890. Because we conclude that we can no longer rely on those factual assumptions and because no other state imposes electrocution as its sole method of execution, we will decide the issue under the Nebraska Constitution.

*(i) Early U.S. Supreme Court Decisions on Electrocution*

In 1890, in *In re Kemmler*,[101] the U.S. Supreme Court decided the State of New York could proceed with the first execution by electrocution. New York had carried out death sentences by hanging until the governor recommended in 1886 that the Legislature find a less barbarous method.[102] Commercially available electricity was new, and states had not used it for an execution.[103] But after a legislative commission reported in 1888 that electrocution was the most humane and practical method of execution known to modern science,[104] the state enacted electrocution as its mode of execution. William Kemmler, the first prisoner scheduled to die by electrocution, challenged the method as cruel and unusual punishment. He alleged electrocution violated his right to due process under both the state and federal Constitutions.[105]

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[100] *State v. Hurbenca*, 266 Neb. 853, 862, 669 N.W.2d 668, 675 (2003), quoting *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

[101] *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890).

[102] *Id.* See, also, *Campbell v. Wood*, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994) (Blackmun, J., dissenting from denial of certiorari).

[103] See Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551 (1994).

[104] *Kemmler v. Durston*, 119 N.Y. 569, 24 N.E. 6 (1890).

[105] *In re Kemmler, supra* note 101.

The trial court concluded that Kemmler had failed to overcome the statute's presumption of constitutionality. It determined that he failed to show "'beyond doubt'" that "'a force of electricity [sufficient] to kill any human subject with celerity and certainty, when scientifically applied, cannot be generated.'"[106] The New York Court of Appeals affirmed. It concluded that the statute's presumption of constitutionality could not be overcome by evidence outside the statute, other than what the court could judicially notice.[107] It therefore "held that the mode . . . might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such."[108] But the Court of Appeals agreed the evidence showed that a current sufficient to produce instantaneous, and therefore painless, death could be applied.[109]

On appeal, the U.S. Supreme Court said that cruel and unusual punishment could not be defined with precision. It stated, however, that certain types of punishment clearly fell within the Eighth Amendment's prohibition: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there [is] something inhuman and barbarous, something more than the mere extinguishment of life."[110]

Over the last 118 years, the *In re Kemmler* standard has remained the baseline criterion under the Eighth Amendment for evaluating a method of execution. The Court did not, however, apply this standard in *In re Kemmler* to New York's newly enacted method, nor did it independently review the evidence regarding electrocution. Instead, it held that the 8th Amendment's protections were not applicable to state actions through the 14th Amendment: "The decision of the state courts

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[106] *Id.*, 136 U.S. at 442.

[107] *Kemmler, supra* note 104.

[108] See *In re Kemmler, supra* note 101, 136 U.S. at 447.

[109] See *id.*

[110] *Id.*, 136 U.S. at 447.

sustaining the validity of [electrocution] under the state constitution is not re[e]xaminable here . . . ."[111] The Court limited the 14th Amendment's protections to the prohibition of "arbitrary deprivation of life, liberty, or property," and "equal protection to all under like circumstances."[112] Under that standard, it concluded the state's new execution method did not violate the prisoner's federal due process rights.[113]

Therefore, the Court did not decide the case under the Eighth Amendment, and there was scant evidence about electrocution in 1890. Yet, lower courts, including this court, have traveled the well-worn path of summarily rejecting claims that electrocution is cruel and unusual punishment. Courts have "typically [relied] on the strength of th[e] Court's opinion in *In re Kemmler*."[114]

In *Malloy v. South Carolina*,[115] a 1915 case, the Court held that South Carolina's statutory change from hanging to electrocution did not constitute ex post facto punishment. It concluded that the penalty for murder—death—had not been increased. Although the Eighth Amendment was not at issue, the Court judicially noticed that 11 other states, including Nebraska, had adopted electrocution after New York did. "[T]his result is the consequent of a well-grounded belief that electrocution is less painful and more humane than hanging."[116] Thus, the Court's reasoning, in part, relied on its factual assumption that electrocution did not increase a condemned prisoner's punishment because electrocution was more humane than hanging.

As in *In re Kemmler*, the Court in *Malloy* did not review any evidence underlying that assumption. Instead, it cited its "approval" of electrocution in *In re Kemmler* and the approval

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[111] *Id*. See, also, *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (discussing holding in *In re Kemmler, supra* note 101).

[112] *In re Kemmler, supra* note 101, 136 U.S. at 448-49.

[113] *Id.*

[114] See *Glass v. Louisiana*, 471 U.S. 1080, 1081, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985) (Brennan, J., dissenting from denial of certiorari; Marshall, J., joins).

[115] *Malloy v. South Carolina*, 237 U.S. 180, 35 S. Ct. 507, 59 L. Ed. 905 (1915), cited in *Alvarez, supra* note 92.

[116] *Id.*, 237 U.S. at 185.

of Massachusetts and New Jersey state courts. Yet, the Massachusetts Supreme Court assumed—without reviewing evidence regarding the physiological effect of electrocution on the human body—that electrocution is an instantaneous and painless method of inflicting death.[117] The New Jersey court declined to "assume" electrocution was unconstitutional, and the opinion shows that no evidence was presented on the issue.[118]

In *Francis v. Resweber*,[119] a 1946 case challenging electrocution, eight justices assumed without deciding that a violation of the 8th Amendment would violate a prisoner's due process rights under the 14th Amendment. The issue was whether Louisiana could conduct a second electrocution after the prisoner's first electrocution failed to result in death—not whether electrocution was inherently cruel or unusual.

The four-justice plurality concluded: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[120] The prisoner's psychological hardship in facing a second attempt to electrocute him was the result of an unfortunate accident. It did not result in making "his subsequent execution any more cruel in the constitutional sense than any other execution."[121] The four-justice dissent concluded that electrocution is not cruel and unusual punishment when painless and instantaneous: "Electrocution has been approved only in a form that eliminates suffering."[122]

Thus, in *Resweber*, both the plurality and the dissent concluded that electrocution could be constitutional. However, both the plurality and the dissent again relied on *In re Kemmler*, in which the Court had refused to apply the Eighth Amendment

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[117] See *Storti v. Commonwealth*, 178 Mass. 549, 60 N.E. 210 (1901).

[118] *State v. Tomassi*, 75 N.J.L. 739, 747, 69 A. 214, 218 (N.J. 1908).

[119] *Francis v. Resweber*, 329 U.S. 459, 462, 67 S. Ct. 374, 91 L. Ed. 422 (1947). See, also, *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).

[120] *Resweber, supra* note 119, 329 U.S. at 464.

[121] *Id.*

[122] *Id.*, 329 U.S. at 474 (Burton, J., dissenting).

and had deferred to the New York Court of Appeals' decision. *Resweber* left intact the presumption that when properly carried out, electrocution is an instantaneous and painless method of inflicting death.

Our review of these early cases illustrates that the U.S. Supreme Court's case law on electrocution relies on unexamined factual assumptions about an electric current's physiological effects on a human. This obvious omission in the Court's jurisprudence results from three factors: (1) the Court's limited knowledge about an electrocution's effect on the human body, (2) the states' desire to find a more humane method of execution than hanging, and (3) the Court's view, when electrocution was first introduced, that the Eighth Amendment was not intended as a restraint on state legislatures' determinations of punishment. But that view has changed. The Supreme Court has specifically held that the Eighth Amendment is a restraint on legislative power to impose punishment.[123] And it has held the 8th Amendment applies to the states through the 14th Amendment.[124]

Yet since deciding *Resweber* in 1946, the U.S. Supreme Court has not addressed the constitutionality of any method of execution,[125] and only indirectly in that case. We agree with Justice Souter that in light of modern knowledge about electrocution, the Court's decisions do not constitute a dispositive response to the issue.[126]

*(ii) This Court's Duty to Safeguard Constitutional Rights*

It is our duty to protect the constitutional rights afforded under both the federal and the state Constitutions.[127] We conclude

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[123] See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

[124] See *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

[125] *State v. Webb*, 252 Conn. 128, 750 A.2d 448 (2000).

[126] See *Poyner v. Murray*, 508 U.S. 931, 113 S. Ct. 2397, 124 L. Ed. 2d 299 (1993) (Souter, J., dissenting from denial of certiorari; Blackmun and Stevens, JJ., join). Accord *Glass, supra* note 114 (Brennan, J., dissenting from denial of certiorari; Marshall, J., joins).

[127] Neb. Const. art. XV, § 1; *Fisher v. State*, 140 Neb. 216, 299 N.W. 501 (1941); *Wilson v. State*, 87 Neb. 638, 128 N.W. 38 (1910).

that we can no longer rely on the factual assumptions implicit in U.S. Supreme Court precedent pertaining to the constitutionality of execution by electrocution. Because we are now presented with evidence of a nature and quality that the Supreme Court never considered when it held electrocution was not cruel and unusual punishment, we cannot rationally defer to federal precedent.

As discussed, we cannot determine how the U.S. Supreme Court would decide a challenge to electrocution as a method of execution under the federal Constitution if it were presented with this evidence. But we note that some of the Court's recent decisions and dissents have called attention to outdated factual assumptions in the Court's precedent.[128] We also know that the Court is highly unlikely to accept an appeal on the issue from any other jurisdiction that has electrocution as an alternative method of execution. The Court has held that a condemned prisoner waives a constitutional challenge to a method of execution if he or she voluntarily selects that method.[129] Only in Nebraska is electrocution the mandated method of execution; there is no alternative.[130]

We reject the dissent's suggestion that we are bound by questionable federal precedent and should allow Mata to attempt a further appeal to the U.S. Supreme Court. It is not our function to predict whether the Supreme Court would grant a writ of certiorari in this case. But it is our duty as constitutional officers to decide the challenge presented in this automatic appeal, based on the record of the case, as tried and decided. And we will not shirk or abdicate our duty to safeguard the constitutional rights afforded by our state Constitution. We conclude that whether electrocution is cruel and unusual punishment is an issue that has fallen to this court to determine.

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[128] See, *Moore, supra* note 97; *Gales, supra* note 87; *Mata I, supra* note 2.

[129] *Stewart v. LaGrand*, 526 U.S. 115, 119 S. Ct. 1018, 143 L. Ed. 2d 196 (1999).

[130] See, e.g., Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 Santa Clara L. Rev. 445 (2007).

### (b) Legal Standards Defining Cruel and Unusual Punishment

Although we conclude that the Nebraska Constitution governs this issue, because both the federal and state Constitutions prohibit cruel and unusual punishment, we look to federal precedent for guidance regarding general standards to maintain harmony between parallel constitutional provisions.

#### *(i) Substantial Risk That Prisoner Will Suffer Unnecessary and Wanton Pain*

[26] The baseline criterion in a challenge to a punishment is whether it imposes torture or a lingering death that is unnecessary to the mere extinguishment of life.[131] "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence" and cruelty inherent in the execution method itself.[132] "[T]he execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself."[133] Capital punishment "must not involve the unnecessary and wanton infliction of pain."[134]

[27] A single accident, however, does not show that a method of execution is inherently cruel.[135] But a pattern of prisoners suffering unnecessary pain presents a different circumstance. A method of execution violates the prohibition against cruel and unusual punishment if there is a substantial foreseeable risk, inherent in the method, that a prisoner will suffer unnecessary pain.[136]

Prisoners are not required to show that their execution will actually result in unnecessary pain. The human body does not

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[131] *In re Kemmler, supra* note 101.

[132] *Resweber, supra* note 119, 329 U.S. at 463 (four-justice plurality opinion).

[133] *Id.*, 329 U.S. at 474 (four-justice dissenting opinion).

[134] *Gregg*, supra note 123, 428 U.S. at 173.

[135] See *Resweber, supra* note 119.

[136] See, *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *vacated on other grounds* 519 U.S. 918, 117 S. Ct. 285, 136 L. Ed. 2d 204; *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

respond uniformly to electric current. And, obviously, there are no first-person accounts of an execution that a court can consult.[137] So, courts must necessarily deal with probabilities.[138] The prohibition against cruel and unusual punishment, however, protects prisoners against sufficiently imminent dangers and current infliction of unnecessary pain.[139]

*(ii) Evolving Standards of Decency*

The State argues the U.S. Supreme Court applies distinct and separate constitutional standards under the Eighth Amendment. It argues that the standard depends upon whether the defendant claims that a punishment is disproportionate or that the method of inflicting the punishment is cruel. The State further argues under this disjunctive scheme that "subjective" standards of decency are not applicable to method-of-punishment claims. And so, according to the State, the only relevant inquiry is whether the method is cruel or barbarous. The State further claims the "unusual" component is the only relevant inquiry in claims that a punishment is excessive or disproportionate. We disagree with the State's analysis.

[28] The prohibition against cruel and unusual punishment is not a static concept and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[140] A court must evaluate claims that punishment is cruel and unusual "in the light of contemporary human knowledge."[141]

The State incorrectly asserts that a court's evaluation of contemporary values is subjective. The U.S. Supreme Court looks to objective criteria for this inquiry, the most reliable of which is legislation enacted by this nation's legislatures.[142]

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[137] See *Harbison, supra* note 136.

[138] *Id.*

[139] *Taylor, supra* note 136.

[140] *Trop v. Dulles,* 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (quoted in *Gregg, supra* note 123).

[141] *Robinson, supra* note 124, 370 U.S. at 666.

[142] See *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

We acknowledge that the Court has stated that an excessiveness claim is judged under currently prevailing standards of decency.[143] But it has also considered both cruelty and unusualness when dealing with disproportionality claims.[144] Contrary to the State's argument, the Court has indicated that evolving standards of decency are relevant to methods of execution:

> [T]he Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373 (1910). Thus, the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.[145]

The U.S. Supreme Court has never held that state legislatures' uniform rejection of a method of execution is irrelevant to whether that method is cruel and unusual punishment.[146] It has considered whether a method of execution was unusual in a challenge to execution by firing squad.[147] And in *Gregg v. Georgia*,[148] the Court rejected a challenge that the death penalty was cruel and unusual punishment under all circumstances. The Court reasoned, in part, that 35 state legislatures had enacted new death penalty statutes to comply with its decision in *Furman v. Georgia*,[149] which invalidated many states' capital sentencing procedures.[150]

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[143] See *id.*

[144] See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). Compare *Weems, supra* note 111.

[145] *Gregg, supra* note 123, 428 U.S. at 171.

[146] See *Campbell, supra* note 102 (Blackmun, J., dissenting from denial of certiorari).

[147] See *Wilkerson v. Utah*, 99 U.S. 130, 25 L. Ed. 345 (1878).

[148] *Gregg, supra* note 123.

[149] *Furman, supra* note 22.

[150] See *Gregg, supra* note 123 (plurality opinion).

We decline to hold that under the Nebraska Constitution, evolving standards of decency apply only to claims of disproportional punishment. We conclude that evolving standards of decency must apply to claims that the State's intended method of execution inflicts unnecessary and wanton pain. To hold otherwise would not comport with the U.S. Supreme Court's consistent holdings since *Furman* that the death penalty is different, both in its severity and irrevocability.[151] The constitutional prohibition against cruel and unusual punishment would be meaningless if the punishment would have to be rejected by every state before it could be cruel and unusual.[152]

Regarding evolving standards, the evidence showed that by 1949, 26 states had changed their execution method from hanging to electrocution, but that no state had adopted electrocution since. Instead, states began adopting lethal gas as their execution method. By 1973, 12 states were using lethal gas and 20 states were using electrocution. Then, in 1977, lethal injection was introduced.

By 1999, of the 38 states that permitted capital punishment, 34 states offered lethal injection as either a choice or the exclusive method of execution and only four states authorized electrocution as their exclusive method of execution.[153] In 2000, Georgia switched from electrocution to lethal injection as its sole method of execution for capital offenses committed on or after May 1, 2000.[154] Florida also switched in 2000 from electrocution to lethal injection unless the person sentenced to death affirmatively elects electrocution.[155] Finally, in 2002, Alabama followed Florida's lead.[156] Thus, as of July 1, 2002,[157]

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[151] See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

[152] See *Campbell, supra* note 102 (Blackmun, J., dissenting from denial of certiorari).

[153] *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (Harding, C.J., specially concurring).

[154] See *Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137 (2001).

[155] Fla. Stat. Ann. § 922.105 (West 2001).

[156] Ala. Code § 15-18-82.1 (Cum. Supp. 2007).

[157] See *id.*

Nebraska is the only state in the nation to require electrocution as its sole method of execution.

Responding to horror stories of "botched" electrocutions in Florida, some states selected lethal injection.[158] It has been stated that courts have switched to lethal injection "because it is universally recognized as the most humane method of execution, least apt to cause unnecessary pain."[159]

Faced with changing societal values, we cannot ignore Nebraska's status as the last state to retain electrocution as its sole method of execution. But this is not our only consideration. We must also consider whether electrocution comports with the "Eighth Amendment's protection of 'the dignity of man.'"[160]

*(iii) Dignity of Man*

[29] "A penalty also must accord with 'the dignity of man,'" which is the basic concept underlying the prohibition against cruel and unusual punishment.[161] Regarding executions, the four-justice dissent in *Resweber* stated: "Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people."[162] The U.S. Supreme Court has implicitly condemned some punishments as barbaric, such as beheading and drawing and quartering, that inflict unnecessary physical violence.[163] As Justice Brennan stated: "[B]asic notions of human dignity command that the State minimize 'mutilation' and 'distortion' of the condemned prisoner's body," irrespective of the pain that such violence might inflict.[164] Another jurist has observed:

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[158] See *Provenzano, supra* note 153, 744 So. 2d at 450 (Pariente, J., dissenting).

[159] *Webb, supra* note 125, 252 Conn. at 145, 750 A.2d at 457.

[160] See, *Glass, supra* note 114, 471 U.S. at 1085 (Brennan, J., dissenting; Marshall, J., joins), quoting *Trop, supra* note 140.

[161] *Gregg, supra* note 123, 428 U.S. at 173, quoting *Trop, supra* note 140.

[162] *Resweber, supra* note 119, 329 U.S. at 473-74 (four-justice dissenting opinion).

[163] See *Wilkerson, supra* note 147.

[164] *Glass, supra* note 114, 471 U.S. at 1085 (Brennan, J., dissenting).

> [W]hile beheading results in a quick, relatively painless death, it entails frank violence . . . and mutilation . . . and disgrace . . . and thus is facially cruel. Post-execution disfigurement . . . and displaying of the mutilated corpse similarly would be forbidden even though this practice involves no conscious pain.[165]

The Georgia Supreme Court has similarly concluded that conscious suffering cannot be the only consideration in constitutional challenges to a method of execution:

> Such a limited focus would lead to the abhorrent situation where a condemned prisoner could be burned at the stake or crucified as long as he or she were rendered incapable by medication of consciously experiencing the pain, even though such punishments have long been recognized as "manifestly cruel and unusual."[166]

[30] We agree that barbarous punishments include those that mutilate the prisoner's body even if they do not cause conscious pain. We conclude that such punishments do not comport with the Eighth Amendment's dignity of man standard.

*(iv) No Requirement to Show Legislature Intended to Cause Pain or Lingering Death*

The State argues that the prisoner must show that the Legislature intended to inflict unnecessary pain or a lingering death. In the cases it relies on, however, the issue was whether a prisoner must show that prison officials were deliberately indifferent to a risk of pain in an execution protocol. The issue was not whether a state legislature intended the method to cause pain. Even so, the federal courts do not agree whether a plaintiff must show prison officials' deliberate indifference. The Seventh Circuit held that a prisoner must show two things: that there is a significant risk of unnecessary pain during the execution and that prison officials have been deliberately indifferent to that risk in developing an execution protocol.[167] We believe,

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[165] *Provenzano, supra* note 153, 744 So. 2d at 428-29 (Shaw, J., dissenting).

[166] *Dawson, supra* note 154, 274 Ga. at 334, 554 S.E.2d at 143, citing and quoting *In re Kemmler, supra* note 101.

[167] See *Lambert v. Buss*, 498 F.3d 446 (7th Cir. 2007).

however, that the Eighth Circuit stated a stronger rationale for rejecting a subjective intent requirement.[168]

In *Taylor v. Crawford*,[169] the Eighth Circuit distinguished condition-of-confinement claims from state sanctioned penalties and held that a prisoner does not need to show a prison official's state of mind when the official is carrying out a state sanctioned penalty. In *Taylor*, Missouri relied on *Resweber*.[170] It argued that in *Resweber*, the U.S. Supreme Court held that the prison officials' second attempt at electrocution was not unconstitutional because there was no purpose to inflict unnecessary pain. The Eighth Circuit, however, concluded that an inquiry into state of mind was necessary in *Resweber* because the second attempt was outside what the statute authorized.

Also, a federal district court similarly reasoned that a prison official's subjective intent is presumptively shown when the pain inflicted is formally meted out as punishment.[171] Relying on U.S. Supreme Court precedent, the court reasoned that a prison official's subjective intent is normally relevant only when the pain inflicted is not meted out as punishment by a statute or sentencing judge. When the official is carrying out an official penalty, however, there is no rationale for requiring the prisoner to show "an additional culpable mental state on behalf of any individual state actors."[172] This reasoning applies even more strongly to state legislatures.

[31] Although the state and federal Constitutions prohibit the "unnecessary and *wanton*" infliction of pain, we do not believe "wanton" in the context of state sanctioned punishment implies a mental state. In a method of execution challenge, "wanton" means that the method itself is inherently cruel.[173] We believe that if a prisoner were required to show a legislature's malicious intent in selecting a method of punishment, it is unlikely that

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[168] See *Taylor, supra* note 136.

[169] *Id.*

[170] *Resweber, supra* note 119.

[171] See *Harbison, supra* note 136.

[172] *Id.*, 511 F. Supp. 2d at 894.

[173] See *Resweber, supra* note 119 (four-justice plurality opinion).

courts would ever find any punishment to be unconstitutional. And, undoubtedly, a punishment may be cruel and unusual despite legislative approval.[174]

In *Trop v. Dulles*,[175] the U.S. Supreme Court held that a statute punishing wartime desertion by forfeiture of citizenship was cruel and unusual punishment. Notably, the Court stated it was not entirely clear that "Congress fully appreciated the fact that [the statute] rendered a convicted deserter stateless."[176] The Court further stated that while Congress had amended the statute to ameliorate its effects, the amendments actually created graver problems by allowing military officials to arbitrarily decide which offenders would be rendered stateless.[177] The Court was unconcerned whether Congress intended to inflict cruel and unusual punishment, and it pointedly recognized that Congress probably did not have this intent. *Trop* clearly shows that legislative intent to inflict cruel and unusual punishment is not a relevant consideration in a method-of-punishment challenge. Similarly, four justices in *Resweber* concluded that state officials' lack of intent to cause pain was irrelevant.[178]

[32] Scientific knowledge about electricity and its effects on the human body has vastly expanded since 1913, when the Nebraska Legislature first selected electrocution over hanging.[179] "Time works changes, brings into existence new conditions and purposes."[180] We presume that the Legislature intended to select an execution method within constitutional bounds. But we conclude that whether the Legislature intended to cause pain in selecting a punishment is irrelevant to a constitutional challenge that a statutorily imposed method of punishment violates the prohibition against cruel and unusual punishment.

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[174] See *Trop, supra* note 140.

[175] *Id.*

[176] *Id.*, 356 U.S. at 89 n.4.

[177] *Id.*

[178] See *Resweber, supra* note 119.

[179] See 1913 Neb. Laws, ch. 32, § 2711, p. 108.

[180] *Weems, supra* note 111, 217 U.S. at 373.

[33] In sum, we conclude that the relevant legal standards in deciding whether electrocution is cruel and unusual punishment are whether the State's chosen method of execution (1) presents a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution, (2) violates the evolving standards of decency that mark a mature society, and (3) minimizes physical violence and mutilation of the prisoner's body. Having established the relevant legal standards, we turn to our standard of review.

### (c) Standard of Review

#### *(i) Questions of Law and Fact*

[34] This challenge to the constitutionality of electrocution as a method of execution presents a mixed question of law and fact. In constitutional challenges presenting mixed questions of law and fact, we normally review the district court's findings of fact for clear error.[181] Here, however, the constitutional implications involved in any death penalty case require us to independently and scrupulously examine the entire record. In challenges to the constitutionality of a method of execution, we determine whether the trial court's conclusions are supported by substantial evidence.[182] On questions of law, we resolve issues independently of the determination reached by the court below.[183]

[35,36] Whether a method of inflicting the death penalty inherently imposes a significant risk of causing pain in an execution is a question of fact.[184] The ultimate issue, whether electrocution violates the constitutional prohibition against cruel and unusual punishment, presents a question of law.[185]

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[181] See, e.g., *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006); *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004); *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[182] See *Webb, supra* note 125.

[183] See *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

[184] See, *Taylor, supra* note 136; *Fierro, supra* note 136.

[185] See *Fierro, supra* note 136.

*(ii) Deference Due Legislature*

[37-39] Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime.[186] Regarding statutory punishments, however, on three occasions we have overstated the Legislature's authority under the constitutional prohibition against cruel and unusual punishment. We stated that the constitutional provision preventing cruel and unusual punishment was not intended to abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime.[187] This statement is clearly too broad. Its roots can be traced to case law preceding the U.S. Supreme Court's application in 1962 of the 8th Amendment to the states through the 14th Amendment.[188] As noted, the Supreme Court has specifically held that "the Eighth Amendment is a restraint upon the exercise of legislative power,"[189] as is the Nebraska Constitution's prohibition against cruel and unusual punishment. More recently, however, we have stated: "'The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review.'"[190]

[40,41] When we review challenges to criminal statutes, we presume that the statutes are constitutional.[191] And the burden to clearly show that a statute is unconstitutional rests upon the challenger.[192] Yet presumptions can be overcome, and the Legislature cannot establish a method of execution

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[186] *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), citing *Gregg, supra* note 123.

[187] *Michalski, supra* note 186; *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984); *State v. Tucker*, 183 Neb. 577, 162 N.W.2d 774 (1968).

[188] See *Robinson, supra* note 124.

[189] *Gregg, supra* note 123, 428 U.S. at 174.

[190] *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 230, 738 N.W.2d 850, 854 (2007), quoting *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

[191] See *Thomas, supra* note 15.

[192] See *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

that offends the constitutional guarantee against cruel and unusual punishment.

(d) Parties' Contentions

Mata contends that his challenge to electrocution is not limited to the current protocol, which the Department of Correctional Services adopted in 2004. He argues that electrocution is cruel because it burns and mutilates the body and presents an unnecessary risk of pain. He also argues that electrocution no longer comports with evolving standards of decency because every state that authorizes the death penalty, except Nebraska, has rejected electrocution.

The State, of course, views the matter differently. The State contends that the district court concluded Mata failed to carry his burden of proof under the appropriate constitutional standard. That argument, however, relies upon a constitutional standard that we have rejected—a requirement that the prisoner show a legislative intent to cause pain and suffering. The State also argues that even if the prisoner remains conscious for 15 to 30 seconds, no basis exists for concluding that electrocution involves unnecessary pain. Finally, the State argues that it is "undisputed that electrocution can and does cause the instantaneous death of a condemned prisoner."[193]

Although Mata contends that his challenge is directed at electrocution and not at the current protocol, an understanding of the current protocol is important because of its similarity to earlier electrocution procedures. We begin by explaining why the protocol was changed in 2004.

(e) Nebraska Statutes Require a Continuous Electric Current but Fail to Specify Its Strength or Force

In 2000, the district court determined, in part, that the State's 1994 electrocution protocol did not comply with § 29-2532 because the current was not continuous. This order was part of the record in *Mata I*. Section 29-2532 provides in part that "[t]he mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted

[193] Brief for appellee at 46.

person a current of electricity of sufficient intensity to cause death; and the application of such current shall be continued until such convicted person is dead." The 1994 protocol required prison officials to apply two 30-second sequences of electric current for a 155-pound person, with a 20-second pause in between shocks. In each sequence, the protocol called for officials to apply 2,450 volts for 8 seconds, followed by 480 volts for 22 seconds. In the 1990's, prison officials applied four sequences of current to electrocute three prisoners.

In response to the district court's order, prison officials changed the protocol in 2004. The new protocol is also standardized to a 155-pound person. But the new protocol requires prison officials to apply 2,450 volts of electric current in one 15-second continuous application.

The exact strength of the current is unknown. The protocol does not specify the amperage, which is the measure of electrical energy in a current. A retired prison administrator who developed the original protocol in the 1980's testified that he had an ammeter installed. He explained that he did this because the risk of fire from the sponges drying out increases if 8 to 10 amperes are applied for too long. He stated that the State uses 6 to 8 amperes and no more than 10. But the executing official for the 1990 electrocutions believed the ammeter simply showed the system was working within the correct range. He did not recall the amperage used or watch the voltage meter during the 1990 electrocutions. During electrocutions, prison officials do not record the amperage or voltage or use a regulator to ensure that the voltage does not drop below the required amount.

The strength of an electric current flowing through a conductor can be calculated if the voltage and a conductor's resistance to a current are known. But as the district court noted, experts do not agree on the human body's resistance as a conductor. Ronald K. Wright, M.D., the certified pathologist who recommended the State's 2004 protocol, testified that it would be unethical for physicians to make these determinations and that states do not measure the voltage exiting a prisoner's body during an electrocution. Because he had to rely on medical journals from the 1890's, he did not know whether a prisoner's size or height would affect the body's resistance. Because there

has never been monitoring, the strength of the current flowing through a prisoner's body in Nebraska electrocutions is unknown. This evidence supports the district court's finding that the effect of electric current in a prisoner's body cannot be predicted.

(f) Preparations for Electrocution

Before the execution, the prisoner's head and left leg are shaved where the electrodes will be placed. Both the State and defense experts agree that a high voltage electric current causes the body to violently react with muscle contractions. Shock victims have been known to suffer broken bones and dislocated joints from the force of these contractions. Consequently, officials must tightly strap the prisoner's torso, hips, arms, legs, ankles, and wrists to the electric chair. Witnesses observed prisoners slamming against these straps during an electrocution. Also, officials fasten the prisoner's head to the chair with a wide leather strap across the face, with a cutout for the nose.

After the prisoner is strapped in tightly, officials place a 3¼-inch circular electrode plate on the crown of the prisoner's head and a similar grounding electrode on the prisoner's left calf to create a circuit path through the body. They place larger natural sponges, which have been soaked in a saline solution, under each electrode next to the prisoner's skin. The saline ions form a bridge between the prisoner's body and the electrodes and are intended to keep the electricity from flowing outside the body. Electricity follows ions and will seek the path of least resistance. Wright testified that the sponge must be damp or the sponge and the prisoner may catch on fire.

(g) The Prisoner's Body Is Burned

Burning of the prisoner's body is an inherent part of an electrocution. Wright testified that under the protocol he recommended, there would be burning and the possibility of severe skin burns in the last seconds of the 15-second application. He stated that the prisoner's skin could reach a temperature of 200 degrees. The protocol shows that the State expects burning and keeps a fire extinguisher close by.

During an electrocution, the executing official watches for smoke coming from the prisoner's head or leg. But the executing official for the three electrocutions performed in the 1990's testified that only smoke from the head would require interruption of the current, not smoke from the leg. Further, the protocol requires officials to interrupt the current only for extensive smoke; officials anticipate smoke equivalent to a burning cigar. If flames appear, the protocol requires officials to stop the current to check the sponges and tighten the electrodes.

Under the 1994 protocol used during the three 1990's electrocutions, witnesses testified that they saw smoke coming from the prisoner's leg and could smell burning flesh in the viewing room. A media witness of the 1997 electrocution reported seeing smoke coming from the prisoner's head also. A prison official testified that he had smelled a lingering odor of burning flesh in the death chamber after all three electrocutions. The coroner's reports showed that there were severe ring burns on the prisoners' heads where officials had attached the electrode plate. A witness also testified to viewing a prisoner's body after an electrocution. She reported sagging skin on the sides of the prisoner's head from the temple areas and cheeks to above and behind the ears.

The State concedes that burning is an inherent part of an electrocution but contends that it is localized. The district court, however, found that current density is highest at the electrodes and especially in the left leg. The left leg is where all of the current must pass to exit to the ground electrode. Third-degree burns and charring often appear at the head and left leg electrodes. Defense experts reviewing post mortem photographs of the prisoners concluded the electric current was causing severe burning and charring of the prisoners' left legs from the knee to the foot. In addition, the current vaporizes water in the skin causing severe steam burns and blistering, and leaving the skin in some areas separated and sagging following an electrocution. We disagree with the State's characterization of the burning as localized. The evidence shows that severe burning is also likely to be present under the 2004 protocol.

### (h) 2004 Protocol Will Not Eliminate Risk of Prisoner Burning or Catching Fire

In 1994, prison officials changed the protocol to remove medical personnel from execution activities. Also, the 2004 protocol does not require a physician to be present. Under the 2004 protocol, after officials stop the current, they must wait 15 minutes before calling a coroner. The protocol, however, does not specify what officials should do if the coroner finds that a prisoner is still alive. But the warden testified that if a prisoner were alive after 18 minutes, an official would repeat the sequence. The executing official for the 1990's electrocutions also testified that if a prisoner were still alive, an official, after checking the equipment, would repeat the sequence.

Wright admitted that under the 2004 protocol, the sponge could be dry by the time a coroner arrives. He stated that the drying out of the sponge is one reason the current cannot be applied much longer than 15 seconds. He explained that the possibility of a fire is why officials must have a fire extinguisher close. So, by the time a coroner is called, 15 minutes after the current is stopped, if the prisoner is still alive, prison officials will need to replace the sponges before reapplying the current to avoid a fire from a dry sponge. But even if they do this, the risk remains that the prisoner's leg will burn at the exit point because the tissue will have already been deeply burned.

Nebraska used imported executioners to perform electrocutions from 1920 to 1959, and they employed different methods. For example, in 1959, the executioner applied 2,200 volts to the prisoner five separate times. In 1929, however, the State applied 2,300 volts for 19 seconds, which is a similar application to that of the 2004 protocol. Because physicians determined that the prisoner was still alive, officials applied the current again. Heavy brown smoke from the prisoner's burning leg filled the room. This shows the current protocol will continue the mutilation of prisoners' bodies. It also supports the district court's conclusion that some prisoners will be tortured during electrocutions.

### (i) District Court Found Some Prisoners Would Experience Unnecessary Pain and Torture

The district court's 2005 order in this appeal illuminates an electrocution's gruesome effects and refutes the State's argument that the court found Mata failed to meet his burden of proof. We summarize the important points.

The court made six specific findings regarding an electric current's physiological effects on humans. First, high voltage causes intolerable pain sensations by direct excitation of peripheral sensory nerves. Second, electricity causes widespread excitation of brain neurons. Third, applying external electricity to the brain can damage brain neurons by interrupting their natural polarity and lead to the loss of neuron function. The court concluded, however, that the loss of function was most critical in the brain stem because those neurons are the most indispensable to respiration and life. Fourth, high voltage causes intense muscle contractions throughout the body, called muscle tetany. The muscles remain locked in full contraction as long as the current is applied. Fifth, high voltage will not cause fibrillation of the heart. Fibrillation is an arrhythmia in which the heart quivers in a chaotic pattern instead of intermittently contracting.[194] Sixth, current flowing through the body will cause thermal heating, known as joule heating. But it is impossible to predict heating in any particular part of the body because of wide variations in the current flow.

The court concluded that it was unknown what path the current would take from the head electrode to the ground electrode on the left leg. It stated that experts sharply disagreed over the mechanism of death in an electrocution. The State's experts believed that electroporation of neurons would cause instantaneous and irreversible loss of brain function. The defense experts believed that the current caused damage to essential organs of the body and that death eventually resulted from the lack of oxygenated blood. The court concluded that the State's theory of instantaneous death assumed a substantial amount of current going to the brain, which was impossible to know. The court observed, "[I]f the state's explanation of the logic

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[194] Dorland's Illustrated Medical Dictionary 625 (27th ed. 1994).

of the mechanisms of electrocution and its merit as a means of executing the death penalty are true, it is hard to understand why virtually all of the world has abandoned the practice except for Nebraska."

The court found that the skull would limit how much current went to the brain. Apart from the current's full power exiting the left leg, the court did not believe the current going to other parts of the body, including the brain, could be determined. Such a determination was difficult because the body is a large mass and humans are not predictable conductors. But because the current would result in the frozen contraction of muscles, it found that a prisoner's heart would be unable to pump blood during the application of current. This would starve the brain and other vital organs of oxygenated blood and cause unconsciousness within 15 to 30 seconds.

Nonetheless, the court recognized that hearts frequently restart on their own. It noted that Nebraska's history, and the history of electrocutions overall, showed that one application of current will sometimes not kill a condemned prisoner. "Since it is clear that there is still a pulse or breathing in a number of instances . . . it seems equally clear that an inmate could revive and regain consciousness after application of current under the 1980s Nebraska protocol and that some have revived after protocols used in other cases." It found that whether Nebraska's inmates had regained consciousness and experienced unnecessary pain during an electrocution is unknown. It observed that the State will obviously reapply the current until the prisoner is dead but stated that it was impossible to know which prisoners would require a second jolt.

Because the current's strength and density in different parts of the body could not be predicted, the court concluded that experts for both sides would sometimes be correct about the mechanism of death. The court summed up its own findings and conclusions as follows:

> The proposition that judicial electrocutions always result in instantaneous and irreversible brain death with the brain approaching the boiling point is a myth. It is probably the case that some instances of judicial electrocutions do

> result in instantaneous brain death. It is certainly true that all of them do not.
>
> . . . Electrocution as a method of executing condemned prisoners is an extremely violent method of accomplishing death. It includes some burning, smoke, and involves extreme contortion of muscles and tissue of almost every part of a person's body. It includes no effort at all to anesthesize the person into unconsciousness before the mechanisms of death are employed.
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> . . . The current mode used for an electrocution in Nebraska . . . will result in instantaneous death in some cases, and will almost certainly not result in death at all in some cases. In still others, it will result in a mechanism of death from anoxia with the condemned most likely being unconscious during much of the time it takes to die. It is unknown what the number of cases will be, nor is it possible to predict which case will have which result. The current mode used for a judicial electrocution is untested . . . .
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> . . . [T]here is no question that the Nebraska practice of executing condemned prisoners exclusively by electrocution is unique, outdated, and rejected by virtually all the rest of the world; including practices for the euthanasia of non-human animals. There is also no question that its continued use will result in unnecessary pain, suffering, and torture for some, but not all of [the] condemned murderers in this state. Which ones or how many will experience this gruesome form of death and suffer unnecessarily; and which ones will pass with little conscious suffering cannot be known.

Contrary to the State's argument, the court did not find that Mata had failed to meet his burden of proof. Nothing in the evidence or the court's order supports the State's argument that electrocution indisputably results in instantaneous death. The experts clearly dispute this contention. Notwithstanding its findings, the court concluded that it was bound by this court's decisions and must overrule Mata's motion to declare

electrocution unconstitutional as a matter of law. Yet, it clearly found that some prisoners would remain conscious for 15 to 30 seconds or during the entire application of the current. It further found it was unknown whether the three Nebraska prisoners electrocuted in the 1990's had regained consciousness during the pauses between sequences. But the court found that some prisoners could revive and have revived and regained consciousness under similar protocols and other protocols. The evidence fully supports those findings and undercuts the State's theory of instantaneous death.

*(i) Heart Capable of Restarting*

The district court correctly noted that the experts do not agree on how death occurs in an electrocution. All the experts testifying about the effect of a high voltage current on the heart believed that the heart could sometimes beat again after the current was stopped. This is because the heart has built-in regulators independent of the brain. Only a forensic pathologist for the defense believed that in most cases, a prisoner's heart could not recover its normal rhythm after the current was stopped.

As the district court found, however, physicians have detected heartbeats after the current is stopped—notably in Nebraska's 1929 execution. A physicist for the defense explained that there is a well-recognized range of electrical strengths that will cause fibrillation of the heart. Electric currents with strengths above or below this range will not cause fibrillation, and 2,450 volts is above the range. While the heart will not effectively pump blood during the application of the current, he believed it would almost always recover.

Similarly, Wright, the State's expert, had assisted with a few autopsies after judicial electrocutions and believed the autopsies showed that the prisoners' hearts almost always start beating again. This evidence supports the district court's finding that some prisoners' hearts will beat rhythmically again after the current is stopped.

*(ii) State's Theories of Instantaneous Loss of Brain Function*

The defense experts disputed the State's theory that prisoners would always lose consciousness. The State's contention that

electrocution does not subject prisoners to unnecessary pain depends on Wright's theories: the electric current would cause instantaneous and irreversible electroporation of brain neurons or thermal heating of neurons would reach the point of causing cell death within 4 to 5 seconds. If correct, either theory would mean instantaneous or near-instantaneous loss of brain function and consciousness.

Wright testified that under the Nebraska protocol, irreversible loss of brain functioning would occur within 1 second, or "the speed of light." He had suggested applying the electric current for 15 seconds to cover any possible variations. He believed the mechanism of death in a judicial electrocution is asphyxiation: The prisoner is unable to breathe because of instantaneous electroporation of neurons. Another State's expert, B.J. Wilder, M.D., a neurologist, also testified that the brain would be instantly depolarized, causing cell death. As the district court explained, electric current can disrupt the natural polarity of neurons. If the electroporation is severe enough and long enough, it causes denaturation of the neurons. Denaturation is a disruption of a cell's protein configuration, which damages the physical properties of the cell's proteins and results in its loss of function. It can be caused by heat or other physical or chemical means.[195] Wright believed a secondary cause of death was joule heating, which would cause the brain to reach a temperature of 110 degrees and to stop functioning within 4 to 5 seconds.

Wright based his theories on a few autopsies of electrocuted prisoners in which he had assisted. His theory also relied on temperature recordings of prisoners' cerebrums after their electrocutions in Florida. The cerebrum is the main two-hemisphere portion of the brain in the upper part of the cranial cavity.[196] Wright had recorded the brain temperatures of between 6 and 12 prisoners between 1977 and 1993. The bodies had been removed from the prison to a location about 1½ hours away before the brain temperatures were taken. Wright did not have specific data, but he remembered that many temperatures were

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[195] *Id.* at 440.

[196] See *id.* at 302.

around 98 to 100 degrees and that one temperature had been as high as 112 degrees.

Wright stated that he knew the brains had denatured because normally they have the consistency of gelatin but they had firmed up. He testified that there is no microscopic evidence that neurons have denatured due to thermal heating or depolarization because the heating is not high enough to cause observable post mortem changes. He did not report discoloration of brain tissue and specifically stated that the brain looked normal.

*(iii) Defense Experts Reject State's Theories*

The defense experts who disputed Wright's theories included Thomas L. Bennett, M.D., a forensic pathologist; Donald D. Price, Ph.D., a neurophysicist; and John P. Wikswo, Jr., Ph.D., a physicist who had studied the effects of electrical injury. They rejected Wright's theories of instantaneous depolarization and denaturation of neurons because they believed he based his theories on an assumption that all of the current enters the brain.

Wright admitted that he based his calculation of thermal heating of the brain on his belief that all of the current enters the brain. He also admitted that a significant delay had occurred before anyone took the brain temperatures he had recorded and that he did not know the ambient temperatures during the delay. Finally, he admitted that Florida applied current to prisoners for almost twice as long as Nebraska's 2004 protocol requires and that many of the temperatures were around 98 to 100 degrees.

The defense experts believed that only 5 to 10 percent of the electric current, and possibly as little as 2 percent of the current, would pass through the skull to the brain. They explained that because the skull is a poor conductor of electricity, it will shunt the current away from the brain. That is, the path of least resistance is around the prisoner's head.

They believed that cell death is a process and that instantaneous loss of brain function was highly unlikely. They also believed that the deeper parts of the brain controlling consciousness and respiration could function even if some parts are damaged. They testified that after an electrocution, there is no

medical evidence of massive damage in the brain, which would indicate instantaneous death, or total loss of neuron function. Although there are other pathways through which an electric current could enter the brain—e.g., veins and nerves—Wikswo did not believe that the current would follow those pathways in a judicial electrocution. He explained that the grounding electrode on the prisoner's leg would generally cause the current to move from the top down.

Several physical observations supported these opinions. For example, most of the physical damage is on the outside of the body. The burn rings frequently noted on prisoners' heads show that the electric current arcs around the sponge and moves out from the electrode radially around the head. If the current were going straight down, there would be a burn disk. Bennett reviewed photographs of all three prisoners electrocuted in Nebraska during the 1990's. He noted that the burning on one prisoner's scalp was consistent with arcing from the sponge and the skin's resistance to current. He believed that the circular burning on the sides of another prisoner's head showed the current—following the path of least resistance—had gone down the sides of his scalp to his neck and body. Similarly, Wikswo noted that in a judicial electrocution in Nebraska, a burn on the side of a prisoner's neck showed that the current had gone around the outside of his head and entered his body at the neck.

In addition, Wikswo and Price had reviewed autopsy reports from other states and testified that there was no evidence of massive damage of prisoners' brains and only isolated spots of denaturation in those brains. Price disagreed with Wright that there is no microscopic evidence of denaturation. He had deliberately denatured cells and observed the structural disorganization caused by the breakdown of protein. He testified that microscopic observation of brain sections from electrocuted prisoners showed no signs of denaturation. Regarding Wright's testimony that the brains of electrocuted prisoners were "firmed up," Bennett testified that denaturation of the brain is a process that continues after death so that findings in an autopsy do not necessarily reflect the brain's condition at death.

In contrast to Wright's testimony, Wikswo testified that the primary indication of thermal denaturation of brain tissue is

discoloration. Reports of isolated spots showing denaturation could have been caused by secondary heating of the skull under the electrode or by the current passing through the skull. But if a significant amount of the current was entering the brain, Wikswo and Price testified that they would have expected to see more damage to other parts of the brain. Instead, other parts of the brain showed no discoloration. Price testified that the isolated spots indicated that the current, which did enter the brain, was not uniform.

Although the experts disputed much of the physical evidence regarding denaturation, the strongest physical evidence that undercuts Wright's theories of total loss of brain function are signs of respiration.

Defense experts explained that parts of the brain located in the brain stem and extending up to the midbrain area control respiration and consciousness. These areas are deep within the brain, away from the skull where the electrode plate is attached. These areas of the brain are also the most resilient. Because consciousness and respiratory control centers are in close proximity, if a prisoner is still breathing after the current is stopped, then it is likely that neither area has been depolarized to the point of incapacity. Bennett explained that even if electroporation had injured neuron cells to the point that they will die, the effect is like a bad burn to a body. The person does not die immediately but dies as the effects keep overwhelming the person's ability to recover. He stated that even after prolonged exposure to high voltage, persons still have brain function; they do not die immediately.

Regarding loss of brain function, Wright testified that the best indication of brain death was whether a person can breathe unassisted. Yet, he admitted that if a prisoner were still breathing, it indicated significantly less current had passed through the brain than he had predicted. Also, he admitted that evidence of respiration could not be reconciled with his theory that the brain instantly stops functioning. Finally, he admitted that if the prisoner were still able to breathe after the current were stopped, the prisoner could obtain more brain function and even possibly survive.

*(iv) Evidence Shows Some Prisoners Still Alive*

The State does not conduct autopsies of electrocuted prisoners to review the effects of electric current on the body or the condition of internal organs. But physicians were present at all of the electrocutions in Nebraska before 1994 and checked prisoners for signs of life. Nebraska electrocuted 15 men from 1920 to 1997. There are obviously no longer witnesses of the early executions, so we refer to newspaper accounts in those cases that are part of this record. The evidence shows that in three known executions, or 20 percent of the total, physicians or eyewitnesses reported that the prisoner was still breathing or alive after the initial application of current. The most dramatic account of a prisoner's being alive after the current was stopped involved almost the same voltage and length as are provided for in the 2004 protocol.

In the 1929 electrocution discussed above, the executioner applied a current with 15 amperes and 2,300 volts for 19 seconds. After officials removed the straps, the physicians examined the prisoner. During the second physician's examination, the prisoner's chest moved, and "[c]onvulsive heaving of the youth's chest and a deep throaty rattle soon gave evidence that [the prisoner] was still breathing." This movement continued at intervals that became shorter and shorter, followed by a throaty rattle "like a deep snore" that also continued at intervals. The physicians again listened for his heartbeat and signaled to the executioner to reapply the current.

Furthermore, the evidence indicates that in the 1994 electrocution, the State applied 2,450 volts for 17 seconds and that the prisoner was still breathing afterward. As noted, the 1994 protocol required prison officials to apply two sequences of current: 2,450 volts for 8 seconds, followed by 480 volts for 22 seconds. However, the prison administrator who developed the 1994 protocol testified that in 1994, he recommended officials apply the 2,450-volt current for 17 seconds instead of 8 seconds in the first sequence, because the prisoner weighed 212 pounds. He believed his recommendation was accepted. No other testimony refutes or confirms this alteration. But if true, in 1994, the State had to apply 2,450 volts for 2 seconds longer than the 15 seconds required by the 2004 protocol. An eyewitness

testified that the prisoner appeared to be breathing after the executioner stopped the initial current and that she heard him make a low guttural growl near the end of the second jolt.

As the district court noted, Nebraska is not unique in reports of prisoners breathing after the current is stopped. A defense expert, who had extensively reviewed eyewitness accounts of electrocutions in other states, testified that prisoners occasionally show signs of consciousness during an electrocution. For example, he stated that a second application of current was required in 15 percent of the electrocutions conducted in Virginia. He had also reviewed 15 narrated audiotapes of judicial electrocutions in Georgia. In two cases, there were signs of consciousness. One prisoner had a nervous tic and was bobbing his head when he was led into the death chamber. After the first current sequence, the officials noted that he was still breathing and then started to bob his head again.

Similarly, defense experts testified that many reports exist of prisoners still breathing after the current is stopped. They also pointed out there are many examples of high voltage shock victims who survived. Those victims reported remaining conscious throughout the shock, even when their head is the point of contact with a high voltage current. Bennett testified that individuals had retained full consciousness about 50 percent of the time. Persons who survived these shocks reported excruciating pain. Defense experts do not believe that prisoners are rendered instantly unconscious in a judicial electrocution and that they suffer similarly while conscious.

*(v) Sources of Pain in an Electrocution*

Obviously, a conscious prisoner would suffer excruciating pain from the electrical burning that is occurring in the body. But defense experts explained that there are other ways a high voltage current causes pain. Price had extensively researched pain mechanisms in the brain. He explained that the electric current that did enter the brain would excite multiple areas in the brain known to cause pain when electrically stimulated. Also, alternating current, which alternates in polarity 60 times per second and is used in electrocutions, is known to repetitively excite nerve tissue. Price also testified that a prisoner would

experience extreme air hunger because the prisoner cannot breathe while his or her diaphragm is rigidly contracted.

Bennett testified that he did not believe a prisoner's thalamus, which is the sensory relay center in the midbrain area, is completely destroyed in an electrocution; thus, a prisoner experiences extreme pain and suffering from electrical stimulation of sensory nerves in the skin and muscles. He explained that the skin is rich in nerve fibers with skin receptors that send messages to the brain when stimulated. Wikswo explained that the brain could not distinguish between different types of stimulations of pain receptors in the body or skin. Muscles also have pain receptors, so the violent contractions of muscles throughout the body would be painful. In addition, the heart's contraction is like the pain of a heart attack.

Wright admitted that when an electric current passes through the body from hand to hand, shock victims who suffer depolarization in their joints do not instantly lose functioning in their arms and hands and still feel intense pain. Further, his admissions during cross-examination bolster the defense experts' opinions that this type of conscious suffering is possible.

*(vi) Evidence Supports Court's Finding That Some Prisoners Will Experience Unnecessary Pain, Suffering, and Torture*

This evidence substantially supports the district court's conclusion that electrocution "will result in unnecessary pain, suffering, and torture" for some condemned prisoners. Contrary to the State's argument, there is abundant evidence that prisoners sometimes will retain enough brain functioning to consciously suffer the torture high voltage electric current inflicts on a human body. The evidence supports the district court's statement that instantaneous and irreversible brain death is a myth. As Wright admitted, "[i]f you reduce the amount of current or you interpose something with a high resistance in that same pathway, then you will create an implement of torture." According to the evidence, that "something" in some cases is the prisoner's skull.

The evidence also supports the district court's statement that the evidence shows one application of current will not always

kill a prisoner. And sometimes, a prisoner will die more slowly from oxygen deprivation and damage to the body's vital organs. The State's expert admitted that a prisoner who can breathe could survive and regain more brain function, even assuming that the prisoner lost total consciousness during the application of the current. No one knows how long a prisoner could languish in agony, attempting to breathe, while the State passively waits to see if he or she dies.

This evidence shows that death and loss of consciousness is not instantaneous for many condemned prisoners. Far from the assumption in early U.S. Supreme Court decisions that "[e]lectrocution has been approved only in a form that eliminates suffering,"[197] the evidence here shows that electrocution inflicts intense pain and agonizing suffering. The record supports the district court's statement that no expert could predict with certainty the result for any particular condemned prisoner. But certainty is not required. The standard is whether the punishment creates a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution.

We reject the State's argument that electrocution would not be cruel and unusual punishment if a prisoner remained conscious for 15 to 30 seconds. Fifteen to thirty seconds is not a blink in time when a human being is electrically on fire. We reject the State's argument that this is a permissible length of time to inflict gruesome pain. It is akin to arguing that burning a prisoner at the stake would be acceptable if we could be assured that smoke inhalation would render him unconscious within 15 to 30 seconds.

[42] Given the evidence and the district court's finding thereon, we conclude that electrocution will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain in a judicial execution by electrocution.

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[197] *Resweber, supra* note 119, 329 U.S. at 474 (four-justice dissenting opinion).

### (j) Conclusion: Electrocution Is Cruel and Unusual Punishment

[43] Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty. Examined under modern scientific knowledge, "[electrocution] has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber" of state prisons.[198] We conclude that death by electrocution as provided in § 29-2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9.

### (k) Resolution

Having concluded that electrocution is cruel and unusual punishment, we face the question of how to dispose of this appeal. The fact remains that although the Nebraska statutes currently provide no constitutionally acceptable means of executing Mata, he was properly convicted of first degree murder and sentenced to death in accord with Nebraska law. We have already affirmed his conviction.[199] His sentence of death, although it cannot be implemented under current law, also remains valid.

[44,45] Under Nebraska law, the sentencing panel can fix the sentence either at death or at life imprisonment.[200] Because a panel's sentencing authority does not extend beyond that, the method of imposing a death sentence is not an essential part of

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[198] *Jones v. State*, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting).

[199] See *Mata I, supra* note 2.

[200] See Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2006).

the sentence.[201] And Nebraska's statutes specifying electrocution as the mode of inflicting the death penalty are separate, and severable, from the procedures by which the trial court sentences the defendant.[202] In short, that a method of execution is cruel and unusual punishment "'"bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."'"[203] Because we find no error in imposing a sentence of death, we affirm the district court's judgment.

[46] On direct appeal in a capital case, our responsibility extends beyond the validity of the conviction and sentence. We are also charged with the duty to administer and supervise the implementation of the death penalty by appointing the day for execution of the sentence and issuing a death warrant.[204] It is in exercising that duty that we have considered whether electrocution is constitutional.[205] And obviously, the State cannot carry out Mata's sentence without a constitutionally acceptable method of execution.

Thus, although we affirm the judgment, we decline to "appoint a day certain for the execution of the sentence"[206] and stay Mata's execution.[207] When the State moves that an execution

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[201] See, *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978); *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948). Cf., *Malloy, supra* note 115; *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997); *State v. Jones*, 200 La. 808, 9 So. 2d 42 (1942); *State v. Brown*, 342 Mo. 53, 112 S.W.2d 568 (1938); *State v. Fitzpatrick*, 211 Mont. 341, 684 P.2d 1112 (1984); *Alberty v. State*, 10 Okla. Crim. 616, 140 P. 1025 (1914); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc).

[202] See, § 29-2532 and Neb. Rev. Stat. § 29-2533 (Reissue 1995); 1913 Neb. Laws, ch. 32, § 1, p. 108. Cf. *Dawson, supra* note 154.

[203] See, *People v. Samayoa*, 15 Cal. 4th 795, 864, 938 P.2d 2, 48, 64 Cal. Rptr. 2d 400, 446 (1997). Accord *People v. Holt*, 15 Cal. 4th 619, 937 P.2d 213, 63 Cal. Rptr. 2d 782 (1997). See, also, *Com. v. Terry*, 513 Pa. 381, 521 A.2d 398 (1987).

[204] See, *Moore, supra* note 97; *State v. Palmer*, 246 Neb. 305, 518 N.W.2d 899 (1994); Neb. Rev. Stat. § 29-2528 (Reissue 1995).

[205] See *Moore, supra* note 97.

[206] § 29-2528.

[207] See *Moore, supra* note 97.

date be set, in addition to the other requirements for such a motion,[208] the State should allege, and be prepared to demonstrate, that a constitutionally acceptable method of carrying out Mata's sentence is available.

## VI. CONCLUSION

Mata's sentence of death is affirmed. But under our system of government, while the Legislature may vote to have the death penalty, it must not create one that offends constitutional rights. We recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it. Condemned prisoners must not be tortured to death, regardless of their crimes.

And the evidence clearly proves that unconsciousness and death are not instantaneous for many condemned prisoners. These prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body. The evidence shows that electrocution inflicts intense pain and agonizing suffering. Therefore, electrocution as a method of execution is cruel and unusual punishment in violation of the Nebraska Constitution, article I, § 9. And, without a constitutionally acceptable method of execution, Mata's sentence of death is stayed.

SENTENCE AFFIRMED, AND EXECUTION STAYED.

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[208] See *Palmer, supra* note 204.

HEAVICAN, C.J., concurring in part, and in part dissenting.

Although I agree with the first seven parts of the majority's analysis, I respectfully dissent from the majority's conclusion that electrocution—a means of execution used in America for well over a century—is no longer constitutional. I therefore write separately to not only voice my dissent from that conclusion, but also to express sincere reservations with several aspects of the analysis used to generate it.

## I.

Early in its analysis, the majority acknowledges that the U.S. Supreme Court has indicated electrocution is not cruel

and unusual. Accordingly, the majority concedes that it has no authority to hold that electrocution violates the Eighth Amendment. But as it is this court's "duty to safeguard our state Constitution," the majority purports to resolve whether "electrocution is prohibited by the Nebraska Constitution's proscription against inflicting cruel and unusual punishment." After a lengthy analysis, the majority concludes that electrocution is, in fact, a violation of the Nebraska Constitution.

The concern, of course, is that we have long held that our constitution's cruel-and-unusual-punishment provision is no more stringent than is the Eighth Amendment to the federal Constitution.[1] Thus, if the Nebraska Constitution does not require anything more than the federal Constitution regarding cruel and unusual punishment, and the U.S. Supreme Court has indicated that electrocution is not cruel and unusual under the federal Constitution, I cannot see how electrocution violates the Nebraska Constitution.

A.

Conceivably, the majority could have reached its result by merely overruling the cases which established the similarity between the Nebraska and federal Constitutions. However, the majority's opinion lacks any such declaration. I trust that if the majority intended such a sweeping change in our constitutional doctrine, it would have done so explicitly.

Moreover, even if the majority had held that the Nebraska Constitution requires more than the federal Constitution, such a position would be difficult to defend. As the majority acknowledges, the cruel-and-unusual-punishment provision in article I, § 9, of the Nebraska Constitution contains the exact same language as that found in the Eighth Amendment. Both provisions provide that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment[s]

[1] *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003); *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999); *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985).

inflicted."[2] Of course, it would be exceedingly difficult—and perhaps a touch disingenuous—to insist that identical language has two different meanings.

It should be indisputable that either the Nebraska Constitution is a mirror of the Eighth Amendment, in which case U.S. Supreme Court precedent is conclusive, or that the Nebraska Constitution requires more than the Eighth Amendment, in which case this court would not be bound by U.S. Supreme Court case law. By contradicting U.S. Supreme Court precedent and yet declining to say that article I, § 9, is any different than the Eighth Amendment, the majority has left us in a sort of constitutional limbo: Our state's constitutional limit on cruel and unusual punishment is not quite like the federal Constitution, yet not quite distinct from it either.

The confusion surrounding the majority's constitutional analysis is heightened when the majority relies on "federal precedent for guidance" on this issue. The numerous subsequent cites to federal case law confirm that the majority retained federal court approaches to this Eighth Amendment question, yet jettisoned the U.S. Supreme Court's ultimate answer. In other words, the majority relied upon those aspects of federal law that supported its conclusion and ignored the remainder that did not.

B.

Indeed, the unmistakable tone of the majority opinion is that *In re Kemmler*[3]—the U.S. Supreme Court decision most often cited as support for the constitutionality of electrocution—is an anachronism. The majority relies upon the dissent to *Glass v. Louisiana*,[4] in which Justice Brennan expresses the belief that *In re Kemmler* "was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience."

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[2] U.S. Const. amend. VIII; Neb. Const. art. I, § 9.

[3] *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890).

[4] *Glass v. Louisiana*, 471 U.S. 1080, 1081, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985) (Brennan, J., dissenting from denial of certiorari; Marshall, J., joins).

Accordingly, Justice Brennan—and, indeed, the majority here—regards *In re Kemmler* as "antiquated authority."[5]

Not long after expressing such sentiment, the majority points out that Nebraska is the only state that mandates electrocution and that the U.S. Supreme Court will almost certainly not "accept an appeal on the issue from any other jurisdiction." As such, the majority feels an ultimate determination as to the constitutionality of electrocution "has fallen to this court."

These comments suggest the majority believes that by striking down electrocution under the Nebraska Constitution, it is doing what the modern U.S. Supreme Court would do under the Eighth Amendment if it, too, were "presented with evidence of a nature and quality that the Supreme Court never considered when it held electrocution was not cruel and unusual punishment." This would explain the majority's decision to resolve this case under article I, § 9, of the Nebraska Constitution—a move that obviates the need to defer to "antiquated" U.S. Supreme Court authority—yet nonetheless rely entirely on federal Eighth Amendment precedent.

Of course, if the majority were truly confident that it is not doing anything the U.S. Supreme Court itself would not do today, it would not have been necessary to draw the Nebraska Constitution into the question. Instead, the majority could have simply emphasized *In re Kemmler*'s antiquity, highlighted the uniqueness of this factual record, and then expressed that it wished it could—but was unable to—reach a different result.[6] This would have given the U.S. Supreme Court the opportunity to grant certiorari and overrule precedent the majority believes is so clearly outdated. Instead, the majority chooses to essentially retain the Eighth Amendment's proscriptions but avoids the problem of having to overrule a U.S. Supreme Court decision by purporting to reach its result under the Nebraska Constitution.

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[5] *Id.*, 471 U.S. at 1083.

[6] See, e.g., *Trident Center v. Connecticut General Life Ins.*, 847 F.2d 564 (9th Cir. 1988) (discussing *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 442 P.2d 641 (1968)).

While this approach may serve the majority's purpose, I believe it does so at the expense of clarity in our constitutional doctrine. Before today's decision, lower courts could rest with confidence on the belief that our constitution requires nothing more than the Eighth Amendment with regard to methods of punishment. By reaching a conclusion that contradicts U.S. Supreme Court precedent, this decision will give lower courts reason to question that belief. At a minimum, attorneys may exploit the ambiguity in today's decision in subsequent cases.

C.

Given the majority's reliance on the Nebraska Constitution, there may be speculation that today's decision is immune from certiorari review. If true, the majority's decision would conclusively resolve the constitutionality of electrocution because, as the last state that mandates electrocution, the U.S. Supreme Court could only address the constitutionality of execution on an appeal from this court. For reasons set forth below, I am of the belief that today's decision is not immune from certiorari review despite the majority's references to the Nebraska Constitution.

It is well settled that the U.S. Supreme Court is precluded from hearing an appeal from a state's highest court where that court's decision was the product of state law—statutory or constitutional.[7] This rule of independent and adequate state grounds reflects the principle that state courts are the final arbiters of their own laws.[8] In such cases, it would be superfluous, and thus a violation of Article III's proscription against advisory opinions, for the Court to resolve any remaining federal issues.[9] The question, however, is how to identify whether a state court's decision truly rests on independent and

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[7] John E. Nowak & Ronald D. Rotunda, Constitutional Law § 2.13 (7th ed. 2004).

[8] *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

[9] *Id.*

adequate state grounds. The Court addressed this very question in *Michigan v. Long*.[10]

At issue in *Long* was whether a police officer could conduct a protective search of the passenger compartment of an automobile that had been lawfully stopped. Citing its state constitution, the Fourth Amendment, and federal case law, the Michigan Supreme Court concluded that such a search was illegal. The U.S. Supreme Court granted certiorari. Before addressing the merits of the case, the respondent argued that the U.S. Supreme Court did not have jurisdiction to hear the case because the Michigan Supreme Court's decision was based on the Michigan Constitution and thus had an independent and adequate state ground.

In response to that argument, the U.S. Supreme Court announced that when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[11]

The rationale is that when a state court construes state law in light of federal authorities, "[t]he state ground is not really 'independent' of the federal ground."[12] In that case, "the U.S. Supreme Court may review because the state court may have misapprehended federal law."[13]

Applying its rule to the case before it, the U.S. Supreme Court in *Long* concluded that the Michigan Supreme Court's decision did *not* rest on independent and adequate state grounds. The Court noted that "[a]part from its two citations to the State Constitution, the [Michigan Supreme Court] relied *exclusively*

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[10] *Long, supra* note 8.

[11] *Id.*, 463 U.S. at 1040-41.

[12] Nowak & Rotunda, *supra* note 7 at 112.

[13] *Id.*

on its understanding of . . . federal cases."[14] Moreover, the Court observed that "[n]ot a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional."[15]

The same is true of the majority's opinion in this case. Although the majority refers to the Nebraska Constitution, it fails to cite to a single Nebraska case in support of its conclusion that electrocution is unconstitutional. The entirety of the majority's analysis is based on cites to federal case law. Indeed, the majority itself conceded that it "look[ed] to federal precedent for guidance" in deciding this issue. Under *Long*, such reliance suggests that the majority's decision is without an independent state ground.

The majority's assertion that "the Nebraska Constitution governs this issue" does not at all diminish this fact. First, the majority never declares that the Nebraska Constitution is more restrictive than the Eighth Amendment. But even if it had, that alone would almost certainly not have been enough to overcome the effect of the majority's reliance on federal case law in light of *Long*: "Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law."[16] As a result, the majority's "references to the State Constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law."[17]

## II.

I am also hesitant about the majority's conclusion that "[a] method of execution violates the prohibition against cruel and

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[14] *Long, supra* note 8, 463 U.S. at 1043 (emphasis in original).

[15] *Id.*

[16] *Id.*, 463 U.S. at 1044. See, also, *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

[17] *Long, supra* note 8, 463 U.S. at 1044 (emphasis in original).

unusual punishment if there is a substantial foreseeable risk, inherent in the method, that a prisoner will suffer unnecessary pain." My concerns with this standard are twofold.

First, I note that in numerous cases, the U.S. Supreme Court has held that capital punishment "must not involve the unnecessary *and wanton* infliction of pain."[18] Yet in a subtle shift, the majority dropped the words "and wanton" from its standard so that it speaks only to an unnecessary infliction of pain. The result is that a prisoner need not show any culpability on the part of the government to invalidate a method of execution.

In justifying the decision to omit "and wanton" from the opinion, the majority explained that it does "not believe 'wanton' in the context of state sanctioned punishment implies a mental state." Rather, the majority believes that the U.S. Supreme Court's use of "wanton" was superfluous and simply another way of saying "inherently cruel." Accordingly, the majority concludes that a "legislative intent to inflict cruel and unusual punishment is not a relevant consideration in a method-of-punishment challenge." As support for this conclusion, the majority relies on the Supreme Court's opinions in *Trop v. Dulles*[19] and *Francis v. Resweber*.[20] I believe the majority's reliance is misplaced.

*Trop* dealt with the constitutionality of a statute which officially divested wartime deserters of their status as American citizens. But only four justices—Chief Justice Warren and Justices Black, Douglas, and Whittaker—addressed the statute's constitutionality under the Eighth Amendment. Justice Brennan, writing separately, found that the law exceeded Congress' authority "to raise and maintain military forces to wage war."[21] Consequently,

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[18] *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (emphasis supplied). Accord, *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004); *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

[19] *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion).

[20] *Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947).

[21] *Trop, supra* note 19, 356 U.S. at 107 (Brennan, J., concurring).

Justice Brennan never addressed the statute's constitutionality under the Eighth Amendment and does not provide a fifth vote for the plurality's Eighth Amendment analysis. Therefore, to the extent that *Trop* does, in fact, show that a legislative intent to inflict pain is irrelevant in assessing the cruelty of a punishment, that premise would be one without majority support.

Much the same can be said of *Resweber*. As the majority readily concedes, *Resweber* was also a four-justice plurality decision. In fact, rather than standing for the proposition that "state officials' lack of intent to cause pain was irrelevant," *Resweber* arguably suggests the opposite. The plurality's conclusion that what transpired in Louisiana was not cruel or unusual was based, at least in part, on the fact that "[t]here [wa]s no *purpose* to inflict unnecessary pain . . ." attributable to the government.[22] At a minimum, *Trop* and *Resweber* show that the idea that a lack of intent to inflict pain is irrelevant in the cruel-and-unusual-punishment analysis is an idea that has never received majority support from the U.S. Supreme Court at any given time.

Instead of *Trop* or *Resweber*, I would point to the U.S. Supreme Court's more recent decision in *Wilson v. Seiter*[23] to help resolve this issue. In *Wilson*, a majority of the Supreme Court reemphasized that "only the '"unnecessary *and wanton* infliction of pain"' implicates the Eighth Amendment."[24] Accordingly, the Court held that "a prisoner advancing such a claim must, at a minimum, allege 'deliberate indifference'" because "'[i]t is *only* such indifference' that can violate the Eighth Amendment . . . ."[25] I think the Court's statements in *Wilson* are sufficiently clear to conclude that "wanton" as used in the Eighth Amendment standard is not superfluous but actually requires at least deliberate indifference, if not outright intent, on the part of the government.

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[22] *Resweber, supra* note 20, 329 U.S. at 464 (emphasis supplied).

[23] *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

[24] *Id.*, 501 U.S. at 297 (emphasis in original) (quoting *Estelle, supra* note 18).

[25] *Id.* (emphasis in original) (quoting *Estelle, supra* note 18).

My second concern with the majority's formulation is that when used independently, the word "unnecessary" creates "too much leeway for a court to declare one method of execution unconstitutional merely because it found another was better."[26] If the majority's use of "unnecessary" is strictly construed, even an extremely small amount of discomfort would be "unnecessary" if some other method—even one far more costly and burdensome—resulted in no pain at all.

A simple hypothetical illustrates this point. Suppose that tomorrow a skin patch is developed which, when applied to an inmate's arm, results in as quick and painless a death as lethal injection now offers. As compared to the skin patch, all the discomfort associated with the injection process—bracing the prisoner's arm, attaching the intravenous bracket, fumbling for a vein, and of course, inserting the needle—would technically be "unnecessary." As a result, lethal injection would be unconstitutional under the majority's standard.

It seems, therefore, that a standard which prohibits the use of "unnecessary pain" is really a standard which demands the least painful method. It is beyond dispute, however, that neither the Eighth Amendment nor the Nebraska Constitution requires the least painful method of execution; those provisions prohibit only the use of cruel and unusual methods.[27] This is evident from the structure and language of the constitutional provisions themselves. Had those provisions been intended to require the least painful method of execution, they would have been written as directives, not limitations.

Whether or not a least-painful standard was the majority's intent, its formulation is open to such an interpretation. To avoid this pitfall, I would refrain from using the phrase "unnecessary pain" as the guiding principal in the analysis. Rather, I believe prior references to "unnecessary pain" refer to methods of execution that are "manifestly cruel and unusual,"[28] such as

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[26] Brief for amicus curiae of the Criminal Justice Legal Foundation in support of respondents at 17, *Baze v. Rees*, case No. 07-5439 (U.S. July 11, 2007).

[27] *Gregg, supra* note 18; *Michalski, supra* note 1.

[28] *In re Kemmler, supra* note 3, 136 U.S. at 446.

those involving torture, a lingering death,[29] or other hallmarks of a "purpose to inflict unnecessary pain."[30] Relying upon the discussion of deliberate indifference from above, one way such a standard might be formulated is to say that constitutional bans on cruel and unusual punishment prohibit "deliberate indifference to an unreasonable risk of severe and prolonged pain in execution."[31] While this may not be an ideal standard, at a minimum, such language would avoid the confusion inherent in the majority's formulation and, in my view, move us closer to the Eighth Amendment's true proscriptions.

III.

Having detailed several concerns with the majority's opinion, I come now to what I believe is its most troublesome aspect: reliance on so-called evolving standards of decency.

The concern with evolving standards of decency in the cruel-and-unusual-punishment context can be traced back to the plurality opinion in *Trop*.[32] There, a plurality of the Court remarked that the Constitution prohibits punishments that run contrary to the "evolving standards of decency that mark the progress of a maturing society."[33] At least initially, the primary indicia of changes in societal standards were "statutes passed by society's elected representatives."[34]

It is true that electrocution has fallen into disfavor among American jurisdictions. Nebraska is the only jurisdiction that retains the electric chair as the sole method of execution and is one of a handful of states that uses the electric chair at all. Even so, it is not necessarily true that the movement away from electrocution has been uniformly precipitated by concerns

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[29] See *id.*

[30] *Resweber, supra* note 20, 329 U.S. at 464.

[31] Brief for amicus curiae of the Criminal Justice Legal Foundation in support of respondents, *supra* note 26 at 18.

[32] *Trop, supra* note 19.

[33] *Id.*, 356 U.S. at 101.

[34] *Stanford v. Kentucky*, 492 U.S. 361, 370, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), *abrogated on other grounds, Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

regarding decency. It may be, for example, that states widely favor lethal injection over electrocution simply because lethal injection is a more practical method of terminating a life.

There is also reason to believe that "[t]he nationwide change to lethal injection was motivated at least as much by a desire to end the litigation over the previous methods [of execution] and the attendant delays as it was by the actual desire to abandon the old methods [themselves]."[35] For example, there is evidence that the change from cyanide gas to lethal injection in California was prompted not by humanitarian concerns, but, rather, to avoid protracted and costly legal challenges to the use of cyanide gas by death row inmates.[36] It is tempting to speculate that Florida's legislature may have been motivated by similar concerns when it changed from electrocution to lethal injection after the U.S. Supreme Court agreed to review the Florida Supreme Court decision upholding electrocution.[37] But even if the trend away from electrocution could be explained solely on the basis of humanitarian concerns, I would still not be convinced that such a concern should factor into our constitutional analysis.

A.

The most significant difficulty with a concern for contemporary standards is that it inherently tempts judges to inject their own subjective values into the constitutional analysis. The danger in such subjectivity is subtle but nonetheless potent. Judges do not sit as a body of elected representatives, as do legislatures. While this distinction provides a degree of independence necessary for judges to make the unpopular decisions that a neutral reading of the law sometimes compels,[38] it also renders courts

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[35] Brief for amicus curiae of the Criminal Justice Legal Foundation in support of respondents, *supra* note 26 at 11.

[36] *Id.*

[37] See *Bryan v. Moore*, 528 U.S. 960, 120 S. Ct. 394, 145 L. Ed. 2d 306 (1999) (granting certiorari to *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999)).

[38] See William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepp. L. Rev. 227 (1980).

ill suited "to respond to the will and consequently the moral values of the people."[39]

Although some may view the Constitution as an invitation to "our judges, to expand on the . . . freedoms that are uniquely our heritage,"[40] this view somewhat naively assumes that judges will always seek to "expand" rather than constrict liberties. If left free to supplant their own values on the cases before them, judges may just as easily seek to limit individual rights as expand them. This, of course, is to say nothing of the fact that a true expansion of rights is a practical impossibility. It is often the case that an expansion of rights for one group results in a loss of rights for others.[41] In this way, subjective judicial decisionmaking paves "a two-way street that handles traffic both to and from individual rights"[42] and therefore presents a danger to any and all ideologies.

The majority downplays the concern that "a court's evaluation of contemporary values is subjective" by pointing out that the U.S. Supreme Court looks only "to objective criteria for this inquiry." However, one can argue that recent Supreme Court history confirms that even courts which initially intend to keep the inquiry into evolving standards truly objective will inevitably allow subjective value judgments to creep into the analysis.

In *Stanford v. Kentucky*,[43] the U.S. Supreme Court addressed whether executing individuals older than 16, but younger than 18, constituted cruel and unusual punishment. In the course of holding that such executions were not cruel and unusual, a four-member plurality observed that a court's role under the Eighth Amendment "is to *identify* the 'evolving standards

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[39] *Furman v. Georgia*, 408 U.S. 238, 383, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Burger, C.J., dissenting).

[40] See, e.g., Laurence H. Tribe, God Save This Honorable Court 45 (1985).

[41] See, e.g., *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); *Thomas v. Anchorage Equal Rights Com'n*, 102 P.3d 937 (Alaska 2004).

[42] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856 (1989).

[43] *Stanford, supra* note 34.

of decency'; to determine, not what they *should* be, but what they *are*."[44] As a result, the plurality held that an evaluation of contemporary standards should be based solely on the objective reality of legislative pronouncements, not "the preferences of a majority of this Court."[45]

A fifth justice, Justice O'Connor, essentially agreed with this premise, yet wrote separately to emphasize her belief that a court's own judgment is relevant when determining "whether the '"nexus between the punishment imposed and the defendant's blameworthiness"' is proportional."[46] Proportionality analysis is irrelevant when assessing the majority of Eighth Amendment issues,[47] including the constitutionality of a *method* of execution as opposed to the propriety of a death sentence *itself*. Therefore, for all practical purposes, Justice O'Connor added a fifth vote in support of the notion that a court's own judgment had no place in most Eighth Amendment debates.

But when the U.S. Supreme Court revisited the issue some 15 years later in *Roper v. Simmons*,[48] it held that the ultimate "task of interpreting the Eighth Amendment remains our responsibility."[49] On that basis, the Court held that executing minors offended conventional standards of decency.[50] Juxtaposing *Stanford* and *Roper* shows that even courts which initially set out with intent to objectively identify what conventional standards of decency are, will likely succumb to the ever-present temptation to subjectively say what those conventional standards should be. There is no doubt that the temptation for judges to inject subjective values into their decisions is always present. But assigning weight to conventional standards of decency does not merely open the door to subjectivity; it invites it.

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[44] *Id.*, 492 U.S. at 378 (plurality opinion) (emphasis in original).

[45] *Id.*, 492 U.S. at 379.

[46] *Id.*, 492 U.S. at 382 (O'Connor, J., dissenting).

[47] See *id.*

[48] *Roper, supra* note 34.

[49] *Id.*, 543 U.S. at 575.

[50] *Id.*

B.

There is also the possibility that concern for contemporary standards of decency will eventually lead courts to rely on foreign law. In *Stanford*, a majority of the Court emphasized that only "*American* conceptions of decency are dispositive"[51] and therefore rejected the contention that "sentencing practices of other countries . . . serve to establish . . . that the practice is accepted among our people."[52] But in *Roper*, the majority openly cited a number of foreign laws and ultimately gave weight to the fact that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[53]

Such an observation may well be true, but I do not believe it is relevant to our analysis. I agree that a legislature assessing the wisdom of a law might want to consider how business is done elsewhere. But a court's role is not to speculate on how a law might be written more effectively; its role is to assess what laws are forbidden by our constitutions. And yet all pretense of state or federal constitutional interpretation is lost the moment a judge looks to foreign law. *Roper* shows that a concern with contemporary standards of decency will inevitably lead to reliance on foreign law. After all, although our nation has a unique experience with constitutional interpretation, we have no monopoly on humanity.

Of course, it would be naive to assume that the influence of foreign law will always result in an "expansion" of personal liberties. For example, Justice Scalia has observed that reliance on foreign law would jeopardize the Fourth Amendment's exclusionary rule, abortion rights, and our nation's adherence to the separation of church and state.[54] Therefore, the specter that judges will rely on foreign law when interpreting our state and federal Constitutions is a broad-based concern.

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[51] *Stanford, supra* note 34, 492 U.S. at 369 n.1 (emphasis in original).

[52] *Id.*

[53] *Roper, supra* note 34, 543 U.S. at 577.

[54] *Roper, supra* note 34 (Scalia, J., dissenting).

C.

However, the problems with evolving standards of decency would not be eliminated even if we could somehow guarantee that the inquiry would be based solely on laws enacted by American legislatures. To begin, it is not at all clear exactly how such an objective analysis should proceed. For example, how many American jurisdictions are needed to show that society's standards of decency have evolved? In *Stanford*, the Court observed that only 15 of the 37 death penalty states refused to impose capital punishment on 16-year-old offenders and only 12 refused to do so for 17-year-old offenders.[55] In the 15 years between *Stanford* and *Roper*, a total of 18 state legislatures—or 48 percent of death penalty states—prohibited the execution of minors.[56] Despite a slight change in otherwise modest figures, the *Roper* majority declared a national "consensus" against the juvenile death penalty.[57] This declaration prompted a flurry of dissenting opinions from the four remaining members of the Court. In the close cases, even a reliance on solely objective indicia will lead to a vexing and contentious debate over how to read the numbers.

Moreover, all of this ignores the "danger in inferring a settled societal consensus from [such] statistics."[58] As Justice O'Connor observed in her concurring opinion in *Thompson v. Oklahoma*,[59] the death penalty has historically undergone dramatic fluctuations in social acceptance, reaching almost total extinction in the late 1960's and early 1970's.[60] As such, when the Court addressed the constitutionality of the death penalty in 1972, a reliance on evolving standards of decency would have compelled the conclusion that "the [death penalty] had become

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[55] *Stanford, supra* note 34.

[56] *Roper, supra* note 34 (Scalia, J., dissenting).

[57] *Id.*, 543 U.S. at 567 (majority opinion).

[58] *Thompson v. Oklahoma*, 487 U.S. 815, 854, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (O'Connor, J., concurring in judgment).

[59] *Id.*

[60] *Id.*

a relic, implicitly rejected by a new societal consensus."[61] Through hindsight, we now know that "any inference of a societal consensus rejecting the death penalty would have been mistaken."[62] But because "legislatures would very likely not have been able to revive" execution in the wake of a U.S. Supreme Court pronouncement that the practice violated the Constitution, the Court's mistaken assumption "would have been frozen into constitutional law."[63]

The final problem with drawing inferences from legislative responses to the death penalty is that such a practice fundamentally misunderstands the intent of constitutional prohibitions on cruel and unusual punishment. In concluding that electrocution is cruel and unusual, the majority points out that virtually every other death penalty state now uses lethal injection as their primary, if not solitary, method of execution. According to the majority, the switch to lethal injection has come " 'because it is universally recognized as the most humane method of execution.' "

However, as noted previously, the Eighth Amendment only prohibits governments from using cruel methods of punishment; it does not demand that they use the most humane methods. As such, it makes no sense to interpret that provision by looking to legislative enactments prompted by the desire to minimize cruelty. A legislative consensus that lethal injection is *more* humane than electrocution does not mean that electrocution is cruel in a more absolute sense. And yet, it seems to me that a more absolute definition of cruelty is, or at least should be, the concern under our constitutions.

The majority's alternative—a preoccupation with national consensus—is at once too lax and too strict in limiting methods of punishment. It is too lax because "[i]t reduces the function of the [E]ighth [A]mendment to bringing the occasionally deviant state into line with the rest."[64] As Professor Chemerinsky

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[61] *Id.*, 487 U.S. at 855.

[62] *Id.*

[63] *Id.*

[64] Erwin Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev. 43, 88 n.200 (1989).

observed, such an "approach would mean that horrible torture would be permitted under the Constitution so long as most states engaged in the practice."[65]

The skin-patch hypothetical illustrates why reliance on contemporary standards of decency is too strict. To refresh, assume that a skin patch is developed which, when applied to an inmate's arm, executes a prisoner as quickly and painlessly as lethal injection. Assume further that only one state continues to use lethal injection and every other death penalty jurisdiction switches to the skin patch. Would such a shift render lethal injection cruel and unusual punishment? It would if "cruel and unusual" is defined according to contemporary standards. But it would be a stretch to say that simply having one's arm held down while attendants search for a vein and insert a needle is unconstitutionally "cruel."

For these reasons, I believe that evolving standards of decency, even when based solely on evidence of legislative action, are best left out of the constitutional analysis. As alluded to above, I believe it far more accurate to say that the Eighth Amendment and article I, § 9, were designed solely to protect against "deliberate indifference to an unreasonable risk of severe and prolonged pain in execution."[66]

Regardless of the precise standard we use, hopefully the above has demonstrated that there is nothing to gain and much to lose by attempting to rely on contemporary standards of decency in assessing the constitutionality of a punishment. Of course, the U.S. Supreme Court's current case law forecloses us from construing the Eighth Amendment in line with these views. It does not, however, prevent us from refusing to make such an approach part and parcel of this state's constitution.

## IV.

Because I sincerely believe this precedent will have adverse consequences in future cases, I respectfully dissent from the portion of the majority opinion that finds electrocution to be unconstitutional.

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[65] *Id.*

[66] Brief for amicus curiae of the Criminal Justice Legal Foundation in support of respondents, *supra* note 26 at 18.

# Stephanie Blaine, appellant, v. Dennis Blaine, appellee.

744 N.W.2d 444

Filed February 15, 2008. No. S-06-927.

1. **Divorce: Contempt: Equity.** Dissolution of marriage cases are equitable in nature, and a civil contempt proceeding cannot be the means to afford equitable relief to a party.
2. **Divorce: Contempt: Property Division.** Under certain circumstances in a divorce action, it may be necessary for an individual to cite another party for contempt to determine whether the other party is holding property that properly belongs to that individual under the terms of a decree.
3. **Divorce: Final Orders: Intent.** Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
4. **Divorce: Pensions: Final Orders.** Where the terms of a final decree are unambiguous, a qualified domestic relations order enforcing that decree must dispose of assets in the manner required by the decree.
5. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.
6. **Contempt: Damages.** An award of damages is unavailable in a civil contempt proceeding.

Appeal from the District Court for Douglas County: Gerald E. Moran, Judge. Reversed and remanded with directions.

Charles M. Bressman, Jr., of Anderson & Bressman Law Firm, P.C., for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Gerrard, J.

Stephanie Blaine and Dennis Blaine were divorced in 1998, and a consent decree divided the marital estate. Dennis was responsible for preparing qualified domestic relations orders to divide certain investments that Dennis held. Dennis failed to do so for several years, and some of the investments depreciated. The question presented in this appeal is whether, when the investments were finally divided in 2006, Stephanie should

have been awarded her share based on the existing value of the investments or the value of the investments on the date specified in the decree.

## BACKGROUND

The parties were divorced by a consent decree entered in the district court on October 5, 1998. The decree divided a substantial marital estate and included, as relevant, the following three provisions:

> US Software Profit Sharing 401K Plan - This Plan will be divided pursuant to a Qualified Domestic Relations Order, equally between the parties as of February 3, 1998.
>
> Sitel Corporation 401K Plan - This account shall be divided pursuant to a Qualified Domestic Relations Order equally between the parties as of February 3, 1998.
>
> . . . .
>
> Intrust IRA Account . . . - This account shall be divided pursuant to a Qualified Domestic Relations order equally between the parties as of February 3, 1998.

Other asset divisions, not at issue in this case, more specifically stated that accounts were to be divided "based upon [their] value as of February 3, 1998." The decree further ordered the parties to "execute any and all documents necessary or proper to fulfill the terms and/or requirements of their Property Settlement Agreement as hereinabove set forth."

On December 15, 1998, Stephanie moved for an order requiring Dennis to, among other things, complete a qualified domestic relations order (hereinafter QDRO) with respect to each of the following accounts: US Software, Inc.; Sitel Corporation (Sitel); and Intrust Independent Trust Corporation (Intrust). A hearing was held the next day, at which Dennis' attorney explained that with respect to the QDRO's, he was "preparing those for division of those assets." The court noted on the record that Dennis' attorney "has agreed that he will now prepare the qualified domestic relations orders." Stephanie's counsel clarified that she wanted "to make sure that all documents reflect that February 3rd, 1998 date." She requested that "all of those documents reflect that date specifically for division of those assets pursuant to the decree." Dennis' counsel replied, "We have no problem with that." The court explained that

> there isn't going to be any more fooling around with this case. We are getting it over with. After today the only thing I expect to see are those qualified domestic relations orders which I will have to sign. Other than that, I do not expect to see the parties down here going over things that they have already been ordered to do.

But it was not until February 27, 2001, that a QDRO was filed in the court with respect to the US Software account, awarding "50% of the Plan as of February 3, 1998." However, US Software's corporate successor informed Dennis' counsel in a letter dated March 12, 2001, that it could not honor the QDRO because Dennis had moved the account to Piper Jaffray in September 2000. We note at this point that all of the accounts either moved or changed names at various times between the entry of the original decree and the contempt proceeding that is the subject of this appeal. While the relevant transfers are discussed below in more detail, for clarity's sake, each account is generally referred to by its original designation.

On July 2, 2004, Stephanie filed an application to show cause, asking the court to order Dennis to show cause why he should not be held in contempt of court for preparing only one of the three QDRO's necessary to transfer Stephanie's share of the investments at issue. The court issued such an order. A hearing was eventually held on June 28, 2006. The issue at the hearing was not whether the QDRO's should finally be entered, but the value of the assets to be transferred. Stephanie sought 50 percent of the value of the accounts as of February 3, 1998, while Dennis argued that the accounts should be divided at their existing value.

Stephanie testified that at the time of the hearing, she had not been presented with any QDRO's for any of the three accounts. She explained that the QDRO filed in 2001 had never been provided to her. Stephanie said she had, over the years, made several efforts to try to get her share of the accounts transferred to her. She testified that in 1999, she had called US Software, and that in 2000, she had written a letter, enclosing a copy of the divorce decree, but had not received a reply. Stephanie had also called Sitel in 1999 and written a letter in 2000. In response, Sitel had sent a letter to Dennis, copied to Stephanie,

instructing him how to divide the account. Stephanie said she wrote Dennis in 2000, asking him to help her transfer the accounts, but Dennis did not respond.

In 2000, Dennis attempted to transfer the Intrust account to Piper Jaffray. Intrust refused, informing Dennis that one of the reasons for the refusal was that Stephanie had sent Intrust a copy of the decree of dissolution. Dennis moved the Sitel account to Piper Jaffray in 2000, and then to Robert W. Baird & Co. Inc. The US Software account was also moved from US Software's corporate successor to Piper Jaffray and then to Robert W. Baird & Co. Dennis testified that he "assume[d]" that someone had prepared the QDRO's on his behalf and did not recall receiving a call or written communication suggesting that the US Software account could not be transferred. Nor did he recall receiving a letter from Stephanie asking him to help her transfer the accounts. Dennis explained that when he moved the accounts, he believed that Stephanie had already received her half. Dennis testified that although some of the accounts had been moved, he had not withdrawn any assets from any of the accounts.

George Morgan, a financial advisor, testified for Stephanie at the hearing and evaluated the worth of the US Software account as of February 3, 1998, as $360,963. The Sitel account had a value of $9,900 on January 1, 1998, but as of March 31, 1998, had a balance of $14,836.76. The Intrust account was valued, in a statement for the period from October 1 to December 31, 1998, at $17,880.58. Stephanie testified that the valuations for the Sitel and Intrust accounts were the closest dates of valuation to February 3, 1998, available in the records for each company.

The Intrust account, as of March 31, 2006, had appreciated in value to $42,400.17. The Sitel account, at the time of trial, had a value of "about $10,000." The value of the US Software account at the time of trial is more uncertain. As previously noted, Morgan valued the account at the time of the decree at $360,963. When the account was moved in September 2000, it was worth $147,176. And Dennis' counsel argued at the contempt hearing that "the account today is worth about $83,000." But there does not appear to be testimony or evidence in the record to substantiate that figure.

The district court found that since February 3, 1998, the value of the three accounts had decreased because of conditions in the stock market. But the court found that Stephanie had failed to prove that had the QDRO's been properly executed, she would have been able to increase the value of the assets from their present value. Thus, the court concluded that Dennis' one-half of the accounts was of equal value to Stephanie's at the time of trial and that Dennis had not increased his value over that to which Stephanie was entitled. The court concluded that Dennis was in contempt for failing to prepare the QDRO's and that Stephanie was entitled to "one-half of the current value" of the accounts.

On July 20, 2006, the court entered an order finding Dennis to be in contempt. On August 9, 2006, two QDRO's were filed in the court, apparently with respect to the Sitel and Intrust accounts, although this is not entirely clear from the record because of the movement of accounts to Robert W. Baird & Co. Each of these QDRO's awarded Stephanie "50% of the Plan," without specifying a date of valuation or division. On August 15, the court entered an order finding that Dennis had complied with the earlier order of the court and purged himself of contempt. On August 17, Stephanie appealed.

## ASSIGNMENT OF ERROR

Stephanie assigns, as consolidated, that the district court erred in awarding her one-half the current value of the accounts, instead of one-half the value as of February 3, 1998.

## ANALYSIS

As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate,[1] and the date of valuation is reviewed for an abuse of the trial court's discretion.[2] But the issue in this case is not the date upon which the accounts were to be valued for division. Instead, the issue is whether the QDRO's should have

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[1] See, *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000); *Walker v. Walker*, 9 Neb. App. 694, 618 N.W.2d 465 (2000).

[2] See, *Tyma, supra* note 1; *Walker, supra* note 1.

incorporated the February 3, 1998, date specified in the decree. A QDRO is, generally speaking, simply an enforcement device of the decree of dissolution.[3] And Dennis has not argued in this proceeding that the original decree should be modified based on fraud or gross inequity. Thus, Stephanie argues that the QDRO should reflect the date of valuation she contends was expressed in the decree.[4]

[1,2] We note that Stephanie's notice of appeal was filed on August 17, 2006—within 30 days of both the August 9 filing of the QDRO's and the August 15 discharge of Dennis' contempt. It is not clear from which order or orders she intended to appeal. In *Klinginsmith v. Wichmann*,[5] an appeal from the denial of an application for contempt, we observed that dissolution of marriage cases are equitable in nature, and a civil contempt proceeding cannot be the means to afford equitable relief to a party. But we also recognized that under certain circumstances, it may be necessary for an individual to cite the other party for contempt to determine whether the other party is holding property that properly belongs to that individual under the terms of a decree.[6] And we acknowledged that in making that determination, the trial court must attempt to resolve the question based upon the language of the decree and the evidence then presented.[7]

[3] Thus, a contempt proceeding is appropriate to resolve the meaning of disputed language in the decree under these circumstances.[8] Even though that may involve "interpretation" of the decree, the interpretation must be based on the language of the decree.[9] It is well settled that once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.[10] In other words,

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[3] *Koziol v. Koziol*, 10 Neb. App. 675, 636 N.W.2d 890 (2001).

[4] See, e.g., *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

[5] *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997).

[6] *Id.*

[7] *Id.*

[8] See *id.*

[9] *Id.*

[10] *Id.*

whether this appeal is regarded as having been taken from the district court's entry of the QDRO's or discharge of Dennis' contempt, the underlying issue is the same, and is determined as a matter of law: Were the QDRO's entered on August 9, 2006, consistent with the terms of the October 5, 1998, decree?

We addressed a similar issue in *Hoshor v. Hoshor.*[11] There, the parties were divorced pursuant to a consent decree providing that the wife "'should receive one-fourth of any payments received from the [husband's] pension and retirement plan by [the husband] at the time such payments are received.'"[12] Several years later, the district court granted the wife's request to enter a QDRO consistent with the decree, distributing one-fourth of the pension, without offsetting postdecree accumulations to the pension. On appeal, we affirmed the court's entry of the QDRO, reasoning that

> because the plain language of the parties' settlement agreement refers to the husband's pension plan, without limiting that term to pension benefits earned during the marriage, we conclude that the trial court was correct in finding that the parties intended that the wife would be entitled to the pension benefits that were earned by the husband both during the parties' marriage and after dissolution.[13]

[4] Although we concluded in *Hoshor* that the parties were required to share the effect of the postdecree change to the value of the disputed assets, *Hoshor* stands for the broader proposition that where the terms of a final decree are unambiguous, a QDRO enforcing that decree must dispose of assets in the manner required by the decree.

[5] In particular, the QDRO should reflect the value assigned and awarded in the decree. The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided. A specific, predictable date of valuation has the effect of clearly allocating the risk of any change in the value of the asset.[14] An early valuation date, as in this case, sensibly

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[11] *Hoshor, supra* note 4.

[12] *Id.* at 745, 580 N.W.2d at 518.

[13] *Id.* at 752, 580 N.W.2d at 522.

[14] *Quillen v. Quillen*, 671 N.E.2d 98 (Ind. 1996).

assigns the risk of a decline in the value of the asset to the party in control of the asset.[15] And because the valuation and distribution of a particular asset rarely takes place in a vacuum, a specific, consistent, and enforceable date of valuation permits the trial court to allocate all the assets of the marital estate in an equitable and fair manner.[16] Thus, the equitable distribution of the marital estate depends on enforcing the date of valuation expressed in the decree.

And contrary to Dennis' suggestion, the decree in this case clearly provided that February 3, 1998, was to be the valuation date of the disputed accounts. While some assets in the decree were more specifically divided "based upon [their] value as of February 3, 1998," Dennis does not explain what the language dividing the disputed accounts "equally between the parties as of February 3, 1998" means, if it is not the date upon which the value of the accounts was to be assessed.

The financial statements in the record illustrate that the IRA and 401K plans in which the disputed assets were invested at the time of the divorce were not portfolios of stocks, commodities, or other assets—they were simply investment accounts, with stated dollar values. The only reasonable interpretation of the decree is that Stephanie was awarded one-half of the dollar value of each account as of February 3, 1998. As a matter of law, that award controls the date of valuation for purposes of subsequent QDRO's.[17] (The allocation of changes in value in the US Software account, by the 2001 QDRO, does not reflect on the meaning of the original 1998 decree. The evidence indicates that the 2001 QDRO was prepared and submitted to the court by Dennis' counsel, without Stephanie's approval.)

This is not a situation, like *Hoshor*,[18] in which the decree clearly contemplated that postdecree changes in value were to

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[15] See *Reese v. Reese*, 671 N.E.2d 187 (Ind. App. 1996).

[16] See, e.g., *In re Marriage of Priddis*, 132 Cal. App. 3d 349, 183 Cal. Rptr. 37 (1982).

[17] See, e.g., *Kremenitzer v. Kremenitzer*, 81 Conn. App. 135, 838 A.2d 1026 (2004); *Grecian v. Grecian*, 140 Idaho 601, 97 P.3d 468 (Idaho App. 2004); *Perry v. Perry*, 143 S.W.3d 632 (Ky. App. 2004).

[18] *Hoshor, supra* note 4.

be shared by the parties. Nor is this a situation in which the decree did not assign a specific date of valuation.[19]

Instead, the situation in this case is apparent: the decree specified a valuation date for the disputed accounts, assigning the risk of a decline in the value of the assets to Dennis, the party in control of them. Had all the assets appreciated in value, Dennis, but not Stephanie, would have benefited from the increases.[20] Instead, some of the assets depreciated. But the date at which the value was to be determined was agreed upon by the parties and set forth in the decree.[21] Any perceived inequality was the result of a falling stock market, not an unequal distribution in the decree.[22]

And more importantly, that Dennis bears the brunt of that decline in value was solely precipitated by Dennis' inexcusable delay in entering the QDRO's required by the decree.[23] There is no suggestion in this case that any funds were added to, or withdrawn from, the disputed accounts after the decree was entered.[24] Nor was the delay in distribution the result of court proceedings, such as a bifurcated proceeding,[25] or an intervening appeal.[26] The record is clear that Dennis was responsible for filing the QDRO's to segregate the assets awarded by the decree—and, obviously, that Dennis (or his attorney) was responsible for the 8-year delay in complying.

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[19] Compare, e.g., *Austin v. Austin*, 748 A.2d 996 (Me. 2000); *Bradley v. Bradley*, 194 S.W.3d 902 (Mo. App. 2006); *Musick v. Musick*, 144 Md. App. 494, 798 A.2d 1213 (2002).

[20] See, e.g., *Perry, supra* note 17.

[21] See *Grecian, supra* note 17.

[22] See *id*.

[23] Compare, e.g., *In re Marriage of Hayden*, 124 Cal. App. 3d 72, 177 Cal. Rptr. 183 (1981), with *Bradley, supra* note 19.

[24] See, e.g., *Thompson v. Thompson*, 811 N.E.2d 888 (Ind. App. 2004); *Sample v. Sample*, 152 Ariz. 239, 731 P.2d 604 (Ariz. App. 1986).

[25] See, e.g., *Leis v. Hustad*, 22 P.3d 885 (Alaska 2001); *Fastner v. Fastner*, 427 N.W.2d 691 (Minn. App. 1988); *In re Marriage of Walters*, 91 Cal. App. 3d 535, 154 Cal. Rptr. 180 (1979). See, also, *Koziol, supra* note 3.

[26] See, e.g., *In re Marriage of Hitchcock*, 309 N.W.2d 432 (Iowa 1981); *Fastner, supra* note 25; *Sample, supra* note 24.

Dennis argues that because the Intrust account was an IRA, instead of a 401K, no QDRO was actually necessary to distribute the funds. The accuracy of that contention is not entirely clear, at least as far as the tax consequences are concerned.[27] But regardless, Dennis' contention is not on point. The decree directed Dennis to file a QDRO for the Intrust account, and he did not do so until after this contempt proceeding was brought. If proved, a good faith belief that a QDRO was not needed for division of the asset might be relevant to whether Dennis was willfully in contempt of court. But it would not obviate Stephanie's underlying right to one-half of the value of the account on the date specified by the decree.

[6] Dennis also relies on the district court's reasoning that Stephanie "failed to prove at trial that, had the QDROs been timely executed, that she would have been able to increase the assets from what they currently are." But it was not Stephanie's burden, in this proceeding, to prove that she was damaged by Dennis' failure to comply with the decree. In fact, an award of damages is unavailable in a civil contempt proceeding.[28] Instead, the purpose of this proceeding was to determine whether Dennis was holding property that properly belonged to Stephanie under the terms of the decree.[29] She was not required to prove what she would have done with the property, had it been made available to her earlier, in order to establish her legal right to possess it.

In short, we conclude that the district court erred in entering QDRO's that did not divide the disputed assets as of February 3, 1998, and in determining that by filing those QDRO's, Dennis had complied with the requirements of the decree. The court, in effect, permitted Dennis to modify the terms of the decree without establishing the factual basis for a modification. Stephanie's assignment of error has merit.

We note that the evidence at the contempt hearing was not entirely clear with respect to the value of the accounts as of

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[27] See *Bougas v. Commissioner*, 86 T.C.M. (CCH) 9 (2003).

[28] See, *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *Klinginsmith, supra* note 5.

[29] See *Klinginsmith, supra* note 5.

February 3, 1998, and that because of its disposition of this case, the district court made no findings with respect to valuation. On remand, it will be necessary for the district court to determine the sum to which Stephanie is entitled, representing one-half of the value of the accounts on February 3, 1998. We recognize, from the representations of counsel, that at least one of the accounts may have lost more than half of its February 3, 1998, value. If that proves to be the case, then it will be necessary for the court and parties to consider other ways in which Dennis can comply with the decree.

We also note that it is unclear whether valid QDRO's have, even now, been entered with respect to all of the disputed accounts. The record does not specify which assets were divided by the two August 9, 2006, QDRO's. The February 27, 2001, QDRO for the US Software account was apparently ineffective because the account had already been transferred to another investment. In other words, the record before us evidences three disputed accounts, but only two effective QDRO's, neither of which are consistent with the decree. On remand, it will be necessary for the district court to enter QDRO's effective as to all of the disputed assets.

## CONCLUSION

We reverse the judgment of the district court and remand the cause with directions. Specifically, the district court is directed to (1) determine the value of each of the disputed accounts as of February 3, 1998, and (2) supervise the entry of QDRO's transferring one-half of the February 3, 1998, value of each account to Stephanie. If the balance of any of the accounts is insufficient to satisfy the award, then the district court, assisted by the parties, should determine how Dennis will comply with the decree. Any other issues arising during those proceedings should be resolved by the district court in a manner consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., dissenting.

I disagree with the majority's central premise that the decree established February 3, 1998, as a "valuation date" for the retirement plan assets, resulting in an award to Stephanie of

"one-half of the dollar value of each account as of February 3, 1998." Had the award of a specific amount been the district court's intent, it could easily have done so in explicit terms,[1] but it did not.

In its division of the retirement plan assets, the court did not use a sum certain nor did it include a reference to "value," as it did with other marital assets. Rather, it provided that the retirement plan accounts were to be "divided . . . equally between the parties as of February 3, 1998." I interpret this language as identifying the assets held in the accounts on that date to constitute marital property subject to division and to award each party one-half of those assets.

For purposes of division of property in the dissolution of marriage, the marital estate includes "any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested."[2] The marital estate includes only that portion of a pension plan which is earned during the marriage, and contributions to pensions before marriage or after dissolution are not assets of the marital estate.[3] We have held that parties may agree to the division of pension and retirement plan assets acquired outside the marriage, notwithstanding that a court could not divide such assets without such an agreement.[4] That is not what the parties did in this case; here, they simply agreed that the assets held in the three retirement plan accounts as of February 3, 1998, were a part of the marital estate, to be divided equally between them.

The record reflects that the retirement plan accounts included stock, annuities, mutual funds, and some cash. The district court specifically found that the value in the accounts had decreased "due to conditions in the Stock Market." As the named participant in the plans, Dennis had the power to withdraw assets and thus controlled whether the assets held in each account

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[1] See, e.g., *In re Marriage of Knutson*, 114 Wash. App. 866, 60 P.3d 681 (2003).

[2] Neb. Rev. Stat. § 42-366(8) (Reissue 2004).

[3] *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998), citing *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997); *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

[4] *Hoshor v. Hoshor, supra* note 3.

on February 3, 1998, remained in the account at the time of the decree and subsequent entry of the QDRO's. However, Dennis had no control over the value of the assets held in the accounts.

The majority cites *Reese v. Reese*[5] for the proposition that an early valuation date "sensibly assigns the risk of a decline in the value of the asset to the party in control of the asset." In *Reese*, the valuation date concerned a business over which the appellant "had complete control of the company both before and after the petition for dissolution was filed."[6] In this case, unlike *Reese*, the value of the retirement accounts was determined by the market, not by any action or inaction by Dennis.

Under the majority's reasoning, Dennis would bear the risk of any decline in market value from February 3, 1998, until the entry of the QDRO, even if that entry were accomplished in a timely manner, and Stephanie would be deprived of the benefit of any appreciation in the value of the assets during the same period. There is no language in the decree to support this reasoning. Instead, the decree is entirely silent as to how market gains or losses occurring after February 3, 1998, and prior to entry of the QDRO's are to be treated by the parties in dividing the retirement plans "equally." Other courts have held that even where a decree refers to a specific "valuation date" for retirement plan assets, in the absence of express language stating otherwise, the decree implicitly contemplates that both parties will share all of the rewards and risks associated with an investment account, so that the parties share equally in gains or losses occurring after the valuation date and before division pursuant to a QDRO is accomplished.[7]

From the record, I conclude that this is what the court intended in this case. The 2001 QDRO for the US Software

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[5] *Reese v. Reese*, 671 N.E.2d 187 (Ind. App. 1996).

[6] *Id*. at 191-92.

[7] *Shorter v. Shorter*, 851 N.E.2d 378 (Ind. App. 2006); *Case v. Case*, 794 N.E.2d 514 (Ind. App. 2003); *Taylor v. Taylor*, 258 Wis. 2d 290, 653 N.W.2d 524 (Wis. App. 2002); *Niccum v. Niccum*, 734 N.E.2d 637 (Ind. App. 2000); *In re Marriage of Gardner*, 973 S.W.2d 116 (Mo. App. 1998). See, *Rivera v. Zysk*, 136 Md. App. 607, 766 A.2d 1049 (2001); *Austin v. Austin*, 748 A.2d 996 (Me. 2000).

account was entered by the same judge who entered the decree, and thus presumably reflected the court's intent. It states that "[a]ny gains, losses, income, depreciation or appreciation on [Stephanie's] interest in the Plan from and after February 3, 1998, shall be hers exclusively." It further states that any "gain, losses, income, depreciation or appreciation" on Dennis' interest, as well as "any new deposits to the Plan by or on behalf of [Dennis] from and after February 3, 1998" shall belong exclusively to Dennis. Stephanie's application to show cause filed in 2004 alleged that Dennis' counsel had prepared only one of the three QDRO's required by the decree, but did not take issue with the language of the 2001 QDRO. Although this language does not appear in the two subsequent QDRO's entered by the court in 2006, those later orders simply award Stephanie "50% of the Plan" with no reference to the February 3, 1998, date. Because the record reflects that Dennis did not withdraw any assets from any of the plans after February 3, 1998, I submit that all three QDRO's accomplished precisely what the decree intended: an equal division of the retirement plan assets which existed as of February 3, 1998, with fluctuation in market value shared equally by the parties. Under the majority's disposition, however, Stephanie will receive much more than 50 percent of the accounts, perhaps even 100 percent plus an additional payment. This is hardly the equal division required by the decree.

What Stephanie really seeks in this case is damages resulting from Dennis' delay in preparing the QDRO's. Citing cases from other jurisdictions, she argues: "If a former spouse is culpable for the delay in distribution, the other spouse can be awarded damages for the other's actions or, as in this case, inactions."[8] This argument fails for two reasons. First, as the district court noted, Stephanie did not prove that earlier execution of the QDRO's would have prevented the decline in market value of her interest in the retirement plans. Second, and more basic, damages are not recoverable in a civil contempt proceeding.[9]

For these reasons, I respectfully dissent.

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[8] Brief for appellant at 12.

[9] *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

# State of Nebraska, appellee, v. Richard L. Louthan, appellant.

744 N.W.2d 454

Filed February 15, 2008. No. S-07-593.

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. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
4. ____: ____: ____. 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.
5. **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 motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
6. **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.
7. **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.
8. ____: ____: ____. If reasonable suspicion exists, the court must then consider whether the detention was reasonable in the context of an investigative stop, considering both the length of the continued detention and the investigative methods employed.
9. **Investigative Stops: Probable Cause: Proof.** The degree of reliability of an informant that must be shown to justify an investigatory stop is less than that required to establish probable cause.
10. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual.

11. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Although a motorist's nervousness is an appropriate factor for consideration within the totality of the circumstances of a prolonged traffic stop, its presence is of limited significance generally.

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

Melissa A. Wentling, Madison County Public Defender, and Harry A. Moore for appellant.

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

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

STEPHAN, J.

After a bench trial in the district court for Madison County, Richard L. Louthan was convicted on one count of possession of a controlled substance. The principal issue on appeal is whether Louthan's Fourth Amendment rights were violated when a law enforcement officer prolonged a traffic stop for several minutes in order to deploy a drug detection dog. We conclude that there was no violation of Louthan's rights and that the evidence obtained from the vehicle as a result of the dog sniff was properly used to secure his conviction.

## I. BACKGROUND

Jason Bauer is a patrol officer and police service dog handler employed by the Norfolk Police Division. Late on the evening of December 2, 2006, Bauer was conducting surveillance on a Norfolk, Nebraska, residence. He was observing the residence because the police division had received complaints from neighbors about "stop-and-go traffic" indicative of drug activity. Also, Bauer had been informed by at least two persons whom he arrested for drug offenses that the owner of the residence was a methamphetamine distributor. Bauer's sources indicated drug activity had occurred at the residence as recently as November 2006. Bauer testified that he had observed the residence on previous occasions over the last 2 years and had

seen persons he knew to be actively engaged in the drug trade leaving the residence.

When he arrived at the residence, Bauer observed a vehicle parked nearby. Bauer determined that the vehicle was registered to Louthan and that the license plates had expired. Approximately 5 minutes after Bauer began his surveillance, he saw Louthan exit the residence and enter the vehicle. Bauer had not seen Louthan enter the residence and did not know how long he had been inside. Bauer initiated pursuit with the intent of stopping Louthan based on the expired plates. He also intended to request Louthan's permission to search the vehicle. Pursuant to police division policy, he requested a backup officer.

Bauer initiated the traffic stop based on the expired plates and Louthan's failure to signal a turn. Louthan acknowledged that he had come from the residence which Bauer had been observing. Bauer questioned Louthan about his involvement with drugs, and Louthan stated that he was free on bond on a pending charge of possession of a controlled substance and that an attempted manufacture charge had also been filed against him. Bauer asked Louthan when he had last used controlled substances, and Louthan responded that it was in September 2006, when he was arrested for possession. Bauer asked Louthan to step out of the vehicle and obtained consent to search Louthan's person. The search revealed nothing of consequence. Bauer then requested permission to search the vehicle, but Louthan refused. Bauer testified that Louthan became "extremely nervous" at this point, although in his report, he noted that Louthan was "somewhat nervous."

Bauer then called the police dispatcher and determined that Louthan's operator's license was valid and that he had no outstanding warrants. As he was doing this, the backup officer arrived on the scene. After completing his conversation with the dispatcher, Bauer directed Louthan to remain with the backup officer. Bauer then retrieved his drug detection dog from his vehicle and directed the dog to sniff the exterior of Louthan's vehicle. At that point, approximately 7 minutes had elapsed since the inception of the traffic stop.

The dog did not alert in his initial pass around the vehicle. Bauer then began to "detail," directing the dog to sniff in certain

locations of the vehicle. The dog alerted and eventually indicated the scent of drugs near the middle of the front hood of the vehicle. Bauer then informed Louthan that he intended to search the interior of the vehicle. From the time that the dog sniff began until Bauer informed Louthan of the result, approximately 4 minutes had elapsed. Bauer then searched the interior of the vehicle and found Louthan's wallet on the transmission hump of the vehicle. Inside the wallet were two bags containing a "rocky substance" later confirmed to be methamphetamine.

Approximately 12½ minutes after Louthan was initially stopped, he was arrested and charged with one count of possession of a controlled substance. He filed a motion to suppress the evidence obtained as a result of the search of his vehicle, arguing that Bauer lacked reasonable suspicion to further detain him after the traffic stop. After conducting an evidentiary hearing, the district court denied the motion. Following a bench trial on stipulated evidence at which Louthan's objection to the dog sniff and resulting search was preserved, he was convicted and sentenced. He filed this timely appeal, and we granted the State's petition to bypass the Court of Appeals.

## II. ASSIGNMENT OF ERROR

Louthan assigns, restated, that the district court erred in overruling his motion to suppress the evidence seized from his vehicle because his continued detention after the initial traffic stop violated his right to be free from unreasonable searches and seizures under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

## 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.[1]

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[1] *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

## IV. ANALYSIS

[2-4] There is no issue concerning the propriety of the traffic stop. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[2] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.[3] This 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.[4] 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.[5] The record in this case reflects that these investigative procedures were completed within approximately 6 minutes after Louthan's vehicle was stopped.

In *Illinois v. Caballes*,[6] the U.S. Supreme Court held that a dog sniff "conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." In that case, one officer conducted the traffic stop while another walked a drug detection dog around the exterior of the vehicle. The Court noted that the duration of the stop during which the dog sniff was conducted "was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."[7] The facts in this case differ from those considered in *Caballes* in that here, the drug detection dog was not deployed until after the investigative steps incident to the traffic stop had been completed.

The Court in *Caballes* acknowledged and did not alter its prior holding that "a seizure that is lawful at its inception can

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[2] *Id.*; *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

[3] See *id.*

[4] *Id.*

[5] *Id.*

[6] *Illinois v. Caballes*, 543 U.S. 405, 410, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

[7] *Id.*, 543 U.S. at 408.

violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."[8] The Court further noted that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."[9] In this case, the dog sniff prolonged the traffic stop several minutes beyond the time required to conduct the normal investigative inquiries relating to the stop. The issue presented is whether prolonging the traffic stop for the time necessary to deploy the drug detection dog which was already at the scene violated Louthan's Fourth Amendment rights and rendered the evidence obtained through the resulting search inadmissible at his trial under the Fourth Amendment exclusionary rule.

[5-8] In resolving this question in the negative, the district court applied a test which this court has employed in cases decided before and after *Caballes*. We have held that in order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.[10] 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.[11] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.[12] Reasonable suspicion must be determined on a case-by-case basis.[13] If reasonable suspicion exists, the court must then consider whether the detention was reasonable in the context of an

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[8] *Id.*, 543 U.S. at 407, citing *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

[9] *Illinois v. Caballes, supra* note 6, 543 U.S. at 407.

[10] See, *State v. Voichahoske, supra* note 1; *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005); *State v. Lee, supra* note 2.

[11] *State v. Voichahoske, supra* note 1; *State v. Verling, supra* note 10.

[12] *Id.*; *State v. Lee, supra* note 2.

[13] *Id.*

investigative stop, considering both the length of the continued detention and the investigative methods employed.[14]

In this case, the district court determined that Bauer had a reasonable suspicion that Louthan was involved in unlawful drug activity because Bauer observed Louthan leave a residence where others had reported purchasing unlawful drugs, Louthan admitted that he had a pending charge of possession of methamphetamine, and Louthan appeared nervous during the traffic stop. The court further determined that the prolonged detention was reasonable, both with respect to its length and the manner in which it was conducted.

### 1. Applicable Standard

The State argues that the district court reached the correct result by applying an incorrect standard. It urges this court to abandon our jurisprudence regarding the Fourth Amendment implications of prolonged traffic stops in favor of a "de minimis rule" employed by several state and federal courts.[15] This rule, as articulated in *U.S. v. $404,905.00 in U.S. Currency*,[16] holds that "when a police officer makes a traffic stop and has at his immediate disposal the canine resources to employ this uniquely limited investigative procedure, it does not violate the Fourth Amendment to require that the offending motorist's detention be momentarily extended for a canine sniff of the vehicle's exterior." Courts applying this rule reject what they perceive as an artificial distinction between the traffic stop and the time required for the canine sniff, reasoning that "the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior."[17]

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[14] See *id*.

[15] See, *U.S. v. Alexander*, 448 F.3d 1014 (8th Cir. 2006); *U.S. v. Martin*, 411 F.3d 998 (8th Cir. 2005); *U.S. v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999); *Hugueley v. Dresden Police Dept.*, 469 F. Supp. 2d 507 (W.D. Tenn. 2007); *State v. Griffin*, 949 So. 2d 309 (Fla. App. 2007); *State v. DeLaRosa*, 657 N.W.2d 683 (S.D. 2003).

[16] *U.S. v. $404,905.00 in U.S. Currency, supra* note 15, 182 F.3d at 649.

[17] *U.S. v. Alexander, supra* note 15, 448 F.3d at 1017.

We are not persuaded to abandon the reasonable suspicion standard in favor of the "de minimis rule" advocated by the State. In *Caballes*, the Court specifically noted a distinction between a dog sniff occurring during a routine traffic stop and one occurring during an "unreasonably prolonged traffic stop."[18] Referring to a decision of the Illinois Supreme Court[19] holding that a dog sniff and subsequent discovery of contraband during an unreasonably prolonged traffic stop was the product of an unconstitutional seizure, the Court stated: "We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained."[20] This indicates that there is a constitutionally significant line of demarcation between a routine traffic stop and one in which a dog sniff is conducted *after* the investigative procedures incident to the traffic stop have been completed. From the video of the traffic stop which is a part of the record in this case, it is apparent that the routine traffic stop had ended and the prolonged detention for deployment of the drug detection dog had begun by the time that Bauer received information from dispatch that Louthan's license was valid and that Louthan had no outstanding warrants.

Was the traffic stop "unreasonably prolonged" beyond this point? While the detention for the dog sniff was not lengthy, that is but one factor in the Fourth Amendment analysis, which requires the dual inquiries of "whether the officer's action was justified at its inception, and whether it was reasonably related in scope in the circumstances which justified the interference in the first place."[21] We agree with the view expressed by the dissent in *State v. DeLaRosa*[22] that "the *threshold* question . . . is whether the officer had an appropriate basis upon which to detain the citizen" after concluding the routine traffic stop. We

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[18] *Illinois v. Caballes, supra* note 6, 543 U.S. at 407, citing *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275, 270 Ill. Dec. 81 (2002).

[19] *People v. Cox, supra* note 18.

[20] *Illinois v. Caballes, supra* note 6, 543 U.S. at 408.

[21] *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[22] *State v. DeLaRosa, supra* note 15, 657 N.W.2d at 691 (Sabers, J., dissenting).

conclude that the "reasonable suspicion" test is the appropriate, necessary, and correct standard for resolving that question.

2. Existence of Reasonable, Articulable Suspicion

We turn, then, to Louthan's contention that the district court erred in applying this standard. As noted, the district court found that Bauer had a reasonable, articulable suspicion that Louthan was involved in unlawful drug activity for three reasons: (1) Bauer observed Louthan leave the residence of a suspected drug dealer, (2) Louthan admitted a prior arrest for possession of methamphetamine, and (3) Louthan appeared nervous when Bauer asked permission to search his vehicle. We examine each of these factors separately, mindful of the rule that 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.[23]

(a) Residence of Suspected Drug Dealer

Relying on *State v. Lee*,[24] Louthan contends that the record provides no factual basis for Bauer's testimony that the residence he was observing, and from which he observed Louthan exit, was a site of unlawful drug activity. In *Lee*, the State claimed reasonable suspicion sufficient to prolong the detention of a motorist stopped in a public recreation area based in part upon an averment that law enforcement had "'received information prior to this incident that drug dealers and users are meeting at this location for drug transactions.'"[25] Noting the lack of any showing regarding the source or reliability of this information, this court held that the averment amounted to "little more than conclusory assertions" which could not be considered in the reasonable suspicion analysis.[26]

[9] The record in this case provides significantly more detail. The site of the suspected drug activity in this case was a specific

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[23] *State v. Voichahoske, supra* note 1.

[24] State v. Lee, *supra* note 2.

[25] *Id.* at 670, 658 N.W.2d at 677.

[26] *Id.* at 670, 658 N.W.2d at 678.

residence, not a general area as in *Lee*. Bauer testified that he knew the name of the resident and that the police department had received complaints from neighbors about "stop-and-go traffic" near the residence. Bauer, who had received specialized drug interdiction training in addition to his training as a drug detection dog handler during his 7 years of service as a Norfolk police officer, testified that "stop-and-go traffic" at a residential location is an indicator of unlawful drug trade being conducted there. Bauer testified that he had received reports over a period of 2 years that the resident was involved in unlawful drug activity, and he identified by name two persons arrested for drug offenses who reported that they had obtained drugs from the resident of the house. He further testified that the most recent report of drug activity at the residence was approximately 1 month prior to Louthan's arrest. Reasonable suspicion may be based upon information which may not be sufficient to establish probable cause. It follows that the "degree of reliability of an informant that must be shown to justify an investigatory stop is less than that required to establish probable cause."[27] We conclude that Bauer's testimony regarding prior drug activity at the residence was sufficiently detailed and reliable to be considered in a reasonable suspicion analysis and that the district court did not err in doing so.

(b) Prior Drug Arrest

[10] An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual.[28] In *Lee*, this court held that the officers' awareness that the motorist had unspecified "'prior drug arrests'" could be considered as a part of the totality of the circumstances in determining whether there was a reasonable, articulable suspicion which would warrant continued detention pending the arrival of a drug detection dog.[29]

In this case, Louthan admitted to Bauer that he had been arrested for possession of methamphetamine in September 2006,

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[27] *United States v. Eisenberg*, 807 F.2d 1446, 1450 (8th Cir. 1986).

[28] *State v. Lee, supra* note 2.

[29] *Id.* at 671, 658 N.W.2d at 678.

approximately 3 months prior to the traffic stop, and that he had last used methamphetamine at that time. We conclude that this information was properly considered by the district court in its reasonable suspicion analysis.

(c) Nervousness

[11] Bauer testified that Louthan was "extremely nervous" when asked if he had "anything illegal" in his vehicle, but in his report, he described Louthan as "somewhat nervous." Although a motorist's nervousness is an appropriate factor for consideration within the totality of the circumstances of a prolonged traffic stop, its presence is of limited significance generally.[30] Standing alone, Bauer's description of Louthan's nervousness would not support a determination of reasonable suspicion. While it may be considered with other factors, it is of minimal significance.

(d) Conclusion

We find no clear error by the district court in its determination of the historical facts which could be considered in determining whether Bauer had a reasonable, articulable suspicion to prolong Louthan's detention for the time required to conduct a dog sniff of his vehicle. Based upon our de novo review of the totality of the circumstances, we conclude that reasonable suspicion existed, based primarily on the facts that Bauer observed Louthan leaving a house at which he had a reasonable basis for believing that unlawful drug activity was conducted and that Louthan admitted he had recently been arrested for possession of methamphetamine.

3. Reasonableness of Detention

We must next determine whether the extended detention in this case was reasonable in the context of an investigative stop, both with respect to its duration and the investigative methods employed.[31] Approximately 7 minutes elapsed from the time Bauer initiated the dog sniff until he arrested Louthan for possession of the controlled substance found in his vehicle as a

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[30] See *State v. Lee, supra* note 2.

[31] See, *State v. Voichahoske, supra* note 1; *State v. Verling, supra* note 10.

result of the search precipitated by the canine alert and indication. Both the dog and Bauer as its handler were trained and certified for drug detection. We agree with the determination of the district court that the extended detention was reasonable.

## V. CONCLUSION

The law enforcement officer had a reasonable, articulable suspicion that Louthan was involved in unlawful drug activity which was sufficient to justify prolonging the traffic stop in order to deploy the drug detection dog which was present on the scene. The prolonged detention was reasonable in the context of a traffic stop, as to both its duration and the investigative methods used. The canine alert and indication provided probable cause for the warrantless search of Louthan's vehicle, a point he does not contest. The district court did not err in denying Louthan's motion to suppress, receiving the evidence obtained in that search, and convicting Louthan of the offense of possession of a controlled substance.

AFFIRMED.

HEAVICAN, C.J., not participating.

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DAVID G. SHOEMAKER, TRUSTEE OF THE MARION P. SHOEMAKER REVOCABLE TRUST, AND HARLEY G. SHOEMAKER, TRUSTEE OF THE HARLEY G. SHOEMAKER REVOCABLE TRUST, APPELLANTS, V. DON SHOEMAKER AND YVONNE SHOEMAKER, APPELLEES.

745 N.W.2d 299

Filed February 22, 2008. No. S-06-319.

1. **Partnerships: Accounting: Appeal and Error.** An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
3. ____: ____. In an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
4. **Statutes.** Statutory interpretation presents a question of law.

5. **Partnerships.** The interpretation of a partnership agreement presents a question of law.
6. **Partnerships: Time.** After January 1, 2001, the Uniform Partnership Act of 1998 applies to any Nebraska partnership, including those formed before January 1, 1998.
7. **Partnerships: Statutes: Words and Phrases.** The Revised Uniform Partnership Act is largely a series of default rules that govern the relations among partners in situations they have not addressed in a partnership agreement and control only when a question is not resolved by the parties' express provisions.
8. **Partnerships.** Under Neb. Rev. Stat. § 67-431 (Reissue 2003), a partner's voluntary withdrawal no longer results in mandatory dissolution; it results in a partner's dissociation.
9. **Partnerships: Legislature.** Under Neb. Rev. Stat. § 67-433(1) (Reissue 2003), the Legislature has created separate paths through which a dissociated partner can recover partnership interests: dissolution and winding up or mandatory buyout.
10. **Partnerships.** A partnership's dissolution under Neb. Rev. Stat. § 67-439(1) (Reissue 2003) is a default rule that applies only when the partnership agreement does not provide for the partnership business to continue.
11. ____. The Revised Uniform Partnership Act does not require strict compliance with a buyout provision to prevent dissolution.
12. ____. When a partnership agreement mandates a buyout of a withdrawing partner's interest but fails to specify a remedy for the partnership's failure to pay, or to timely pay, the buyout price, the default rules of the Uniform Partnership Act of 1998 apply.
13. ____. Under Neb. Rev. Stat. § 67-434 (Reissue 2003), dissolution is not a remedy for a partnership's failure to timely pay an estimated buyout price.
14. ____. Under the Uniform Partnership Act of 1998, a withdrawing partner's rights are governed by the dissolution and winding up provisions or the mandatory buyout provisions, but not both.
15. ____. If a partnership agreement is silent on profit distributions to a withdrawing partner, the default rule under Neb. Rev. Stat. § 67-434(2) (Reissue 2003) does not authorize profit distributions.
16. ____. The Revised Uniform Partnership Act allows partners, in their partnership agreement, to fix the method or formula for determining the buyout price for a withdrawing partner's interest unless the agreement causes a forfeiture of the partner's interest.

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

V. Gene Summerlin, Marnie A. Jensen, and Justin Firestone, of Ogborn, Summerlin & Ogborn, P.C., for appellants.

Mark A. Christensen and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

CONNOLLY, J.

This appeal presents two main issues. The first is whether a partnership is dissolved by operation of law under the Uniform Partnership Act of 1998 (the 1998 UPA) when a partner voluntarily withdraws.[1] The second is whether the parties intended the partnership to dissolve if the remaining partners failed to timely pay the buyout price for the withdrawing partner's interest. Briefly stated, we hold that under the 1998 UPA, a partner's voluntary withdrawal does not dissolve a partnership if the parties intended the business to continue. We further conclude that the parties intended the business to continue and did not intend the partnership to dissolve if the remaining partners failed to timely pay the buyout price for a withdrawing partner's interest. Accordingly, we affirm.

## I. SUMMARY OF THE CASE

This action arose from a partnership dispute between two brothers, Don Shoemaker and Harley G. Shoemaker, and their wives. Each of the four partners owned an equal share of the partnership, D & H Real Estate (D & H). After Harley and his wife, Marion Shoemaker, gave notice that they were withdrawing from D & H, the partners failed to agree on the buyout price of Harley's and Marion's interests. Harley, as trustee of his own trust, and their son David G. Shoemaker, as trustee of Marion's trust, later sought an accounting and an order compelling D & H to wind up and terminate its business. Harley and David claimed that D & H was already in dissolution once the remaining partners failed to pay the buyout price within the time specified by the partnership agreement.

The remaining partners, Don and his wife, Yvonne Shoemaker, counterclaimed for breach of contract. They claimed that Harley and Marion failed to complete an appraisal process in the partnership agreement for determining the buyout value of their interests. They also claimed that Harley and Marion continued

[1] See Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2003).

to negotiate past the buyout deadline and were estopped from claiming that Don and Yvonne had breached the agreement.

Each couple acted in unison. So, unless otherwise necessary to explain the background facts, we will refer to Harley and David, Marion's trustee, as "Harley" and Don and Yvonne as "Don." The district court agreed with Don. It concluded that Harley was estopped from claiming that Don had breached the agreement by failing to comply with the buyout deadline. It also concluded that Harley had breached the agreement by failing to comply with the appraisal process. Finally, the court applied part of the partnership's distribution of earnings to Harley toward the purchase price of his interest in the partnership.

## II. BACKGROUND

### 1. Partnership Agreement

In 1984, Don and Harley created D & H by oral agreement. The partnership's assets included 24 acres with improvements west of Lincoln and the right to collect rent from tenants. Harley and David owned Shoemaker's Truck Station, Inc., a truckstop and restaurant on the property. When Don and Harley created D & H, the partnership leased part of the property to the truckstop for 5 years and gave the truckstop the right to renew the lease for 4 additional terms of 5 years. At all relevant times, the truckstop was a tenant. In 1987, the partnership entered into a 99-year lease with Don on another part of the property. The parties stipulated that Don's son and daughter-in-law owned a motel on this property.

In September 1989, Don and Harley signed a written partnership agreement for D & H. Don and Harley each had a 50-percent interest in D & H. The following sections are relevant:

> Section 3. Term of Partnership
>
> The partnership commenced by oral agreement on the 1st day of July, 1984, and shall continue until dissolved by mutual agreement or by the terms of this agreement.
>
> . . . .
>
> Section 11. Dissolution or Termination of the Partnership
>
> a. Any partner may withdraw or retire from the partnership upon 90 days prior notice to the remaining partner(s);

b. The death or legal incapacity of a partner shall immediately terminate the interest of such deceased or legally incapacitated partner in future partnership profits or losses;

c. In the event of the withdrawal [or] retirement . . . of a partner, the remaining partner(s) shall have the right to continue the business of the partnership themselves or in conjunction with any other person or persons they may select, but they shall pay to the retiring partner . . . the value of such partner's interest in the partnership as provided in the following section.

Section 12. Valuation of Partnership Shares

The value of the interest of a withdrawing [or] retiring . . . partner, as of the date of such withdrawal [or] retirement . . . shall be determined in the following manner. In the event that the remaining partner(s) and the . . . retiring partner are unable to agree upon the value to be assigned to the partnership shares, all interested individuals shall select an appraiser and in the event they are not able to agree upon an appraiser, the remaining partner(s) and the . . . retiring partner shall be entitled to select an appraiser with the appraisers separately submitting their appraisals. If the appraisals are within ten percent of each other[,] the value shall be an average of the two appraisals. If the difference in the appraisals exceeds ten percent[,] the two appraisers shall together attempt to reach agreement on the value and if unable to do so shall obtain a third appraiser with the three appraisers together agreeing upon the value. The appraisers shall determine the value of the partnership as a going concern with all assets to be valued at their fair market value.

Section 13. Payment Upon Dissolution or Termination

The value of the partner's interest as determined in the above section shall be paid without interest to the withdrawing or retiring partner . . . not later than 90 days after the effective date of the dissolution or termination.

Section 14. Termination and Liquidation

In the event the remaining partner(s) do not elect to purchase the interest of the retiring, deceased or legally

> incapacitated partner, or in the event the partners mutually agree to dissolve the partnership, the partnership shall terminate and the partners shall proceed with reasonable promptness to liquidate the business of the partnership.

In December 1992, Don and Harley each assigned half of their partnership interest to their wives.

### 2. Harley's Withdrawal From Partnership

On September 19, 2001, Harley sent Don a letter and stated that he was withdrawing from the partnership: "Therefore, pursuant to Section 11[a] of the Partnership Agreement . . . this letter constitutes notice that we withdraw from the partnership effective 90 days after the date of this notice." Don retained attorney Peter Katt, and Harley retained Alan Slattery.

On October 1, 2001, Katt e-mailed Slattery that he would respond to Harley's letter within 30 days. On October 30, Katt wrote Slattery that section 12 of the agreement, regarding the appraisal of a withdrawing partner's interest, applied only if the partners did not agree on the value of the interest. He stated that the parties should attempt to agree on the value before selecting an appraiser. On November 1, Slattery responded that the appraisal process in section 12 applied only if Don elected to continue the business by December 20, 2001, the effective date of Harley's withdrawal. He further stated that if Don made that election, Harley would participate in the valuation process. But if Don failed to elect to continue the business by December 20, then D & H would be dissolved.

On November 9, 2001, Katt wrote Slattery that he agreed Harley's withdrawal was effective December 20. He also agreed that if Don did not elect to purchase Harley's interest, then section 14 of the agreement applied regarding termination and liquidation of D & H. He stated Don would advise Harley whether he elected to purchase Harley's interest by December 15, "provided [Harley] provides us with a value for his interest on or before December 1, 2001." Katt also suggested moving the effective date to December 31 for accounting and tax purposes.

On November 14, 2001, Katt and Slattery met to discuss the value of Harley's interest and the possibility of Harley's

purchasing Don's interest instead. On November 28, Harley offered to purchase Don's interest for $1.15 million. On December 6, responding to an inquiry from Slattery, Katt e-mailed Slattery. He stated he was working on a "'business continuation'" proposal and that he was still waiting for a response to his suggestion that the parties extend the deadlines under the agreement. The next day, Slattery responded that he would not "extend any deadlines unless the parties have made an agreement, or if it appears the parties are likely to reach an agreement." On December 13, Katt wrote Slattery that Don was declining Harley's offer to purchase Don's interest and that Don was electing to continue the business. Katt stated that although Harley's offer had been based on an appraiser's fair market value of D & H, selling would cause Don a substantial loss of annual income. Katt again asked for the price that Harley would be willing to accept for his 50-percent interest.

### 3. Buyout Period

After Don elected to continue the business, Harley continued to pursue purchasing Don's interest until January 18, 2002, when it was clear that Don would not sell. On January 24, Harley agreed to sell his interest for $1.75 million. For this price, he would allow D & H to amend the lease agreement with the truckstop so that D & H would not be obligated to pay for improvements when the lease ended. In February, Don asked for tax returns and a list of improvements Harley believed belonged to the truckstop and not to the partnership. On March 12, Harley provided depreciation schedules for 1999 and a list of the improvements that belonged to the truckstop. But the schedules only showed original costs and did not include depreciation or amortization. On the same day, Slattery e-mailed that he would provide more current information when he received it from Harley.

On March 28, 2002, Katt wrote that Don agreed to pay Harley $1.25 million for his interest. Katt further stated that Don was operating under a belief that the effective date of Harley's withdrawal was December 31, 2001. On April 3, Slattery wrote that Harley rejected Don's offer. Slattery stated: "Based on the apparent inability of the parties to agree upon the

value of the interest to be sold, and pursuant to Section 12 . . . all parties are to select an appraiser."

### 4. Appraisal Period

The parties continued to make offers and counteroffers in May 2002 but failed to agree. From May to July 10, the parties unsuccessfully attempted to create a joint set of instructions for appraisers. In July, the parties instructed their separate appraisers. Sometime between August 27 and October 1, the appraisers met with Don and Harley to decide what items the partnership owned. On October 1, Don's appraiser determined the retrospective value of the partnership's "'leased fee estate'" was $2.66 million. On October 11, Harley sued Don, and on October 18, he instructed his appraiser to suspend work.

### 5. Communications While Lawsuit Was Pending

On October 25, 2002, Don informed Harley that he was ready to close on short notice once Harley's appraiser had reached a valuation. On November 20, Don offered to purchase Harley's interest based on Don's appraisal. He stated that if Harley did not respond by the end of November, Don would consider his failure an intent to breach the agreement. Two days later, Harley responded that Don's "efforts to now perform the Agreement, months after such performance was due, are very telling," and that "rather than try to resurrect a dead Agreement," they should "both devote our time to getting the pending lawsuit decided."

In February 2003, Harley assigned his 25-percent interest to the Harley G. Shoemaker Revocable Trust, and Marion assigned her 25-percent interest to the Marion P. Shoemaker Revocable Trust. Marion died in July 2003. As noted, their son David is the trustee of Marion's trust; Harley is the trustee of his trust. The parties stipulated that during the pendency of the lawsuit, Harley and Marion or their trusts continued to receive "earnings" from the partnership. (The parties' use of the term "earnings" in their stipulation apparently refers to the partnership's profit distributions.) Don claimed that the court should apply these payments toward the buyout price for Harley's interest. From December 20, 2001, to December 31, 2005, the partnership

paid to Harley and Marion or their trusts $570,180, representing 50 percent of truckstop earnings, and $14,540, representing 50 percent of motel earnings.

### 6. Parties' Allegations

In Harley's January 2005 amended complaint, he alleged that D & H was in dissolution. He asked that D & H be wound up and terminated. He claimed that Don failed to elect to continue the business when he failed to pay for Harley's interest by March 20, 2002, or within 90 days after Harley's withdrawal was effective. Don answered that he had tendered payment under the agreement but that Harley had refused to accept payment. Don also alleged that by his conduct, Harley had modified the agreement to eliminate the requirement that payment be made within 90 days, had waived that right, or was estopped from claiming that Don had breached the agreement by failing to pay for Harley's interest within 90 days. Don counterclaimed that Harley had breached the agreement by refusing to complete the appraisal process and prayed for specific performance. He requested the court to transfer Harley's interest at the price determined by Don's appraiser or to require Harley to complete his own appraisal.

### 7. District Court Concludes Partnership Is Not Dissolved and Orders Harley to Complete Appraisal

The district court found that Harley had negotiated in good faith but had caused Don to rely on his continued negotiations past the buyout deadline. The court concluded Harley did not intend to complete the valuation process. The court found that all the elements of equitable estoppel were satisfied. The court also found that the parties had modified the agreement on the buyout deadline by continuing to negotiate. On the counterclaim, the court found that Harley had breached the agreement by failing to complete the appraisal process and ordered him to complete that process within 60 days. Harley appealed, but the Court of Appeals dismissed for lack of jurisdiction.[2]

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[2] *Shoemaker v. Shoemaker*, 13 Neb. App. lxvi (No. A-05-476, May 18, 2005).

### 8. District Court Values Harley's Interest and Applies Part of Harley's "Earnings" Toward Purchase Price of His Interest

On remand, the district court ordered Harley to complete his appraisal by July 29, 2005. Afterward, the court ordered the parties' appraisers to reach an agreement on the partnership's value because there was more than a 10-percent difference in their valuations. Don's appraiser valued the partnership at $2.66 million, and Harley's appraiser valued it at $2.285 million. In setting the value, the appraisers agreed on $2.35 million. The court determined that the appraisers had properly valued the partnership based on its leased fee value and accepted their agreed-upon valuation.

In January 2006, the court heard arguments on whether the partnership's distributions of "earnings" to Harley and Marion or their trusts constituted profit distributions or payments toward the buyout price for Harley's interest. Harley argued that the payments were profit distributions because Don had not purchased his interest or, alternatively, that he was entitled to interest. The court concluded that the parties had negotiated in good faith until October 2002. But it determined that if Harley had not breached the agreement by failing to complete the appraisal process, Don would have purchased Harley's interest by late 2002. The court further determined that Don did not have to pay interest to Harley; the court reasoned that interest would only be required if the remaining partners had refused to pay Harley the value of his partnership interest, which had not occurred. It ruled that Harley's interest was $1.175 million. It further ruled that the partnership's distributions of earnings after December 31, 2002, $431,206.98, applied to the buyout price of Harley's interest. Finally, it ruled that Don did not owe interest because he had not refused to pay the buyout price and because the partnership agreement provided that no interest was to be paid.

## III. ASSIGNMENTS OF ERROR

Harley assigns, restated, that the district court erred in concluding that (1) the partnership was not in dissolution when Don failed to pay for Harley's interest within the 90-day time limit and (2) Harley lost his right to enforce the partnership

agreement through one of the following theories: waiver, equitable estoppel, implied modification, bad faith dealing, or breach of the agreement. Harley alternatively assigns that if the partnership was not in dissolution, then the court erred by applying part of his earnings toward the purchase price of his interest and in determining the amount Don owed to Harley for his interest.

## IV. STANDARD OF REVIEW

[1-3] An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.[3] On appeal from an equity action, we resolve questions of law and fact independently of the trial court's determinations.[4] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[5]

[4,5] Statutory interpretation presents a question of law.[6] The interpretation of a partnership agreement presents a question of law.[7]

## V. ANALYSIS

### 1. Applicability and Effective Date of the 1998 UPA

Generally, the parties agree that the partnership agreement governs whether the partnership was dissolved. Nonetheless, the parties at times rely on the 1998 UPA,[8] and the act is relevant. So, in our analysis, we will be focusing on the interplay between the 1998 UPA and the partnership agreement.

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[3] See *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003).

[4] See *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

[5] See *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[6] *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

[7] *Dissolution of Midnight Star Enterprises*, 724 N.W.2d 334 (S.D. 2006); *Wallerstein v. Spirt*, 8 S.W.3d 774 (Tex. App. 1999); *Waikoloa Ltd. Partnership v. Arkwright*, 268 Va. 40, 597 S.E.2d 49 (2004).

[8] See §§ 67-401 to 67-467.

[6] In the 1998 UPA, the Legislature set a termination date for the original Uniform Partnership Act (the original UPA)[9] and adopted the subsequent model act that is commonly called the Revised Uniform Partnership Act (RUPA).[10] Thus, the 1998 UPA is Nebraska's counterpart to RUPA. Sections 67-464 and 67-466 provide that after January 1, 2001, the 1998 UPA shall apply to any Nebraska partnership, including those formed before January 1, 1998. The original UPA provisions terminated on January 1, 2001.[11]

Here, the relevant events occurred after the effective date of January 1, 2001, so the 1998 UPA unquestionably governs the parties' dispute although they formed their partnership in 1989.[12]

### 2. Effect of Harley's Withdrawal and Don's Failure to Timely Pay the Buyout Price for Harley's Interest

#### (a) Parties' Contentions

Although the parties rely on the partnership agreement, they disagree on the effect of Don's failure to purchase Harley's interests before the 90-day time limit expired in section 13 of the agreement. Don contends that under the plain language of the partnership agreement, his failure to pay Harley within 90 days did not dissolve the partnership. Don also argues that the agreement did not provide time was of the essence. He contends that he offered to purchase Harley's interest within a reasonable time because Harley was attempting to purchase Don's interest during part of the 90-day period. He also points out that Harley's attorney had stated an appraisal was necessary after Harley rejected Don's buyout offer. Don alternatively argues that Harley modified the time limit or waived his right to enforce it by continuing to negotiate the buyout price.

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[9] See Neb. Rev. Stat. §§ 67-301 to 67-346 (Reissue 2003).

[10] See, Introducer's Statement of Intent, L.B. 523, Banking, Commerce and Insurance Committee, 95th Leg., 1st Sess. (Feb. 18, 1997); Prefatory Note, Unif. Partnership Act (1997), 6 (Pt.1) U.L.A. 5 (2001).

[11] See § 67-301.

[12] See, *Della Ratta v. Larkin*, 382 Md. 553, 856 A.2d 643 (2004); *Warnick v. Warnick*, 76 P.3d 316 (Wyo. 2003).

Finally, he argues that even if he breached section 13 by failing to pay the buyout price within 90 days, Harley's remedy was specific performance.

Of course, Harley views the matter differently, but we believe Harley's arguments are inconsistent. Harley primarily asserts a contract interpretation argument. He contends that because Don failed to comply with the 90-day time limit under section 13 of the agreement, Don did not elect to purchase Harley's interest under section 14—one of the events triggering dissolution and termination under section 14. Harley also asserts statutory arguments under the default rules of the 1998 UPA. First, he contends that under the 1998 UPA, a partner's voluntary withdrawal from an at-will partnership results in mandatory dissolution and winding up of the partnership. Second, he argues that under the original UPA, courts will not enforce "anti-dissolution" provisions that avoid automatic dissolution unless the remaining partners strictly comply with the provision.[13] He implicitly contends that RUPA similarly requires strict compliance. We first address Harley's statutory argument regarding mandatory dissolution for a partner's voluntary withdrawal.

(b) 1998 UPA's Effect on Voluntary Withdrawals

We believe Harley misconstrues RUPA's effect on partnership law. He contends that the partnership was in dissolution under the 1998 UPA because Don failed to strictly comply with the buyout provision. Under the original UPA, dissolution of an at-will partnership was mandatory upon a partner's expressed will to dissolve the partnership.[14] "Unless otherwise agreed," the partners who had not wrongfully dissolved the partnership had the right to wind up the partnership affairs.[15] The partnership was terminated once the winding up of its affairs was completed.[16]

[7] Although dissolution was mandatory, the partners could agree to prevent termination of the business.[17] But problems

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[13] Brief for appellants at 22.

[14] See § 67-331.

[15] § 67-337.

[16] See § 67-330.

[17] See § 67-337.

arose with third parties and partnership property that partnership agreements could not prevent.[18] By making the partnership a distinct entity from its partners, RUPA avoids problems caused by mandatory dissolution.[19]

> RUPA's underlying philosophy differs radically from UPA's, thus laying the foundation for many of its innovative measures. RUPA adopts the "entity" theory of partnership as opposed to the "aggregate" theory that the UPA espouses.[20] Under the aggregate theory, a partnership is characterized by the collection of its individual members, with the result being that if one of the partners dies or withdraws, the partnership ceases to exist.[21] On the other hand, RUPA's entity theory allows for the partnership to continue even with the departure of a member because it views the partnership as "an entity distinct from its partners."[22]

RUPA effects this change by

> giv[ing] supremacy to the partnership agreement in almost all situations. [RUPA] is, therefore, largely a series of "default rules" that govern the relations among partners in situations they have not addressed in a partnership agreement. . . .
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> . . . .
>
> . . . RUPA's basic thrust is to provide stability for partnerships that have continuation agreements. . . . [RUPA] provides that there are many departures or "dissociations" that do not result in a dissolution.

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[18] See, 2 Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 7.03(*a*) (2007); RUPA, *supra* note 10, § 801, comment 1 at 190.

[19] See § 67-409(1).

[20] Thomas R. Hurst, *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 Fla. L. Rev. 575 (1996).

[21] See Joan E. Branch, Note, *The Revised Uniform Partnership Act Breakup Provisions: Should They Be Adopted?*, 25 Creighton L. Rev. 701 (1992).

[22] *Creel v. Lilly*, 354 Md. 77, 89-90, 729 A.2d 385, 392 (1999).

> . . . Many dissociations result merely in a buyout of the withdrawing partner's interest rather than a winding up of the partnership's business.[23]

This means that RUPA's default rules are gap-filling rules that control only when a question is not resolved by the parties' express provisions in an agreement.[24]

Section 67-404 carries out the legislative intent to make the partnership provisions the controlling rules and the 1998 UPA provisions the default rules. Except for limited exceptions that do not apply here,

> relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, the Uniform Partnership Act of 1998 governs relations among the partners and between the partners and the partnership.[25]

[8,9] Section 67-431 provides that a partner's voluntary withdrawal no longer results in mandatory dissolution; it results in a partner's "dissociation." Section 67-433(1) manifests a legislative intent to create separate paths—dissolution and winding up or mandatory buyout—through which a dissociated partner can recover partnership interests: "If a partner's dissociation results in a dissolution and winding up of the partnership business, sections 67-439 to 67-445 [dealing with dissolution and winding up] apply; otherwise, sections 67-434 to 67-438 [dealing with mandatory buyout] apply."[26] The comment to § 603 of RUPA, the section upon which § 67-433 is patterned, specifically provides that it operates as a "'switching'" provision.[27]

(c) Under the 1998 UPA, Dissolution Is Only a Default Rule

Harley incorrectly argues that § 67-439(1) mandates dissolution. Apart from circumstances that are not present, § 67-439, in relevant part, provides:

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[23] Prefatory Note, Unif. Partnership Act (1997), *supra* note 10 at 5-6.

[24] See Black's Law Dictionary 1357 (8th ed. 2004).

[25] § 67-404.

[26] § 67-433(1).

[27] Unif. Partnership Act (1997) § 603, *supra* note 10, comment 1 at 172.

> A partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:
>
> (1) In a partnership at will, the partnership's having notice from a partner . . . of that partner's express will to withdraw as a partner, or on a later date specified by the partner.

[10] It is true that this section does not clearly state it is a default rule that does not apply if the agreement provides otherwise. But we construe statutes relating to the same subject matter to maintain a sensible and consistent scheme and to give effect to every provision.[28] When read together with § 67-404 (partnership agreement controls except for limited exceptions) and § 67-433 (providing separate paths of dissolution or mandatory buyout), we conclude dissolution for a partner's voluntary withdrawal under § 67-439(1) is a default rule. Section 67-439(1) applies only when the partnership agreement does not provide for the partnership business to continue. Moreover, the 1998 UPA specifically requires that we apply and construe the act "to effectuate its general purpose to make uniform the law with respect to the subject of the act among states enacting it."[29] Section 67-439 is taken from § 801 of RUPA. Comment 1 to § 801 provides in part:

> With only three exceptions, the provisions of Section 801 are merely default rules and may by agreement be varied or eliminated as grounds for dissolution. The first exception is dissolution under [subsection (4)] resulting from carrying on an illegal business. The other two exceptions cover the power of a court to dissolve a partnership under [subsection (5)] on application of a partner and under [subsection (6)] on application of a transferee.[30]

Regarding voluntary withdrawal from a partnership, comment 3 explicitly provides that RUPA's rule of mandatory dissolution upon a partner's withdrawal is a default rule. It "applies only

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[28] See *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[29] § 67-463.

[30] Unif. Partnership Act (1997) § 801, *supra* note 10, comment 1 at 190.

[absent] an agreement affording the other partners a right to continue the business."[31] Comment 1 explains that a partnership agreement cannot preclude a partner from seeking a judicial dissolution under § 67-439(5), but Harley did not seek a judicial dissolution. In fact, he was actively seeking to continue the business himself by purchasing Don's interest. Harley's actions were consistent with the partnership agreement, which allows the remaining partners to continue the business despite a partner's voluntary withdrawal.

(d) Parties Intended Partnership to Continue

We reject Harley's argument that the partnership was dissolved upon his voluntary withdrawal under § 67-439(1) because we conclude that the parties' agreement gave the remaining partners a right to continue the business. Although section 11 of the partnership agreement is titled "Dissolution or Termination of the Partnership," the reference to dissolution in the title merely reflects the original UPA rules. Those rules mandated a partnership's dissolution after a voluntary withdrawal or death of a partner.[32] But what is relevant under the 1998 UPA is whether the parties agreed the business could continue. Three separate provisions of the partnership agreement show that Don and Harley intended to allow the partnership to continue.

First, section 3 provides that the partnership "*shall continue* until dissolved by mutual agreement or by the terms of this agreement." In section 14, the parties explicitly agreed that termination of the partnership would occur only upon two events: (1) "the remaining partner(s) do not elect to purchase the interest of the retiring, deceased or legally incapacitated partner," or (2) "the partners mutually agree to dissolve the partnership." Finally, subparagraph (c) of section 11 provides: "In the event of the withdrawal . . . the remaining partner(s) shall have the right to continue the business of the partnership . . . , but they shall pay to the retiring partner . . . the value of such partner's interest in the partnership as provided in [Section 12]." We conclude that the agreement gave the remaining partners a right to

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[31] *Id.*, comment 3 at 190.

[32] See §§ 67-331 and 67-342.

continue the business despite the withdrawal of a partner. So the default rule of dissolution under § 67-439(1) did not apply.

### (e) Partnership Was Not Dissolved Because of Don's Failure to Timely Pay the Buyout Price

Because dissolution is no longer mandatory, the parties' agreement that a remaining partner has the right to continue the business controls. Harley, however, contends that because Don failed to comply with the 90-day time limit for purchasing a withdrawing partner's interest under section 13, Don did not elect to purchase Harley's interest under section 14. His argument is twofold. Harley's statutory argument is that RUPA requires strict compliance with an "anti-dissolution" provision to avoid automatic dissolution and winding up. His contract interpretation argument is that the partnership agreement required dissolution when Don failed to timely pay the buyout price for his interest.

#### *(i) RUPA Does Not Require Strict Compliance With a Buyout Provision to Avoid Dissolution*

Harley's statutory argument that the partnership is dissolved is diametrically opposed to RUPA's main premise—that the partnership agreement controls in almost every circumstance. Except for an unpublished trial court judgment from Florida,[33] the cases Harley cites are not on point; they do not support a strict compliance rule that requires dissolution for breach of a buyout provision.[34]

The Florida case fails to persuade us. We acknowledge the Florida trial court stated that agreements to avoid automatic dissolution "are in derogation of the common law and the Uniform Partnership Act."[35] But New York's partnership law controlled that wrongful expulsion action, and New York has not adopted RUPA. Further, the trial court did not cite any authority for this

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[33] See *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646 "AJ," 1996 WL 449247 (Fla. Cir. Mar. 29, 1996) (unpublished opinion).

[34] See, *Teeter v. De Lorenzo*, 275 A.D.2d 528, 711 N.Y.S.2d 629 (2000); *Clark v. Gunn*, 134 N.Y.S.2d 206 (N.Y. Sup. 1954); *Hanes v. Giambrone*, 14 Ohio App. 3d 400, 471 N.E.2d 801 (1984).

[35] *Beasley, supra* note 33, 1996 WL 449247 at *2.

statement. The decision was motivated by the audacity of the partnership's argument that in expelling a partner, it had contractually insulated itself from dissolution no matter how egregious its conduct in breaching its partnership agreement.[36]

[11] More important, concluding that RUPA requires strict compliance with a buyout provision to prevent a partnership's dissolution would be inconsistent with a main purpose of RUPA—to prevent mandatory dissolution. Further, Harley had a statutory remedy for buyout disputes. Section 67-434(9) provides judicial remedies for a partnership's failure to pay a buyout price. If strict compliance with a buyout provision were required to avoid dissolution, RUPA would not provide a withdrawing partner with remedies. The result would simply be dissolution. We reject Harley's strict compliance argument. The question remains, however, whether the parties intended the business to dissolve because of a remaining partner's failure to timely pay the buyout price for the withdrawing partner's interest.

*(ii) Parties Did Not Intend Partnership to Dissolve for Late Payment of Buyout Price*

We reject Harley's contract interpretation argument that because Don failed to pay the buyout price within the 90-day time limit under section 13, Don did not elect to purchase Harley's interest under section 14. Before Harley's withdrawal was effective, Don informed Harley that he was electing to continue the business and asked Harley the price at which Harley would be willing to sell his interest. The agreement's provisions do not show that Don's election to continue the business was conditioned upon his timely payment of the buyout price.

As noted, section 13 provides that "[t]he value of the partner's interest as determined in [section 12] shall be paid without interest to the withdrawing or retiring partner . . . not later than 90 days after the effective date of the dissolution or termination." So, under section 13, if the parties do not agree on the buyout price, the agreement effectively requires the appraisal process in section 12 to be completed within 180 days of a withdrawing partner's giving notice to withdraw.

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[36] *Id.*

Section 13, however, does not state that the partnership's failure to pay the buyout price within 90 days shall result in the dissolution of the partnership. Similarly, section 11 does not condition a remaining partner's right to continue the partnership upon his timely payment of the buyout price. Instead, section 11 states that if a remaining partner elects to continue the business, the remaining partner shall pay the value of the withdrawing partner's interest. And section 14 does not provide that the business will terminate if a remaining partner fails to timely pay the buyout price. Thus, we do not interpret the partnership agreement as requiring dissolution because Don failed to timely purchase Harley's interest under section 13. Harley's contract interpretation argument fails.

[12] Instead, we read the partnership agreement to mandate a buyout of a withdrawing partner's interest, but it failed to specify a remedy for the partnership's failure to pay, or to timely pay, the buyout price. Therefore, because the agreement is silent on this point, the default rules of the 1998 UPA apply.

#### (f) Default Remedy for Breach of a Mandatory Buyout Provision

As noted, under the switching provision in § 67-433(1), when a partner's dissociation does not result in dissolution of the partnership, the mandatory buyout provisions of "sections 67-434 to 67-438 apply." The purchase of a dissociated partner's interest is governed by § 67-434. Harley argues that subsection (5) required Don to pay an estimated buyout price of Harley's interest when the parties could not agree on the value. Section 67-434(5) provides:

> If no agreement for the purchase of a dissociated partner's interest is reached within one hundred twenty days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (3) of this section.

Harley further argues that under § 67-434(5), his notice of his intent to withdraw constituted a written demand for payment. Thus, he argues, Don had a total of 180 days, under the

partnership agreement, to pay the estimated buyout price. We disagree. Subsection (5) does not refer to any time limit within a partnership agreement. The 180 days under the partnership agreement is irrelevant under subsection (5). Instead, the event that triggers a partnership's duty to pay an estimated buyout price within 120 days is a written demand, which Harley did not make. We conclude that this provision has no application.

[13,14] Further, even if subsection (5) applied, nothing in § 67-434 provides dissolution as a remedy for a partnership's failure to timely pay an estimated buyout price. Harley cannot rely on a mandatory buyout provision in § 67-434 to bolster his argument that the partnership was in dissolution. Such an argument is inconsistent with § 67-433(1), which creates separate paths through which a withdrawing partner can recover his or her interest. A withdrawing partner's rights are governed by the dissolution and winding up provisions or the mandatory buyout provisions, but not both. Section 67-434(9) provided Harley's remedy for the partnership's failure to timely pay the buyout price or its unsatisfactory offer:

> A dissociated partner may maintain an action against the partnership, pursuant to subdivision (2)(b)(ii) of section 67-425, to determine the buyout price of that partner's interest, any offsets under subsection (3) of this section, or other terms of the obligation to purchase. *The action must be commenced within one hundred twenty days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered.*

Harley, however, failed to use this provision. On March 28, 2002, Don offered to pay Harley $1.25 million for his interest. Harley did not seek a judicial valuation of his interest under § 67-434(9) within 120 days of March 28. So he has waived this remedy.

In sum, the district court correctly concluded that the partnership was not dissolved, but we believe its reasoning regarding Don's breach of section 13's buyout deadline was incorrect. The district court concluded that Harley had lost his right to enforce the partnership agreement. Implicit in this determination was the court's reasoning that if Harley could have enforced

the agreement, the partnership would have been dissolved. This reasoning was incorrect. Under the partnership agreement, Harley did not have the right to force the partnership's dissolution when Don elected to continue the business. Although Don failed to timely pay the buyout price, absent a remedy provision in the agreement, Harley's remedy was statutory. His statutory remedy against the partnership did not include dissolution, and he waived the remedy of judicial valuation. Therefore, section 12 of the agreement provided the method for determining his interest's value.

### 3. Harley Was Not Entitled to Profit Distributions or Accrued Interest

Harley alternatively argues that if the district court correctly determined the partnership was not in dissolution, then the court erred in (1) applying part of his earnings toward the buyout price of his interest and (2) determining what Don owed Harley for his interest. The court determined that the value of Harley's interest was $1.175 million. It also determined that the partnership's payments to Harley and Marion through December 31, 2002, were income distributions. The parties stipulated that between the effective date of Harley's withdrawal, December 20, 2001, to December 31, 2002, the partnership paid Harley and Marion $153,513.18, which represented 50 percent of its earnings for that period. But the court determined that the partnership's payments from January 1, 2003, to December 31, 2005, totaling $431,206.98, applied toward the purchase price of Harley's interest. Finally, it determined that Harley was not entitled to accrued interest for two reasons: (1) Interest was only available if Don had refused to pay Harley, which was not the case, and (2) the agreement provided that no interest was to be paid.

Harley is not disputing the partnership's valuation at $2.35 million. But he contends that the court erred in applying the partnership earnings he received after January 1, 2003, toward the purchase price of his interest. He argues that because Don had not yet purchased his interest, the payments after January 1, 2003, should have been considered "income or interest payments to dissociated partners" under § 67-434—the

mandatory buyout statute dealing with the purchase of a dissociated partner's interest.[37]

(a) Dissociated Partners Are Not Entitled to Profit Distributions Under § 67-434

[15] The partnership agreement is silent on whether a withdrawing partner is entitled to profit distributions until the remaining partners pay for his interest. Thus, the statutory default rules for mandatory buyouts under § 67-434 control this issue. Under the original UPA, when a partnership continued after dissolution, § 67-342 allowed a withdrawing partner, in specified circumstances, to elect to receive the value of his partnership interest plus interest. Or, instead of interest, a partner could elect to receive a share of profits until the accounts were settled.[38] Don correctly argues, however, that the 1998 UPA did not carry over the option to elect a share of profits. Under the 1998 UPA, § 67-434(2) provides that the buyout price for a dissociated partner's interest must include the value of his interest, plus interest "paid from the date of dissociation to the date of payment." It does not authorize profit distributions. RUPA's counterpart to § 67-434 is § 701. The comments to § 701 specifically provide that "[t]he UPA . . . option of electing a share of the profits in lieu of interest has been eliminated."[39]

In his reply brief, Harley acknowledges this change in the law. We conclude that Harley was not entitled to profit distributions after the effective date of his withdrawal.

(b) The Partnership Agreement Precludes Accrued Interest

[16] Harley next contends that he was entitled to have the court consider the distributions he received as accrued interest on the value of his partnership interest. The district court reasoned, in part, that Harley was not entitled to interest because the partnership agreement precluded the payment of interest. Section 13 provides: "The value of the partner's interest as determined in [section 12] shall be paid without interest to the

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[37] Brief for appellants at 33.

[38] § 67-342.

[39] Unif. Partnership Act (1997) § 701, *supra* note 10, comment 3 at 177.

withdrawing or retiring partner . . . .” But Harley counters that “[t]he Partnership Agreement is silent as to what should happen if the buyout is not completed within ninety days.”[40] He argues that § 67-434(2) therefore operates as a gap filler and requires interest to be paid from the date of his dissociation to the date the partnership pays the buyout price. Harley’s argument overlooks the obvious fact that the partnership agreement is not silent on the payment of interest. Section 13 specifically precludes interest. Comment 3 of RUPA’s counterpart to § 67-434 provides in part:

> The Section 701 rules are merely default rules. The partners may, in the partnership agreement, fix the method or formula for determining the buyout price and all of the other terms and conditions of the buyout right. Indeed, the very right to a buyout itself may be modified, although a provision providing for a complete forfeiture would probably not be enforceable.[41]

In his reply brief, Harley argues that the purpose of requiring a partnership to pay interest is to compensate dissociated partners for the use of their capital. He claims that requiring interest eliminates the partnership’s incentive to delay paying the buyout price. Comment 3 to § 701 of RUPA supports Harley’s contention that “the partnership must pay interest . . . to compensate the dissociating partner for the use of his interest in the firm.”[42] And we recognize that equity principles apply in partnership disputes unless displaced by the 1998 UPA.[43] Yet enforcing section 13 does not cause a forfeiture of Harley’s partnership interest. Nor can we conclude that the partnership has unfairly benefited from the use of Harley’s capital interest when Harley was largely responsible for delays in the appraisal process. Moreover, the court gave Harley the benefit of profit distributions through December 2002 that he was not statutorily entitled to receive. We conclude that the partnership agreement

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[40] Brief for appellants at 34.

[41] Unif. Partnership Act (1997) § 701, *supra* note 10, comment 3 at 177.

[42] *Id.*

[43] See § 67-405.

controls and that Harley was not entitled to accrued interest on the value of his partnership interest because the partnership agreement precluded interest. Because Harley was not entitled to profit distributions or accrued interest, the district court did not err in applying the partnership's distributions after January 1, 2003, to the purchase price of Harley's interest.

## VI. CONCLUSION

For reasons other than those stated by the district court, we conclude that the court did not err in determining that the partnership was not dissolved by Don's failure to timely pay the buyout price for Harley's interest after Harley withdrew from the partnership. We further conclude that the district court did not err in applying some partnership distributions to Harley toward the buyout price of his partnership interest. Harley was not entitled to profit distributions after his dissociation. The court also did not err in failing to treat the distributions as accrued interest when the partnership agreement specifically provided that the partnership was not required to pay interest on the value of a withdrawing partner's interest.

AFFIRMED.

WRIGHT, J., not participating.

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# MARY LYN LYNCH AND THOMAS LYNCH, INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

745 N.W.2d 291

Filed February 22, 2008. No. S-06-737.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** An insurance policy is a contract.

4. **Actions: Insurance: Breach of Contract: Damages.** In assessing claims for damages in insurance contract actions, it is ordinarily necessary to assert a breach.
5. **Insurance: Contracts: Intent: Appeal and Error.** An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.
6. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
7. **Class Actions: Standing: Summary Judgment.** The right of a party to sue as representative of a class may be determined on a motion for summary judgment.
8. **Class Actions.** In determining whether a class action is properly brought, considerable discretion is vested in the trial court.
9. ____. In order to justify class action treatment, there must exist both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court.

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

Christopher D. Jerram, of Kelley & Lehan, P.C., for appellants.

Mark C. Laughlin, Joseph K. Meusey, and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellee.

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

STEPHAN, J.

This case is before us for the second time. Initiated as a class action, the named plaintiffs alleged that with respect to "medical payments coverage" included in their automobile insurance policies, State Farm Mutual Automobile Insurance Company (State Farm) charged a premium for indemnity coverage but instead provided managed care coverage of lesser value. In *McGinn v. State Farm Mut. Auto. Ins. Co.*,[1] we held that a named plaintiff who had not asserted a claim against State Farm under his medical payments coverage could not state a cause of action for breach of contract or any of his other theories of recovery.

[1] *McGinn v. State Farm Mut. Auto. Ins. Co.*, 268 Neb. 843, 689 N.W.2d 802 (2004).

We affirmed an order dismissing his claims and ordering him stricken as a party plaintiff. This appeal involves the original plaintiffs, Mary Lyn Lynch and Thomas Lynch, who appeal from a subsequent order granting State Farm's motion for summary judgment and dismissing the action. We affirm.

## I. BACKGROUND

Mary was involved in an automobile accident on August 18, 1995, in which the vehicle she was driving was struck from behind by a vehicle driven by Rita Norman. Mary sought medical treatment for the injuries sustained in the accident, for which she incurred expenses.

At the time of the accident, Mary and her husband, Thomas, were insured under an automobile insurance policy issued by State Farm. The portion of the policy designated "MEDICAL EXPENSES," which included an "Amendatory Endorsement," provided in pertinent part:

> We will pay reasonable medical expenses incurred, for *bodily injury* caused by accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices.
>
> . . . .
>
> We have the right to make or obtain a utilization review of the medical expenses and services to determine if they are reasonable and necessary for the *bodily injury* sustained.
>
> . . . .
>
> 1. If the injured *person* has been paid damages for the *bodily injury* by or on behalf of the liable party in an amount:
>
> . . . .
>
> b. equal to or greater than the total reasonable and necessary medical expenses incurred by the injured *person*, we owe nothing under this coverage.

Mary submitted bills to State Farm for medical expenses in the amount of $1,906, which she claimed to have incurred as a result of the accident. State Farm paid $1,351 of this amount and denied the remainder.

Mary asserted a claim for her injuries against Norman. The claim was settled on August 24, 1999, for $6,838.67. As a part of this settlement, Mary and Thomas specifically reserved any and all claims they had against State Farm. Of the total settlement amount, $500 was deposited in escrow "to fully protect any and all alleged subrogation claims by State Farm . . . presently owed or hereafter ordered in any subsequent judicial proceeding to be paid by State Farm to Mary Lynch."

The Lynches commenced a class action suit against State Farm in the district court for Douglas County. They alleged that State Farm was engaged in a scheme whereby it marketed medical payments medical coverage "as a promise of protection through indemnity, not as a managed care plan," but in fact provided managed care coverage for which a lesser premium should have been charged. They sought to represent a class defined to include

> every individual within the State of Nebraska who purchased a contract of automobile insurance from [State Farm] on or since January 1, 1990, which included medical payments coverage, and who, at the time of purchase or renewal of said contract were not informed by [State Farm], either in the contract itself or by other means, of [State Farm's] scheme.

The Lynches alleged six separate theories of recovery, designated as "causes of action," including: breach of contract; breach of covenant of good faith and fair dealing; violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999); fraud; unjust enrichment; and violation of Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998). They prayed for various forms of relief, including damages measured by the difference between the premiums actually paid for medical payments coverage and the lesser premium which they contend was applicable to the managed care coverage they received.

State Farm filed a motion for summary judgment, seeking dismissal of the entire case or, in the alternative, partial summary judgment and dismissal of the class action allegations. The Lynches filed a motion to approve a class notice and a motion seeking partial summary judgment with respect to certain factual and legal issues.

In an order granting State Farm's motion for summary judgment and dismissing the action, the district court determined that the Lynches' own claim against State Farm must fail because they could not establish a breach of contract. Specifically, the court determined that because the Lynches received more than the amount of their medical payment claim in the settlement with Norman, State Farm had no liability to them under its medical payments coverage, and thus, the Lynches "cannot be heard to complain about an alleged scheme if they have not been damaged by it. Further they cannot be the standard bearers for all of those in a class who have submitted claims and been denied by [State Farm]." The court determined that the Lynches, "having been paid in full no longer share a common interest with those in the purported class whose claims have been denied" and, further, that individual issues with respect to each member of the purported class would be dissimilar and predominate over issues common to the class. Finally, the court noted that the Lynches' expert witnesses were "generally unfamiliar with [State Farm] and its policyholders in the state of Nebraska and offer opinions derived from other cases in other states which have little bearing on the issues in this case" and that their opinions were therefore without sufficient foundation and were conclusory in nature. Accordingly, the court granted State Farm's motion for summary judgment and dismissed the action.

The Lynches perfected a timely appeal, and we granted their petition to bypass, in which State Farm concurred.

## II. ASSIGNMENTS OF ERROR

The Lynches assign, restated and consolidated, that the trial court erred in (1) granting State Farm's motion for summary judgment, (2) failing to grant their motion for summary judgment, (3) determining that their expert witnesses' opinions were conclusory and lacked foundation, and (4) concluding that the case could not proceed as a class action.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as

to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

## IV. ANALYSIS

### 1. Mary Lynch

#### (a) Breach of Contract Claim

[3,4] An insurance policy is a contract.[4] In assessing claims for damages in insurance contract actions, it is ordinarily necessary to assert a breach.[5] In *McGinn*, we held that a State Farm insured who had not filed a claim under the policy could not state a cause of action for breach of contract. Here, Mary filed a claim under the medical payments coverage, which State Farm denied in part. The first issue presented is whether the district court erred in determining as a matter of law that the denial did not constitute a breach of the insurance contract. Under our standard of review, we afford Mary the benefit of all favorable factual inferences in resolving this issue.

[5,6] We begin with the language of the policy. An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.[6] Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are

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[2] *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007); *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[3] *Id.*

[4] *McGinn v. State Farm Mut. Auto. Ins. Co., supra* note 1; *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[5] *McGinn v. State Farm Mut. Auto. Ins. Co., supra* note 1; 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 232:42 (2000).

[6] *Guerrier v. Mid-Century Ins. Co., supra* note 4; *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

not inconsistent with public policy or statute.[7] Here, the policy unambiguously provided that if an insured receives a payment from a third-party tort-feasor which is equal to or greater than medical expenses incurred by the insured, State Farm would "owe nothing" under its medical payments coverage. Other courts have held that language identical to that in the policy before us constitutes a legitimate policy exclusion intended to prevent double recovery of medical expenses.[8]

Relying on *Otteman v. Interstate Fire & Cas. Co., Inc.*,[9] Mary argues that State Farm waived its right to rely on the exclusion by its partial denial of her claim for medical payments benefits. We are not persuaded by this argument. *Otteman* involved a claim by an insurance agent against his errors and admissions liability insurer. The policy provided that the insured could not settle a liability claim asserted against him without the written consent of the insurer. We held that the insurer's unreasonable delay in processing a third party's liability claim against its insured amounted to a denial of coverage and constituted a waiver of any right to enforce the policy provision requiring its consent to settlement. Here, the medical payments coverage is not liability insurance, and no claim was made against Mary. Instead, Mary had potential claims against her insurer and a third party for the same medical expenses. Neither the provisions of the policy nor State Farm's denial of benefits restricted Mary from asserting a claim against the third party. The policy simply provided that if she were successful in recovering an amount equal to or greater than the amount of her medical expenses, State Farm would "owe nothing." *Otteman* does not support Mary's waiver argument in these circumstances.

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[7] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

[8] See, *State Farm Mut. Auto. Ins. Co. v. Walker*, 234 Ga. App. 101, 505 S.E.2d 828 (1998); *State Farm Mut. Auto. Ins. Co. v. Brewer*, 221 Ga. App. 745, 472 S.E.2d 529 (1996); *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328 (Alaska 1995).

[9] *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 111 N.W.2d 97 (1961).

Finally, we are not persuaded by Mary's argument that the policy provision in question should be declared void in violation of public policy. As noted, other courts have found the same policy provision enforceable, implicitly, and in one case explicitly, rejecting a claim that the provision is contrary to public policy.[10] Mary has provided no authority to the contrary. We conclude, as other courts have, that the provision is an enforceable contractual bar against double recovery of medical expenses.

It is undisputed that the amount which Mary recovered from the party responsible for her injuries exceeded the amount of medical expenses she claimed from State Farm under her medical payments coverage. We note that she was also reimbursed by her health insurance carrier for some of the expenses, but we do not consider these reimbursements pertinent to our analysis. We conclude as a matter of law that because Mary recovered more than the amount of her medical expenses in her settlement with a third party, State Farm had no contractual obligation to Mary under the plain language of its medical payments coverage provisions.

In *McGinn*, we reasoned that because the plaintiff had not filed a claim against his medical payments coverage, he could not claim a breach of contract with respect to those policy provisions. Similarly here, where the undisputed facts demonstrate that Mary has no legal entitlement to medical payments benefits under the State Farm policy, she has no cognizable claim for breach of contract.

(b) Other Individual Claims

The claims asserted by Mary in this case are the same as those asserted by the plaintiff in *McGinn*. We noted in that case that each of the claims "incorporates the existence of the contract for insurance and each is dependent on the viability of [the named plaintiff's] breach of contract claim."[11] We concluded that because McGinn had not stated a viable claim for breach

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[10] See *Maynard v. State Farm Mut. Auto. Ins. Co., supra* note 8.

[11] *McGinn v. State Farm Mut. Auto. Ins. Co., supra* note 1, 268 Neb. at 849, 689 N.W.2d at 806.

of contract, he could not state a cause of action with respect to his remaining claims. Here, we conclude that because Mary's breach of contract claim fails as a matter of law, so too must the remainder of her claims.

(c) Class Action Claims

[7-9] The right of a party to sue as representative of a class may be determined on a motion for summary judgment.[12] In determining whether a class action is properly brought, considerable discretion is vested in the trial court.[13] Class actions are authorized under Neb. Rev. Stat. § 25-319 (Reissue 1995), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." In order to justify class action treatment, there must exist "both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court."[14] Class certification may be denied even if a named plaintiff meets all of the technical requirements of § 25-319.[15]

Because her breach of contract claim against State Farm is without merit as a matter of law, Mary lacks commonality with members of the purported class on whose behalf she sought to litigate similar breach of contract claims. The district court did not err in concluding that because Mary could not maintain her individual cause of action against State Farm, she was unqualified to represent the purported class.[16]

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[12] *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976).

[13] *Berkshire & Andersen v. Douglas County Board of Equalization*, 200 Neb. 113, 262 N.W.2d 449 (1978); *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975).

[14] *Hoiengs v. County of Adams*, 245 Neb. 877, 901, 516 N.W.2d 223, 240 (1994).

[15] See *Berkshire & Andersen v. Douglas County Board of Equalization, supra* note 13.

[16] See *McGill v. Automobile Ass'n of Michigan*, 207 Mich. App. 402, 526 N.W.2d 12 (1995).

(d) Expert Testimony

Mary assigns error in the determination by the district court that her expert witnesses lacked foundation for their opinions concerning the alleged scheme by which State Farm administered and charged premiums for medical benefits coverage. Because we conclude as a matter of law that Mary had no individual entitlement to medical payments benefits and cannot sue as the representative of the purported class, the manner in which State Farm may have administered such medical benefits with respect to other policyholders is not before us, and we need not reach this assignment of error.

2. Thomas Lynch

Thomas' personal interest in this case is somewhat unclear from the record. He is the named insured on the State Farm policy, but there is no indication that he has ever asserted a medical payments claim in his own behalf. As such, his claims would be barred by our holding in *McGinn.* However, at oral argument, counsel suggested that Thomas is a coclaimant with his wife, Mary. Assuming without deciding that to be so, his assignments of error are without merit for the reasons discussed herein with respect to Mary's claim.

## V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting State Farm's motion for summary judgment and dismissing this action. Accordingly, we affirm.

Affirmed.

Wright, J., participating on briefs.

McCormack, J., not participating.

# Will Prout and Big John's Billiards, Inc., a Nebraska corporation, appellants, v. Nebraska Department of Health and Human Services Regulation and Licensure, appellee.

745 N.W.2d 570

Filed February 22, 2008. No. S-06-764.

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. 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.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Andrew M. Loudon and Jacob Wobig, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Teresa M. Hampton, Special Assistant Attorney General, for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Wright, J.

## NATURE OF CASE

Big John's Billiards, Inc., and its owner, Will Prout (collectively Big John's), sought a waiver under the Nebraska Clean Indoor Air Act (Act), Neb. Rev. Stat. § 71-5701 et seq. (Reissue 2003 & Cum. Supp. 2006), to allow smoking in pool halls in Lincoln and Omaha. The Nebraska Department of Health and Human Services Regulation and Licensure (Department) denied the waiver, and Big John's filed a petition for review in the Lancaster County District Court. The court affirmed the denial of the waiver. Big John's appeals.

## SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act

may be reversed, vacated, or modified by an appellate court for errors appearing on the record. 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. *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

## FACTS

The pool halls at issue are located in 13,000-square-foot buildings. Each has only one front door for use by customers. The pool halls include a bar and a delicatessen where "burgers and fries" are prepared. The buildings have 18-foot ceilings, and each building has six large "smoke eaters" to remove smoke. A warning sign posted on the front door of each pool hall states: "WARNING[:] 'SMOKER FRIENDLY POOL HALL[.]' The air in this building may be hazardous to your health[.] NON-SMOKERS ENTER AT AT [sic] YOUR OWN RISK[.] IT'S YOUR CHOICE[.] Cigarette Smoke Cleaned Electronically[.]"

Under the Act, a waiver from its provisions may be granted by the Department if an applicant demonstrates compelling reasons for a waiver and establishes that the waiver will not significantly affect the health and comfort of nonsmokers. Big John's filed an application seeking a waiver for the pool halls. The Department determined that Big John's had not met the requirements of the Act, and it denied the request for a waiver.

After the denial, Big John's requested a hearing before the Department. Evidence at the hearing applied in large part to the Omaha pool hall only because, at the time of the administrative hearing, Lincoln had passed a city ordinance banning smoking entirely, and Prout said the Lincoln facility was in compliance with the ordinance. At that time, Omaha did not have an ordinance banning smoking in public places.

Prout testified that when the pool hall was full, 90 percent of the customers smoked. He said it was not possible to have a nonsmoking area at the time he built the pool halls 25 years ago. He had not attempted to modify the buildings because he did not believe it was possible to create nonsmoking areas that

would comply with the Act's requirements. Any modification would require removal of some pool tables to build a second handicapped ramp. According to Prout, the food service area could not be separated because customers are "wandering around. They're playing pinball. They're going to the dart machines. They're playing shuffleboard. They're sitting there at the tables." The pool tables cannot be moved because of their weight and because the lighting above the tables was installed 25 years ago. A pool cue is 5 feet long, and Prout said there needs to be room between tables to "draw the stick and shoot the balls." Prout said moving the tables closer together would create space problems. Prout said it did not make sense to convert 50 percent of the business to nonsmoking when 90 percent of his customers were smokers, because he would lose revenue.

Applications for employment with Big John's had the following statement at the top of the form:

> Big John's Billiards is a smoker friendly pool hall and your employment will expose you to secondhand smoke. Secondhand smoke is a documented health hazard resulting in many diseases that may cause death. The effect of secondhand smoke is a non-issue to smokers. Employment of non-smokers is at the discretion of the management. By signing this application you are exercising your right to work in a building that is not smoke-free and protected by the laws of the local city government.

Todd Falter, who oversaw the Act as the environmental health programs manager for the Department, recommended denial of the waiver. He testified that Big John's came within the statutory definition of a retail store because it sold pool cues and T-shirts, it came within the statutory definition of a bar because it sold alcohol, and it came within the statutory definition of a restaurant because it served food. Falter said the economic effect of the Act on a business was not a factor in determining whether a waiver should be granted. Rather, the decision was based on public health concerns. Falter said one waiver had been granted in the previous 2 years—for the Lied Center for Performing Arts in Lincoln to allow smoking onstage by performers.

Falter said one factor taken into consideration in denying the waiver was that food inspectors, liquor commission inspectors, tax commissioners, and law enforcement representatives could all be required to enter Big John's as a part of their employment, and they would be required to be in a smoking area against their wishes.

Falter stated that the pool hall could be divided to provide a nonsmoking section which would allow smokers to have access to all the same facilities available to nonsmokers while not requiring nonsmokers to pass through the smoking area to use the amenities of the establishment. The Act does not require that the amenities be equal in both sections. It requires only that access be provided to all amenities, Falter said.

After the hearing, the Department's director entered an order finding that Big John's had not demonstrated a compelling reason to grant a waiver, that Big John's had failed to demonstrate that the waiver would not significantly affect the health and comfort of nonsmokers, and that the health and comfort of nonsmokers would not be protected as well with a waiver as they would be under the provisions of the Act. The director affirmed the denial of the application for the waiver.

Big John's sought review in the district court. The court affirmed the decision of the Department, finding that Big John's should not be granted a waiver for either location.

## ASSIGNMENTS OF ERROR

Big John's claims that the district court erred in concluding (1) that the Department did not err in determining that the reasons given by Big John's for requesting a waiver from the Act were not compelling and that granting Big John's a waiver from the Act would significantly affect the health and comfort of nonsmokers and (2) that the refusal of the Department to grant a waiver from the Act was not unreasonable, arbitrary, and capricious.

## ANALYSIS

The purpose of the Act is to "protect the public health, comfort, and environment by prohibiting smoking in public places and at public meetings except in designated smoking areas."

§ 71-5702. A waiver from the Act's requirements may be granted if the Department "determines there are compelling reasons to do so and a waiver will not significantly affect the health and comfort of nonsmokers." § 71-5711. The Department's regulations provide little additional guidance as to the factors that will be taken into consideration to determine whether to grant a waiver. The regulations state: "In order to grant a waiver, the Department must determine that the health and comfort of nonsmokers would be protected as well under a waiver as if there were compliance with the Act." 178 Neb. Admin. Code, ch. 7, § 006.03 (2003).

At the hearing before the Department, Prout testified that 90 percent of the customers in the pool halls smoked. He stated that it would not be possible for him to make part of the building a nonsmoking area in order to comply with the Act. The compelling reason he presented for the waiver was the decrease in revenue he believed would occur if smoking was not allowed. Prout said that after the smoking ban was passed in Lincoln, the revenue for the Lincoln facility was cut in half, dropping from $600,000 per year to $300,000 per year. However, the record showed that the Lincoln facility had reopened and was complying with the city ordinance at the time of the hearing.

There was evidence that the pool halls had only one public entrance, and even if customers were warned by the sign at the entrance, other persons, such as food inspectors, liquor commission inspectors, tax commissioners, and law enforcement representatives would be required to enter Big John's as a part of their employment. Employees were informed on the employment application that the pool halls allowed smoking, but there was no area where nonsmokers could avoid the smoke caused by the 90 percent of the customers who smoked.

A drawing of the layout of the Omaha pool hall was entered into the record. It indicates a single public entrance. Customers check out billiard balls and request a table at a billiards desk. Prout explained that when customers make a reservation for a table, they are assigned the next available table regardless of its location. The billiards desk is located next to a bar and delicatessen area where food is served. There are 12 pinball machines near the bathrooms, which are in the corner near the

front entrance. Prout said he cannot simply divide the pool hall in half because there is only one restroom, so he could not make one restroom available for smokers and one for nonsmokers.

However, Falter stated that the facility could be configured to come into compliance with the Act. The most obvious way would be to divide the building in half and create a nonsmoking section near the entrance. It could include pool tables and stools and still allow access to the restrooms and food area. Additional pool tables, other tables, and stools at the rear of the building could be designated as a smoking area. Prout disputed that the building could be adequately divided because 90 percent of the patrons are smokers.

The district court found that Big John's had not shown that granting a waiver would not significantly affect the health and comfort of nonsmokers or that nonsmokers would be protected as well as they would be if there was compliance. The court found no merit in the argument by Big John's that it is a public place that was not contemplated by the Legislature when the Act was written. Although Big John's argued that undue financial burden should be a consideration in granting a waiver, the district court noted that Nebraska law does not mention financial burden as a basis for a waiver. The court stated that legislative history suggests financial consideration was not intended as a factor because the Legislature stated that the health, welfare, and comfort of the citizens far outweighed the economic effects as a result of the Act.

The district court noted that even if financial burden were a consideration, Big John's had not presented evidence of such. The Omaha facility could come into compliance by designating half of its existing facility as nonsmoking, but Big John's had made no attempt to come into compliance. The court found that nonsmoking members of the public were required to enter the building, including health inspectors and law enforcement.

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. *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007). When reviewing such an order, the inquiry is whether the decision conforms to the law,

is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *id*.

The district court's order was not arbitrary, capricious, or unreasonable. Big John's did not demonstrate any compelling reason for a waiver except to argue that it would be impacted financially. The Act does not identify financial burden as a compelling reason for a waiver. In addition, Big John's did not show that the health and comfort of nonsmokers would not be significantly affected if a waiver were granted. Simply providing warnings to persons who enter the building does not protect them from smoke. And the claim that 90 percent of the customers smoke does not support a finding that the health and comfort of the other 10 percent would not be significantly affected if a waiver were granted.

Prout testified that he had made no attempt to comply with the Act's requirements. In fact, he did not believe it would be possible to come into compliance by modifying the pool halls. However, Falter, the Department's representative, testified that Big John's could divide the Omaha building into smoking and nonsmoking areas and thereby comply with the Act.

## CONCLUSION

We find no error on the record. The record shows that the district court's affirmance of the Department's denial of a waiver conformed to the law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable. The judgment of the district court is affirmed.

AFFIRMED.

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LANA SUE SIMPSON, APPELLANT, V.
ROBERT EUGENE SIMPSON, APPELLEE.

744 N.W.2d 710

Filed February 22, 2008. No. S-06-1461.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.

2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
4. ____: ____. The Nebraska Child Support Guidelines provide that in calculating child support, a court must consider the total monthly income of both parties.
5. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends on the circumstances of each case.
6. **Modification of Decree.** To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.
7. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Jeffrey L. Hansen and Margaret A. Olsen, of Simmons Olsen Law Firm, P.C., for appellant.

James W. Ellison and James M. Mathis, of Kovarik, Ellison & Mathis, P.C., for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Lana Sue Simpson appeals from an order of the district court denying her request to modify alimony. She also appeals the district court's refusal to include expatriate compensation in the gross monthly income of her former spouse, Robert Eugene Simpson, for purposes of modifying Robert's child support and alimony obligations.

## BACKGROUND

On December 30, 2002, an order was entered by the district court dissolving Lana and Robert's marriage. Under the

terms of the decree, Lana was awarded custody of the parties' children, born May 10, 1988, and August 10, 1990. When the decree of dissolution was entered, Robert's gross monthly income was $10,833 and Lana's gross monthly income was $1,577.74. Robert was ordered to pay child support in the amount of $1,617 per month for two children and $1,109.35 per month for one child. Robert was also ordered to pay alimony in the amount of $1,250 per month for 72 months.

In October 2004, Lana requested a modification of the divorce decree. Among other things, Lana sought to increase Robert's child support and alimony obligations. In a January 2005 order, the district court found that since the entry of the decree of dissolution, there had been a material change in the parties' respective incomes. At that time, Lana's annual gross income was $29,000 and Robert's annual gross income had increased from $180,000 in 2002 to $325,000 in 2005. The court held that in light of the parties' situation and the attendant circumstances, it was reasonable for Robert to pay child support in the amount of $3,250 per month for two children, and $2,250 per month for one child. The court further found, however, that Robert's substantial increase in income was not a sufficient ground to increase alimony payments. The court noted that Lana had failed to meet her burden of proof that additional funds were necessary to reasonably meet her current needs.

In May 2006, Lana again sought a modification of Robert's child support and alimony obligations. Lana alleged that Robert's income had increased significantly and that because she had returned to school full time, she did not have the same income as she did in January 2005.

At that time, Robert was working for Lehman Brothers, Inc., in Mumbai, India. Under the terms of his international employment, Robert was guaranteed minimum total compensation of $550,000 in salary and bonuses for the 2006 work year. As part of his compensation package, Robert received an annual base salary of $175,000 payable in equal monthly increments. The balance of his minimum total compensation was to be paid as a bonus on or about January 31, 2007. Robert also received additional compensation described as "expatriate benefits/allowances." Expatriate compensation is additional

compensation provided to offset the differences in costs of living outside an employee's home country. This pay is reflected on Robert's pay stubs as "Choice $" and Bonus Special 2006. "Choice $" is defined by Lehman Brothers as "[a] cash payment designed to defray the material difference in living expenses in Mumbai (relative to the cost of living/housing in the New York metropolitan area)." The Bonus Special 2006 compensation is designed to defray the even greater additional costs associated with living in Mumbai in light of Nebraska's lower cost of living and housing in comparison to the New York metropolitan area. The record reflects that in January 2006, Robert received $7,112.39 in "Choice $" compensation and $3,225.81 in Bonus Special 2006 compensation. In February 2006, Robert received $10,022 in "Choice $" compensation and $4,000 in Bonus Special 2006 compensation. From March through September 2006, Robert received in each of those months, $10,504.54 in "Choice $" compensation and $4,000 in Bonus Special 2006 compensation.

In January 2005, Lana was employed full time and had a gross monthly income of $2,416.67. In her 2004 modification action, Lana estimated average monthly living expenses were $4,944 for herself and the parties' two children. In November 2005, Lana voluntarily left her employment and remained unemployed at the time of the court's November 2006 order. In the present action to modify, Lana claims that her average monthly living expenses increased to $9,123.34.

In its November 2006 order, the district court found that Robert's expatriate compensation was not available to pay child support, but, rather, was necessary for Robert's additional cost of living in India. The court explained that Robert's expatriate compensation is "analogous to the deviation recognized in Guideline C(1), i.e. extraordinary expenses of either parent or child." Accordingly, the district court determined that Robert's gross income for child support calculations was $550,000 annually, or $45,833.33 per month. The district court also determined that annual income in the amount of $29,000 should be attributed to Lana. The court further determined that Lana had provided no documentation to support her claim that her living expenses had increased so substantially. In light of

Robert's increased income, the district court increased Robert's child support obligation to $4,250 per month for two children and $3,250 per month for one child. The court denied, however, Lana's request to increase Robert's alimony obligation. Lana appeals.

## ASSIGNMENTS OF ERROR

Lana assigns, restated, that the district court erred in (1) failing to include expatriate compensation in Robert's gross monthly income for purposes of child support and alimony and (2) failing to find good cause to increase Robert's alimony obligation to Lana.

## STANDARD OF REVIEW

[1,2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[1] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

## ANALYSIS

### Expatriate Compensation

Lana contends that the district court erred in failing to include Robert's expatriate compensation in Robert's gross monthly income for purposes of child support and alimony.

A review of Robert's pay stubs reveals that his expatriate compensation is counted as income. Paragraph D of the Nebraska Child Support Guidelines defines total monthly income as income "derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages." The guidelines are very specific—all income from all sources is to be included except for those incomes specifically excluded. Not excluded under the guidelines is compensation meant to

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[1] *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

[2] *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

offset a spouse's increased cost of living while residing in a different locale. We conclude, therefore, that Robert's expatriate compensation is income for purposes of support calculations.

## Child Support

[3,4] In general, child support payments should be set according to the guidelines.[3] The guidelines provide that in calculating child support, a court must consider the total monthly income of both parties.[4] As explained above, this includes Robert's expatriate income.

To determine monthly support amounts, the combined monthly net income of both parties is factored into table 1 of the guidelines to establish the appropriate level of support.[5] At the time of the district court's order, table 1 did not provide for support amounts when the combined net monthly income exceeds $10,000. Paragraph C(3) of the guidelines provided that when total net income exceeds $10,000, child support "may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist." We have held that "'total monthly child support calculations which exceed the combined net monthly income provided for in the guidelines should be left to the discretion of the trial court and affirmed absent an abuse of discretion.'"[6]

As pointed out by the district court, the evidence reflects that the additional living expenses incurred by Robert while living in Mumbai are significant. Among those expenses are rental payments of $7,905 per month. Robert's employer would not allow him to drive a car in India, and he therefore had to employ a full-time driver. Also, each trip to and from the United States for holidays, visitation, et cetera, cost $3,000 to $6,000 per trip in airfare. These are additional expenses that Robert would

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[3] *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007). See Neb. Rev. Stat. § 42-364.16 (Reissue 2004).

[4] See *State on behalf of A.E. v. Buckhalter, supra* note 3.

[5] *Id.*

[6] *Id.* at 455, 730 N.W.2d at 350, quoting *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

not incur while residing in Nebraska, and the record reflects that these additional expenses are offset by Robert's expatriate compensation. Under the facts of this case, we cannot say that the district court abused its discretion when it determined that Robert's expatriate compensation is not reasonably available for child support payments.

## Alimony

Finally, Lana contends that the district court erred in refusing to increase Robert's alimony obligation.

[5-7] Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown.[7] Good cause means a material and substantial change in circumstances and depends on the circumstances of each case.[8] To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.[9] The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.[10]

In 2005, at the time of the last modification of the parties' decree, Lana had an annual gross income of approximately $29,000 and Robert had an annual gross income of $325,000. Since that time, both parties have seen significant changes in their financial situations. Lana voluntarily left her employment in November 2005 and presently remains unemployed. She is, however, completing her bachelor's degree via online classes through the University of Phoenix. Robert, on the other hand, has seen a significant increase in his annual gross income. Lana also claims that her living expenses have increased. When she first sought modification in 2004, Lana estimated that her living

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[7] *Finney v. Finney, supra* note 1.

[8] *Id.*

[9] See *id.*

[10] *Id.*

expenses were $4,944 for her and the parties' two children. In the present action, Lana claims her average monthly living expenses are $9,123.34, almost double what they were 2 years ago. The changes in the parties' financial situations is the basis for Lana's request for modification of alimony.

We have stated that an increase in income is a circumstance that may be considered in determining whether alimony should be modified.[11]

In *Desjardins v. Desjardins*,[12] we acknowledged that an increase in a party's income is a circumstance which may be considered in determining whether alimony should be modified. We noted, however, that a party's increase in income is considered in conjunction with changes in the other party's situation. The record in the present case reveals that Lana did not present any evidence to substantiate her purported increase in living expenses. Lana presented only testimony and a current expense itemization that is unsupported by other documentary evidence. A review of the itemizations from the previous modification proceeding and this proceeding reflect that the increase in Lana's living expenses is primarily attributable to the parties' children, particularly the college expenses for the oldest child who had reached majority at the time of the hearing. Excluding the children's separate expenses, Lana's current living expenses are substantially the same as they were at the time of the last modification proceeding.

The record further reveals that the only other substantial change in Lana's financial situation is her present lack of employment. While her initiative to further her education is commendable, the record reveals that her decision to leave her employment was not because of her decision to return to school. Lana testified that she chose to leave her employment for a "multitude" of reasons. She testified, "Basically it was my values were very different than what [my employer's] values were, or as I gathered it."

We have stated that a petition to modify alimony will be denied if the change in financial condition is due to the fault

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[11] See *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991).

[12] *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992).

or voluntary wastage or dissipation of one's talents or assets.[13] Although Lana is presently attending college, her decision to leave her employment, by her own admission, was not to pursue further education, but, rather, personal differences with her employer. We do not consider this to be a material and substantial change of circumstances.

Although an increase in the income of the spouse paying maintenance is a relevant factor for the trial court to consider, it alone does not require the court to modify the amount of maintenance previously ordered.[14] In this case, the district court found that Lana had not proved her claim that her living expenses had increased from $4,944 to $9,123.34 per month. We note that most, if not all, of the increase she seeks is for additional expenses for the parties' children. The child support, however, had increased for two children from $1,617 in December 2002, to $3,250 in January 2005, and then to $4,250 in November 2006. "'The ultimate issue is whether . . . changes are sufficiently substantial and continuing so as to make the original terms of the decree unreasonable.'"[15] We have stated that alimony should not be used to equalize the incomes of the parties or to punish one of the parties.[16] Under the facts of this case, we conclude that the evidence of Robert's increased income does not constitute, in and of itself, a material and substantial change in circumstances, without a proven increase in Lana's living expenses. Accordingly, we affirm the order of the district court.

## CONCLUSION

For the reasons discussed above, we conclude that Robert's expatriate compensation is income for purposes of support calculations. We further determine, however, that the district court did not abuse its discretion in refusing to increase Robert's child support and alimony obligations.

AFFIRMED.

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[13] *Pope v. Pope, supra* note 2.

[14] *Swartz v. Johnson*, 192 S.W.3d 752 (Mo. App. 2006).

[15] *Id.* at 755, quoting *Rustemeyer v. Rustemeyer*, 148 S.W.3d 867 (Mo. App. 2004).

[16] *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

# DUANE S. HOLMSTEDT, APPELLANT, V. YORK COUNTY JAIL SUPERVISOR (NAME UNKNOWN) ET AL., APPELLEES.

745 N.W.2d 317

Filed February 29, 2008. No. S-05-906.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Service of Process.** When a motion to dismiss raises grounds pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) and any combination of rule 12(b)(2), (4), and (5) grounds, the court should consider the rule 12(b)(2), (4), and (5) grounds first and should then consider the rule 12(b)(6) grounds only if it determines that it has personal jurisdiction and that process and service of process were sufficient.
3. **Civil Rights: Public Officers and Employees.** In order to sue a public official in his or her individual capacity, a plaintiff in an action pursuant to 42 U.S.C. § 1983 (2000) must expressly and unambiguously state so in the complaint; otherwise, it will be assumed that the defendant is being sued only in his or her official capacity.
4. ____: ____. In actions pursuant to 42 U.S.C. § 1983 (2000), a suit against a public employee in his or her official capacity is merely a suit against the public employer.

Petition for further review from the Court of Appeals, SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired, on appeal thereto from the District Court for York County, ALAN G. GLESS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Duane S. Holmstedt, pro se.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Duane S. Holmstedt filed an action pursuant to 42 U.S.C. § 1983 (2000) against the York County jail supervisor, the York County Sheriff's Department, Sheriff Dale Radcliff, Lt. Paul Vrbka, and Deputy Ray Silverstrand (collectively defendants).

The district court for York County dismissed the action as to all defendants pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003), subsections (2) (lack of personal jurisdiction), (4) (insufficiency of process), (5) (insufficiency of service), and (6) (failure to state claim). Holmstedt appealed to the Nebraska Court of Appeals, which concluded that the district court properly dismissed the action as to the York County Sheriff's Department for lack of personal jurisdiction but erred in dismissing the complaint as to the remaining individual defendants. *Holmstedt v. York Cty. Jail Supervisor*, 15 Neb. App. 893, 739 N.W.2d 449 (2007). We granted the defendants' petition for further review. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to affirm the dismissal as to all defendants.

## STATEMENT OF FACTS

The Court of Appeals set forth the facts as follows:

> On May 20, 2005, Holmstedt filed a pro se complaint in the York County District Court against the defendants, which he designated in the caption as follows: "York County Jail Supervisor, (name unknown) York County Sheriff's Department, Sheriff Dale Radcliff, Lt. Paul Vrbka, Deputy Ray Silverstrand, Defendants." In the complaint, which he entitled "Petition," the allegations which appear to be relevant to a possible claim against the defendants are that he was arrested and interrogated by Radcliff and Vrbka on August 13, 2003. He alleges with some particularity that he was abused by them on that day and on later occasions while incarcerated in the York County jail (apparently awaiting the disposition of a criminal charge against him). Holmstedt alleges he was struck, yelled at, deprived of an attorney, and told that he "had to tell [them] everything." He also alleges that Radcliff deprived him of medical care and medication. He alleges other abuse by Radcliff, Vrbka, and Silverstrand during subsequent intermittent times he was in the jail. For purposes of this opinion, we think it is unnecessary to set forth all of the details of his pro se handwritten complaint. Holmstedt prays that the defendants be charged and

prosecuted for the alleged crimes, that the York County Sheriff's Department be ordered to pay him the sum of $250,000, and that the remaining defendants be ordered to pay him $25,000 each.

The transcript shows that the defendants were served on May 23, 2005, by delivery of a copy of the summons and complaint for each of the named defendants as follows: on Radcliff, to "Dale E. Radcliff"; on the York County Sheriff's Department, to "Dale E. Radcliff, Sheriff of York County, Nebraska"; on the York County jail supervisor, to "John Prusia, York County Jail Supervisor"; on Vrbka, to "Paul M. Vrbka"; and on Silverstrand, to "Ray Silverstrand a/k/a Gene R. Silverstrand."

Separate motions to dismiss were filed by counsel for each of the defendants in the name used in the complaint. Each motion raised the same grounds for dismissal, that is, pursuant to rule 12(b)(2), (4), (5), and (6), and all but the motion of the York County Sheriff's Department alleged the complaint was deficient in that it (1) purports to sue the respective defendant in his official capacity but the defendant was not served in his official capacity, (2) fails to state a claim for relief because it fails to allege that Holmstedt exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a) (2000), and (3) fails to state a claim for relief against the defendant acting in his official capacity pursuant to § 1983. The motion of the defendant York County Sheriff's Department differs in that the first reason stated in its motion to dismiss was that there is no individual or political subdivision which may be sued known as the "'York County Sheriff's Department,'" rather than the first reason stated by the other defendants, as shown above.

The transcript shows a letter from Holmstedt to the trial judge dated June 4, 2005, and file stamped June 7, wherein Holmstedt "object[s]" to the motions to dismiss and then goes on to briefly argue each of the points raised in the motions. The motions were heard by the district court on June 24, with Holmstedt appearing by telephone and the defendants' attorney appearing in person. At that

> hearing, the defendants' attorney stated the bases for the motions to dismiss. Then Holmstedt stated that his brief had been mailed "yesterday," and requested a continuance. The continuance was denied, but the judge stated that he would not rule until he had received Holmstedt's brief. Holmstedt started to read the brief over the telephone; the judge asked Holmstedt whether he had anything to say that was not in the brief, and he said no. The judge then stated that he would rather not listen to Holmstedt read the brief because he was going to read the brief several times himself before he ruled on the motion. Holmstedt stated, "That works." The hearing was concluded shortly thereafter.
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> Holmstedt's brief in opposition to the motions to dismiss was dated June 23, 2005. The brief was received by the district court clerk on June 29, but was not filed because the brief was considered Holmstedt's written argument to the court. On July 12, the district court entered an order which stated, in its entirety, "Motion to dismiss sustained in all bases. Complaint dismissed."

*Holmstedt v. York Cty. Jail Supervisor*, 15 Neb. App. 893, 895-97, 739 N.W.2d 449, 455-56 (2007).

Holmstedt appealed to the Court of Appeals. He asserted, inter alia, that the district court erred in dismissing his complaint as to each of the defendants. With regard to the defendant "York County Sheriff's Department," the Court of Appeals determined that the complaint contained no allegations that would support a finding that such an entity could be sued. The Court of Appeals noted that while "York County" was an entity that could be sued, if it was Holmstedt's intent to sue a department of York County, suit was required to be brought in the proper name of the county. The Court of Appeals therefore concluded that the district court properly sustained the motion to dismiss the "York County Sheriff's Department" under rule 12(b)(2), (4), and (5). *Holmstedt*, 15 Neb. App. at 905, 739 N.W.2d at 461.

With regard to the remaining defendants, who were all individuals, the Court of Appeals found it necessary to determine the capacity in which such individuals were being sued in

order to determine the jurisdiction-related issues. The Court of Appeals stated that under § 1983, public servants may be sued in their official capacity, in their individual capacity, or both. The Court of Appeals noted, however, that federal circuit courts disagree on the proper means of determining whether an action is pleaded as one suing a person in his or her official capacity or as one alleging individual liability. The Court of Appeals cited *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir. 2001), in which the Court of Appeals for the Sixth Circuit stated that the majority of circuits followed a "course of proceedings" test which considers factors such as the nature of the plaintiff's claims, requests for compensatory or punitive damages, subsequent pleadings, and the nature of any defenses, such as qualified immunity, raised in response to the claim, which defenses would indicate whether the defendant had actual knowledge of the potential for individual liability. The Court of Appeals for the Sixth Circuit noted that only two circuits deviated from the "course of proceedings" test. The Court of Appeals for the Eighth Circuit has held that in order to sue a public official in his or her individual capacity, "a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity." *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999). The Court of Appeals for the Ninth Circuit, by contrast, has held that "[w]here state officials are named in a complaint which seeks damages under 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities." *Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 42 F.3d 1278, 1284 (9th Cir. 1994).

Because the Nebraska Supreme Court had not ruled on which method should be used to determine the capacity in which a person is sued under § 1983 in Nebraska state courts, the Court of Appeals attempted to determine how this court would decide the issue and took guidance from federal jurisprudence. Although noting that the Eighth Circuit approach "displays the virtues of simplicity and certainty," the Court of Appeals concluded that this court would follow the majority of circuits and adopt the "course of proceedings" test. *Holmstedt*, 15 Neb. App. at 903, 739 N.W.2d at 460.

Applying the "course of proceedings" test, the Court of Appeals noted that Holmstedt conceded in his brief that he had not specified whether the individual defendants were being sued in their official capacities or in their individual capacities. Because the case was in its early stages, the Court of Appeals noted that it lacked information regarding some of the factors in the "course of proceedings" test, such as defenses raised in an answer and subsequent pleadings by the plaintiff. However, the Court of Appeals determined that Holmstedt had sued the individual defendants in their individual capacities because the complaint alleged actions by identified individuals and did not allege violations related to actions taken pursuant to policy, ordinance, regulation, or custom which would have suggested that the individuals were being sued for actions taken in their official capacities. *Holmstedt v. York Cty. Jail Supervisor*, 15 Neb. App. 893, 739 N.W.2d 449 (2007).

Having determined that the individual defendants were sued in their individual capacities, the Court of Appeals further determined that the record showed proper service of process on defendants Radcliff, Vrbka, and Silverstrand. With respect to the defendant "York County Jail Supervisor," the Court of Appeals noted that Neb. Rev. Stat. § 25-321 (Cum. Supp. 2006) allows a plaintiff to designate a defendant by description when a name is unknown. The Court of Appeals determined that the summons for "'York County Jail Supervisor'" was properly served on "'John Prusia, York County Jail Supervisor.'" *Holmstedt*, 15 Neb. App. at 904, 739 N.W.2d at 461. Having found no deficiency regarding personal jurisdiction, process, or service of process with respect to the individual defendants, the Court of Appeals concluded that the district court erred in sustaining the individual defendants' motions to dismiss under rule 12(b)(2), (4), and (5). *Holmstedt, supra*.

The Court of Appeals then considered the rule 12(b)(6) challenges raised by the individual defendants. With respect to the defendants' argument that Holmstedt failed to exhaust administrative remedies, the Court of Appeals determined that failure to exhaust remedies was properly categorized as an affirmative

defense and concluded that any such failure could be addressed by procedural devices other than a motion to dismiss and that dismissal at this stage was not warranted based on a failure to plead exhaustion. *Holmstedt, supra*. The Court of Appeals further concluded that as to each individual defendant, Holmstedt had alleged "facts establishing conduct by a person acting under color of state law, which conduct deprived Holmstedt of rights, privileges, or immunities secured by the Constitution and laws of the United States." 15 Neb. App. at 907, 739 N.W.2d at 462. The Court of Appeals concluded that the district court had erred in granting the individual defendants' motions to dismiss under rule 12(b)(6).

Because it concluded that the district court had erred in granting the individual defendants' motions to dismiss under rule 12(b)(2), (4), (5), and (6), the Court of Appeals reversed the dismissal of Holmstedt's complaint as to such defendants. As noted above, the Court of Appeals affirmed the dismissal of the "York County Sheriff's Department" and such ruling is not challenged or discussed on further review.

We granted the defendants' petition for further review.

## ASSIGNMENTS OF ERROR

The defendants assert that the Court of Appeals erred in (1) using the "course of proceedings" test rather than the Eighth Circuit's approach to determine whether the defendants were sued in their individual or in their official capacities, (2) failing to affirm the dismissal as to the individual defendants in their official capacities for lack of personal jurisdiction, and (3) holding that the complaint stated a claim under § 1983 against the individual defendants in their individual and in their official capacities.

## STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

## ANALYSIS

*Court Should Consider Motions to Dismiss Under Rule 12(b)(2), (4), and (5) Before Considering Whether Complaint Fails to State a Cause of Action Pursuant to Rule 12(b)(6).*

We note first that the defendants moved for dismissal based on rule 12(b)(2), (4), (5), and (6) and that in dismissing the action as to all defendants, the district court stated the motions were "sustained in all bases." Rule 12(b) provides that a party may move to dismiss an action on various bases including, inter alia, the following subsections: (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, and (6) failure to state a claim upon which relief may be granted.

[2] With respect to the various bases upon which the defendants moved for dismissal, the Court of Appeals noted this court's opinion in *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 600, 694 N.W.2d 625, 629-30 (2005), in which we stated that "when a motion to dismiss raises both rule 12(b)(1) [subject matter jurisdiction] and [rule 12(b)](6) grounds, the court should consider the rule 12(b)(1) grounds first and should then consider the rule 12(b)(6) grounds only if it determines that it has subject matter jurisdiction." Extrapolating from *Anderson* and relying on federal case law, the Court of Appeals determined that a similar approach applied here and that issues of personal jurisdiction, process, and service of process, raised pursuant to rule 12(b)(2), (4), and (5), should have been determined before the district court considered whether the complaint stated a claim under rule 12(b)(6). We agree with the Court of Appeals' determination and conclude that when a motion to dismiss raises rule 12(b)(6) grounds and any combination of rule 12(b)(2), (4), and (5) grounds, the court should consider the rule 12(b)(2), (4), and (5) grounds first and should then consider the rule 12(b)(6) grounds only if it determines that it has personal jurisdiction and that process and service of process were sufficient. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (federal court generally may not rule on merits of case without first determining that it

has subject matter jurisdiction and personal jurisdiction). See, also, *Sucampo Pharmaceuticals v. Astellas Pharma*, 471 F.3d 544, 548 (4th Cir. 2006) ("dismissal of a case on an issue relating to the merits of the dispute, such as failure to state a claim, is improper without resolving threshold issues of jurisdiction, including personal jurisdiction").

*The Rule Followed by the Court of Appeals for the Eighth Circuit, Rather Than "Course of Proceedings" Test, Should Be Used in Nebraska Courts to Determine Whether Plaintiff in § 1983 Action Is Suing Defendant in Individual or in Official Capacity.*

The defendants assert that the Court of Appeals erred in using the "course of proceedings" test rather than the Eighth Circuit's rule to determine whether the individual defendants were sued in their individual or in their official capacity or both. We agree that the rule followed by the Court of Appeals for the Eighth Circuit should have been followed.

The Court of Appeals for the Eighth Circuit has held that in order to sue a public official in his or her individual capacity, "a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity." *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999). See, also, *Baker v. Chisom*, 501 F.3d 920 (8th Cir. 2007) (stating that requiring express statement that defendant is sued in individual capacity is consistent with Federal Rules of Civil Procedure). In *Johnson*, the Eighth Circuit Court noted that in § 1983 actions, "liability exposes public servants to civil liability and damages [and that] only an express statement that they are being sued in their individual capacity will suffice to give proper notice to the defendants." 172 F.3d at 535. The Eighth Circuit has advised that in order to meet the pleading requirement in § 1983 actions, "litigants wishing to sue government agents in both capacities should simply use the following language: 'Plaintiff sues each and all defendants in both their individual and official capacities.'" *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). Such language "guarantees that the defendant receives prompt notice of his or her potential personal liability." *Id*. The Eighth

Circuit has stressed that the statement of capacity must be clear and that "[n]either a cryptic hint in a plaintiff's complaint nor a statement made in response to a motion to dismiss is sufficient." *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 620 (8th Cir. 1995).

[3] We believe that the rule followed by the Court of Appeals for the Eighth Circuit is reasonable and addresses a valid concern regarding providing sufficient notice to individual defendants, especially where a legal action could result in personal liability. The Eighth Circuit rule is simple for a court to apply, and it is not difficult for a plaintiff to comply with the rule. Federal district courts in Nebraska follow the Eighth Circuit rule. We are not aware of Nebraska state jurisprudence which would preclude following the Eighth Circuit rule in state court. Furthermore, we think that consistency between state courts and federal courts in Nebraska on this issue is prudent. A plaintiff in Nebraska is permitted to bring his or her § 1983 action either in a Nebraska state court or in a federal district court in Nebraska. To the extent it is feasible and consistent with applicable laws and rules of procedure, we believe such a plaintiff should be subject to similar pleading rules whether the § 1983 action is brought in state court or in federal court, thereby obviating the possibility of different outcomes during the pleading stage of the action. In summary, the Eighth Circuit Court has adopted the rule that in order to sue a public official in his or her individual capacity, a plaintiff in a § 1983 action must expressly and unambiguously state so in the complaint; otherwise, it will be assumed that the defendant is being sued only in his or her official capacity. Because such rule is reasonable and does not appear to conflict with Nebraska laws or rules of procedure, we conclude that such rule should be followed in Nebraska state courts.

Applying the Eighth Circuit rule, we review the complaint and conclude that the individual defendants in the present case were not sued in their individual capacities but were sued only in their official capacities. Holmstedt's complaint does not expressly and unambiguously state that the individuals were sued in their individual capacities, and under the Eighth Circuit rule, it is therefore assumed, and we conclude, that the

individuals were sued only in their official capacities. The contrary ruling of the Court of Appeals is reversed.

*Holmstedt Failed to Properly Serve the Individual Defendants in Their Official Capacities.*

Having concluded that Holmstedt sued the individual defendants solely in their official capacities, we consider the defendants' motions to dismiss pursuant to rule 12(b)(2), (4), and (5). We conclude that Holmstedt failed to properly serve the defendants in their official capacities and that therefore, the district court did not err in granting the motions to dismiss pursuant to rule 12(b)(2), (4), and (5). The reversal of the district court's order by the Court of Appeals was error and therefore must be reversed.

[4] The individuals named in this action were public servants employed by York County. In § 1983 actions, a "suit against a public employee in his or her official capacity is merely a suit against the public employer." *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) (citing *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). Therefore, this suit against employees of York County in their official capacities was a suit against York County.

Neb. Rev. Stat. § 25-510.02 (Reissue 1995) provides the proper procedure for service on the State and other political subdivisions. Subsection (2) provides, "Any county, city, or village of this state may be served by personal, residence, or certified mail service upon the chief executive officer, or clerk." In order to sue the individuals in their official capacities, and thereby to sue York County, Holmstedt was required to make service on York County in compliance with § 25-510.02(2). The statute required service on the chief executive officer or the clerk of the county, rather than on the named county employees. Holmstedt served the named employees, rather than the appropriate official of York County. Holmstedt therefore failed to properly serve York County and by extension failed to serve the individuals in their official capacities.

Because Holmstedt did not properly serve the individuals in their official capacities, the district court did not gain personal jurisdiction over such defendants. See, similarly, *Nebraska*

*Methodist Hospital Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996) (in order to vest court with personal jurisdiction over State in case arising under Administrative Procedure Act, plaintiff must serve summons upon Attorney General). Therefore, we conclude that the district court properly granted the individual defendants' motions to dismiss pursuant to rule 12(b)(2), (4), and (5) and that the Court of Appeals erred when it reversed the dismissal. Because dismissal was proper under these subsections, we need not consider the assignment of error regarding dismissal pursuant to rule 12(b)(6).

## CONCLUSION

The Court of Appeals affirmed the district court's dismissal of the action as to the York County Sheriff's Department pursuant to rule 12(b)(2), (4), and (5), and Holmstedt did not seek further review of such affirmance. Thus, the York County Sheriff's Department stands dismissed. On further review, we conclude that the individual defendants were sued only in their official capacities and that the district court did not gain personal jurisdiction over such defendants because Holmstedt failed to properly serve them in their official capacities. Because we conclude that the district court properly dismissed the action as to the individual defendants pursuant to rule 12(b)(2), (4), and (5), we conclude that the Court of Appeals erred in reversing the order of dismissal as to the individual defendants, and we therefore reverse the Court of Appeals' order. We remand the cause to the Court of Appeals with directions to affirm the district court's dismissal of the action as to all defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

# Richard A. DeWester, Personal Representative of the Estate of Lindsey DeWester, deceased, appellant, v. Kyle W. Watkins, an individual, appellee.

745 N.W.2d 330

Filed February 29, 2008. No. S-06-230.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself or herself in the activity in such a manner as to create an unreasonable risk of harm to others.
4. **Negligence: Liability.** One who supplies a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his or her youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself or herself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.
5. **Negligence: Motor Vehicles.** The law requires that an owner use care in allowing others to assume control over and operate his or her automobile, and holds the owner liable if he or she entrusts the automobile to, and permits it to be operated by, a person whom the owner knows or should know to be an inexperienced, incompetent, or reckless driver, or an intoxicated driver, or a driver otherwise incapable of properly operating an automobile without endangering others.
6. **Negligence: Motor Vehicles: Damages.** A person who authorizes or permits a motor vehicle under his or her control to be driven by an unlicensed driver, in violation of the Motor Vehicle Operator's License Act, is guilty of negligence and may be liable for damages proximately resulting from the negligent operation of the motor vehicle.
7. **Negligence.** Negligent entrustment should be defined with reference to control of the entrusted property.
8. **Negligence: Liability.** A defendant's ownership of entrusted property is not a prerequisite for liability for negligent entrustment.
9. ____: ____. To be liable for negligent entrustment, the defendant must have had the authority to permit or prohibit the entrustee's use of the entrusted property.
10. **Negligence: Case Overruled.** To the extent that *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993), holds that legal ownership of entrusted property is an essential element of a negligent entrustment claim, it is overruled.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the District Court for Dundy County, JOHN J. BATTERSHELL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Andrew J. Wilson and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Martin J. Troshynski, of Ruff, Lindemeier, Gillett, Dawson & Troshynski, for appellee.

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

GERRARD, J.

Kyle W. Watkins' father purchased a vehicle and provided it to Kyle for his use. Kyle permitted Lindsey DeWester, a 14-year-old girl without a driver's license, to drive the vehicle. Lindsey lost control of the vehicle and was killed in the resulting accident. Lindsey's estate sued Kyle for wrongful death, alleging that Kyle had negligently entrusted the vehicle to Lindsey. The issue presented in this appeal is whether a claim for negligent entrustment of property can be brought against a defendant who had the right to control the property, but was not its legal owner. We conclude that such a claim may be brought and, therefore, direct that this cause be remanded back to the district court which had entered summary judgment in favor of the defendant.

## BACKGROUND

The accident occurred 3 days before Kyle's 17th birthday. Kyle and a friend had been drinking beer and "cruising around town" in a Jeep Cherokee. Kyle and his father both testified that his father owned the Jeep and paid for its expenses, but that Kyle was the Jeep's primary driver. Kyle's father had his own vehicle and did not keep a set of keys for the Jeep with him. Kyle's father testified that he specifically recalled telling Kyle not to permit other people to drive the Jeep.

Kyle and his friend stopped at a local convenience store, where Lindsey saw them. Kyle knew Lindsey from school, and

they had socialized after school and on weekends. Kyle and his friend went into the convenience store bathroom, and when they returned to the Jeep, Lindsey was in the driver's seat. Kyle had left the Jeep's doors unlocked and the keys in the ignition, but had not expected Lindsey to get in the car. Lindsey was 14 years old, and Kyle knew Lindsey did not have a driver's license. Nevertheless, Kyle's friend got in the front passenger seat, and Kyle sat in the back seat, behind his friend.

After Kyle and his friend got in the Jeep, Lindsey "took off down the road." Lindsey wanted to drop Kyle's friend off at his house and took a county road. It was dark, and the road and T-shaped intersection they were approaching were unlit. Kyle testified that Lindsey "looked up all of a sudden, I guess, and she tried to jerk the wheel because she saw that there was no more road." The Jeep rolled over. None of the three occupants had been wearing seatbelts, and Lindsey was ejected from the vehicle. Lindsey died as a result of the accident.

Lindsey's father, Richard A. DeWester, as personal representative of Lindsey's estate, sued Kyle, alleging negligent entrustment of the Jeep. (The estate also sued Dundy County, but the county has been dismissed with prejudice and is not a party to this appeal.) The district court entered summary judgment in favor of Kyle, because the Jeep was owned by Kyle's father, not Kyle. The Nebraska Court of Appeals affirmed,[1] concluding that it was bound to do so by this court's holding in *Vilas v. Steavenson*,[2] which will be discussed at greater length below. The estate petitioned for further review, arguing, among other things, that *Vilas* should be overruled. We sustained the estate's petition for further review.

## ASSIGNMENTS OF ERROR

The estate assigns that the Court of Appeals erred in affirming the district court's decision sustaining Kyle's motion for summary judgment.

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[1] See *DeWester v. Dundy County*, No. A-06-230, 2007 WL 2372615 (Neb. App. Aug. 21, 2007) (not designated for permanent publication).

[2] *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993).

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

## ANALYSIS

[3,4] The tort of negligent entrustment is explained by the Restatement (Second) of Torts § 308, which states that

> [i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[4]

And the Restatement, § 390, explains, in a "special application" of § 308,[5] that

> [o]ne who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[6]

[5] While we have previously not expressly adopted § 308 or § 390, we conclude that they accurately reflect Nebraska law. We have adopted closely related sections of the Restatement,[7]

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[3] *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

[4] Restatement (Second) of Torts § 308 at 100 (1965).

[5] See *id.*, § 390, comment *b*. at 315.

[6] *Id.*, § 390 at 314.

[7] See, *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956); *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

and more importantly, we adopted the substance of § 390, in the context of motor vehicles, in *Deck v. Sherlock*.[8] In *Deck*, a plaintiff injured in an automobile accident sued the driver of the other automobile and the automobile owner who had loaned his vehicle to the driver. The plaintiff's evidence showed that the owner and driver had been drinking together and that the owner could have known at the time the vehicle was loaned that the driver intended to continue drinking. In concluding that an issue of fact was presented as to the owner's liability to the plaintiff, we explained that the "controlling rule" was

> [t]he law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others.[9]

In *Deck*, we framed the rule in terms of the "owner" of the automobile, because the defendant in that case *was* the owner.[10] And we adhered to that phrasing in *Wagner v. Mines*,[11] another negligent entrustment case in which the defendant was the owner of the vehicle. In neither case were we required to, nor did we, address whether legal ownership of the vehicle was required to establish liability.

But in *Vilas*,[12] this court confronted a situation similar to that presented here, in which the plaintiff sued both a son who had loaned a vehicle to an underage driver and the father who owned the vehicle at issue. The *Vilas* court discussed the liability of the father at length, concluding that the doctrine

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[8] *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956).

[9] *Id.* at 90-91, 75 N.W.2d at 102. Accord, *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994); *Vilas, supra* note 2; *Wagner v. Mines*, 203 Neb. 143, 277 N.W.2d 672 (1979); *Suiter v. Epperson*, 6 Neb. App. 83, 571 N.W.2d 92 (1997).

[10] See *Deck, supra* note 8.

[11] *Wagner, supra* note 9.

[12] *Vilas, supra* note 2.

of negligent entrustment did not apply to the father because he had not knowingly entrusted the vehicle to the underage driver. The *Vilas* court then concluded, without discussing the issue, that "[i]t also appears that the doctrine of negligent entrustment does not apply to [the son] since he did not own the vehicle."[13]

That conclusion, however, is inconsistent with both the Restatement and the overwhelming weight of authority from courts to have considered the issue. As previously noted, § 308 of the Restatement applies to activity that is "under the control of the actor."[14] And comment *a.* to § 308 explains that

> [t]he words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.[15]

Based on the Restatement's reasoning, most courts have framed the relevant issue in a negligent entrustment case as whether the defendant in a negligent entrustment action had the right to *control* the entrusted property, with ownership simply being one way of proving a right to control. As the Illinois Supreme Court explained, "entrustment must be defined with reference to the right of control of the subject property. In essence, if the actor does not have an exclusive or superior right of control, no entrustment of the property can occur."[16] A right to control does not always mean ownership, but generally means that the defendant must have a greater right of possession or control than the entrustee.[17]

Given that, it is hardly surprising that the overwhelming majority of courts to have analyzed the issue have concluded

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[13] *Id.* at 810, 496 N.W.2d at 550.

[14] Restatement, *supra* note 4, § 308 at 100.

[15] *Id.*, comment *a.* at 100.

[16] *Zedella v. Gibson*, 165 Ill. 2d 181, 187, 650 N.E.2d 1000, 1003, 209 Ill. Dec. 27, 30 (1995).

[17] *Neary v. McDonald*, 956 P.2d 1205 (Alaska 1998).

that a nonowner who has control of a vehicle can be held liable for negligently entrusting the vehicle.[18] Certificates of title and other incidents of legal ownership are often documents of convenience, rather than reflections of the actual possession and control of a vehicle.[19] And the basis for liability under the doctrine of negligent entrustment is the power to permit and prohibit the use of the entrusted chattel, which need not arise from legal ownership.[20] Holding otherwise produces the paradox that even the grossest negligence can be insulated from liability, so long as the person deciding who can drive a car is not the person who legally owns it.

[6] We also note that under the Motor Vehicle Operator's License Act,[21] it is a Class III misdemeanor[22] for any person "[t]o authorize or knowingly permit a motor vehicle owned by him or her *or under his or her control* to be driven upon any highway by any person who is not authorized under the act or is in violation of any of the provisions of the act . . . ."[23] And we have held that a person who violates that statute "is guilty of negligence and liable for damages proximately resulting

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[18] See, *Harrison v. Carroll*, 139 F.2d 427 (4th Cir. 1943) (applying Virginia law); *Green v. Harris*, 70 P.3d 866 (Okla. 2003); *Estate of Trobaugh v. Farmers Ins. Exch.*, 623 N.W.2d 497 (S.D. 2001); *Neary, supra* note 17; *Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436 (1997); *Ransom v. City of Garden City*, 113 Idaho 202, 743 P.2d 70 (1987); *Chiniche v. Smith*, 374 So. 2d 872 (Ala. 1979); *Dicranian v. Foster*, 114 Vt. 372, 45 A.2d 650 (1946); *Salamone v. Riczker*, 32 Mass. App. 429, 590 N.E.2d 698 (1992); *Cameron v. Downs*, 32 Wash. App. 875, 650 P.2d 260 (1982); *Jones v. Cloud*, 119 Ga. App. 697, 168 S.E.2d 598 (1969). See, also, *Tissicino v. Peterson*, 211 Ariz. 416, 121 P.3d 1286 (Ariz. App. 2005); *Williams v. Bumpass*, 568 So. 2d 979 (Fla. App. 1990) (negligent entrustment of firearm). Cf., *McGinnis v. Hand*, 293 Mont. 72, 972 P.2d 1126 (1999); *Zedella, supra* note 16. But see *Coble v. Knight*, 130 N.C. App. 652, 503 S.E.2d 703 (1998).

[19] See *Green, supra* note 18.

[20] See *Broadwater, supra* note 18.

[21] Neb. Rev. Stat. §§ 60-462 to 60-4,188 (Reissue 1998 & Supp. 2001).

[22] See § 60-4,111.

[23] § 60-491(10) (emphasis supplied).

from the negligent operation of the motor vehicle."[24] Although *Vilas* cited that proposition, the court's eventual conclusion was inconsistent with the statute.

[7,8] In this case, the district court entered summary judgment for Kyle based on the rule announced in *Vilas*, and the Court of Appeals affirmed that judgment because the doctrine of vertical stare decisis compelled it to strictly follow *Vilas*.[25] The estate argues that *Vilas* was wrongly decided and should be overruled. We agree. We are persuaded by the Restatement, the reasoning of other courts to have decided the issue, and our own authority giving effect to the clearly articulated public policy of the Motor Vehicle Operator's License Act, that negligent entrustment should be defined with reference to control of the entrusted property, and a defendant's ownership of the property is not a prerequisite for liability for negligent entrustment.[26]

[9,10] In other words, to be liable for negligent entrustment, the defendant must have had the authority to permit or prohibit the entrustee's use of the entrusted property. But control of the entrusted property is the essential element of a negligent entrustment claim, not legal ownership.[27] To the extent that *Vilas*[28] holds otherwise, it is overruled.

Kyle cites cases that he claims support a rule that a nonowner cannot be held liable for negligent entrustment. But those cases present circumstances in which the nonowner defendant was alleged to have negligently entrusted the property *to the owner* of the property, who was usually intoxicated.[29] Stated colloquially, the question in those cases was whether the defendant had a legal duty not to return a drunk driver's car keys. Even on that

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[24] *Gertsch v. Gerber*, 193 Neb. 181, 184, 226 N.W.2d 132, 134 (1975). Accord, *Vilas, supra* note 2; *Wagner, supra* note 9. See, also, *Keller v. Wellensiek*, 186 Neb. 201, 181 N.W.2d 854 (1970); *Walker v. Klopp*, 99 Neb. 794, 157 N.W. 962 (1916).

[25] See *DeWester, supra* note 1, citing *Sanford v. Clear Channel Broadcasting*, 14 Neb. App. 908, 719 N.W.2d 312 (2006).

[26] See, *Zedella, supra* note 16; *Tissicino, supra* note 18.

[27] *Tissicino, supra* note 18.

[28] *Vilas, supra* note 2.

[29] See, e.g., *Coble, supra* note 18 (citing cases).

point, there is a division of authority.[30] But obviously, when the issue is control of the vehicle, entrusting a vehicle to its owner presents a complication in that the defendant arguably had no authority to deny the vehicle to someone with a superior right to its possession. Decisions addressing that issue are easily distinguishable from this case, and there is no need for us to reach that issue here.

We also note a division of authority regarding the issue of contributory negligence under a comparative negligence statutory scheme, where the plaintiff is also the entrustee.[31] Although Kyle alleged contributory negligence in his answer, it was neither raised in support of Kyle's motion for summary judgment nor addressed by the district court, and it is not before us in this appeal. The sole issue presented here is whether a claim for negligent entrustment can be stated against a defendant who had the right to control the property, but was not its legal owner. We have concluded that it can.

## CONCLUSION

A defendant's ownership of entrusted property is not a prerequisite to liability for negligent entrustment. While we recognize that the district court and Court of Appeals concluded otherwise because they were bound by this court's precedent, we nonetheless reverse the judgment of the Court of Appeals and remand the cause to that court with directions to reverse the judgment of the district court and remand the cause for further proceedings.

Reversed and remanded with directions.

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[30] Compare, e.g., *id.*; *Weeks v. City of New York*, 181 Misc. 2d 39, 693 N.Y.S.2d 797 (1999).

[31] Compare, e.g., *King v. Petefish*, 185 Ill. App. 3d 630, 541 N.E.2d 847, 133 Ill. Dec. 636 (1989); *Herbert v. Whittle*, 69 Md. App. 273, 517 A.2d 358 (1986).

Stephan, J., concurring.

This is an unusual negligent entrustment case in that it involves only two parties: the person alleged to have negligently entrusted the motor vehicle and the personal representative of the party to whom the vehicle was entrusted. The

typical negligent entrustment case involves at least three parties, including the person who entrusts the vehicle to another, the entrustee whose negligent operation causes an injury, and the injured party who seeks compensation. We have held in such cases that negligent entrustment standing alone does not establish liability; it must also be shown that the driver to whom the vehicle was entrusted negligently caused the plaintiff's injury.[1]

As a matter of general principle, I agree with the court's holding today that one who controls access to a motor vehicle may be held liable for negligent entrustment, even if he or she is not the owner. But I reserve judgment on the question of whether a negligent entrustment claim can ever be asserted by or on behalf of the entrustee whose own negligence is a proximate cause of an accident and resulting injury. This issue was not briefed or argued in this appeal, and as the majority notes, it would require an evaluation of the parties' respective claims under Nebraska's comparative negligence statute, which cannot be undertaken on this record. There may be other considerations as well. Thus, I concur in the judgment of the court, leaving to another day the question of whether negligent entrustment, standing alone, can establish liability to an entrustee.

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[1] See, e.g., *Gertsch v. Gerber*, 193 Neb. 181, 226 N.W.2d 132 (1975).

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## Katherine R. Napleton Revocable Self-Declaration of Trust, appellant, v. Vatterott Educational Centers, Inc., a Missouri corporation, appellee.

745 N.W.2d 325

Filed February 29, 2008. No. S-06-1032.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
4. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
5. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
6. ____. When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Andrew J. Hilger, of Greul & Hilger, L.L.C., for appellant.

James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

## NATURE OF CASE

The Katherine R. Napleton Revocable Self-Declaration of Trust (Napleton), the lessor of property located in Omaha, Nebraska, brought suit against Vatterott Educational Centers, Inc. (Vatterott), the assignee of the lease, for breach of contract. Napleton alleged that Vatterott was liable for the failure of the assignor-lessee of the property, the Omaha College of Health Careers, Inc. (Omaha College), to pay property taxes in years preceding the assignment of the lease to Vatterott. We affirm the district court's granting of summary judgment in favor of Vatterott.

## BACKGROUND

Napleton is the owner of property located at 225 North 80th Street in Omaha. In 1999, Napleton and Omaha College entered into a lease agreement wherein Omaha College leased the property from Napleton. On October 5, 2001, Napleton, Omaha College, and Vatterott entered into an agreement entitled "Assignment & Amendment of Lease Agreement" (Assignment Agreement).

Under the terms of the Assignment Agreement, Napleton agreed to terminate Omaha College's rights and obligations under the 1999 lease and to assign Omaha College's rights and obligations to Vatterott. The Assignment Agreement further provided that Vatterott would pay rent during the term of the lease as well as "additional rent." The additional rent clause provides: "Lessee agrees to pay to Lessor as additional rent those amounts and at such time as payment of such additional rent would be required to be paid by Tenant under [the] terms of Section 4, Additional Rent, of the 1999 Lease." Section 4 of the 1999 lease provided:

> Tenant agrees to pay to Landlord as additional rent those amounts and at such time as payment of such additional rent would be required to be paid by General Motors Corporation under the terms of the Original 1955 Lease if said Original 1955 Lease were still in full force and effect.

The 1955 lease referenced in the 1999 lease was between New England Mutual Life Insurance Company and General Motors Corporation. Article 2, § 2.02, of the 1955 lease provided:

> As additional rent, Lessee shall pay, from the operative date of this lease, all:
>
> (a) Taxes, assessments and other governmental charges except as hereinafter stated in paragraph (e) of this section;
>
> . . . .
>
> (e) Other expenses and charges;
>
> which during any term of this lease shall be levied, assessed or imposed by any governmental authority upon or with respect to, or incurred in connection with the ownership, possession, occupation, operation, alteration, maintenance, repair and use of the premises . . . .

Property taxes on the property for the year 2000 were due in the amount of $29,168.38. The property taxes on the property for the year 2001 were due in the amount of $31,261.62. However, neither the 2000 nor the 2001 property taxes were paid by Omaha College or Napleton. Napleton claims that it first became aware that Omaha College was delinquent on property taxes for the tax years 2000 and 2001 in February 2003. On

February 19, 2003, Napleton requested payment from Vatterott for the property tax delinquency in the amount of $71,513.15. That amount included the amount of taxes delinquent for the 2000 and 2001 property tax years, as well as $11,083.15 in interest. Vatterott forwarded a check in the amount of $7,537.20 to Napleton, which Vatterott determined was its prorated share of the property taxes for 2001.

Napleton brought the present action against Vatterott, alleging breach of contract. Vatterott filed a motion for summary judgment, which was granted by the district court. In its order, the district court stated that although Vatterott agreed to pay additional rent under the Assignment Agreement, the Assignment Agreement did not obligate Vatterott to pay accrued but unpaid obligations of Omaha College. The district court then found as a matter of law that

> an assignee is not liable for covenants or agreements of the assignor broken before the assignee acquired the leasehold unless agreed to by the parties at the time the lease was entered into. . . . The prior obligations of Omaha College . . . became causes of action in favor of [Napleton] against Omaha College . . . at the time those covenants were broken.

Napleton now appeals.

## ASSIGNMENTS OF ERROR

Napleton asserts that the district court erred in (1) its interpretation of the Assignment Agreement and (2) finding as a matter of law that an assignee is not liable for lease covenants or agreements broken by the assignor prior to the assignment.

## STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[1]

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[1] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

## ANALYSIS

### Privity of Estate

Napleton argues that the property tax delinquency was an obligation under the 1999 lease. Napleton claims that obligations under the 1999 lease were amended prospectively from the date of the Assignment Agreement, but were not terminated. Napleton further argues that under the Assignment Agreement, Omaha College's obligations under the 1999 lease were terminated, but that to the extent Omaha College failed to perform its obligations under the 1999 lease, those obligations were assumed by Vatterott. The broad question presented by these arguments is whether an assignee of a lease for real property must perform obligations not fulfilled by the assignor of the lease prior to the lease assignment.

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.[3]

It has generally been stated that an assignee or transferee of an interest in leased property is liable for a breach of a promise that runs with the land and which is broken while the assignee or transferee holds the leasehold estate, but is not liable for a promise that runs with the land if the promise is broken before the assignment or transfer.[4]

In *Regency Adv. Ltd. v. Bingo Idea-Watauga*,[5] the assignee of a landlord brought an action against a commercial tenant, claiming in part that the tenant breached the lease by failing to pay rent. The tenant counterclaimed, alleging that the

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[2] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[3] *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007).

[4] See, e.g., Restatement (Second) of Property § 16.1 (1977); 49 Am. Jur. 2d *Landlord and Tenant* § 960 (2006).

[5] *Regency Adv. Ltd. v. Bingo Idea-Watauga*, 936 S.W.2d 275 (Tex. 1996).

assignee breached the lease by failing to build leased space for the tenant. The Texas Supreme Court held that the assignee was not liable for breach of the lease because the obligation to build leased space accrued before the lease was assigned to the assignee. Quoting the Restatement of Property (Second), the court stated, "'A transferee is liable on a promise that runs with the transferred interest only to the extent of a breach of the promise that occurs while the transferee is in privity of estate with the person entitled to enforce the promise.'"[6]

In *Lone Star Gas v. Mexia Oil & Gas*,[7] the buyer under a gas purchase contract sued in part the assignee to whom the seller had assigned its lease interests in a gas well. The buyer alleged that the assignee was obligated to reimburse the buyer for taxes paid on gas well production. The Texas Court of Appeals held that the assignment which stated that it was "subject to" the gas purchase contract between the buyer and the seller/assignor did not obligate the assignee to pay the prior debt of the assignor. The court explained that privity of estate is the foundation of the assignee's liability on covenants that run with the land. Because there was not privity of estate between the buyer and the assignee when the breaches took place, the assignee was not liable for breaches that took place before the assignment.[8]

Finally, in *First Nat. Bank v. Hazelwood Co.*,[9] the Oregon Supreme Court stated the following proposition:

> The rule is . . . "The assignee is only liable for covenants running with the land which are broken while he is the legal assignee."
>
> . . . .

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[6] *Id.* at 277 (quoting Restatement, *supra* note 4, comment *h*.).

[7] *Lone Star Gas v. Mexia Oil & Gas*, 833 S.W.2d 199 (Tex. App. 1992).

[8] *Id.* (citing *Washington N. Gas Co. v. Johnson*, 123 Pa. 576, 16 A. 799 (1889) (assignee liable for covenants maturing while held by him, but not liable for those previously broken)).

[9] *First Nat. Bank v. Hazelwood Co.*, 85 Or. 403, 407-08, 166 P. 955, 956 (1917) (quoting 1 David McAdam, The Rights, Duties, Remedies and Incidents Belonging to and Growing Out of the Relation of Landlord and Tenant 863, 875 (Thomas F. Keogh ed., 4th ed. 1910)).

> "An assignee is only liable for his own breaches of express or implied covenants in the lease which run with the land, so long as he retains possession by himself or his tenants."

The court further noted the following rule: "'An assignee of the leasehold is in privity of estate with the lessor and is liable to him personally for the breach of the lessee's covenants which are annexed to and run with the leasehold and which are broken while he holds the leasehold estate.'"[10]

In the present case, Napleton and Vatterott were not in privity of estate when the 2000 tax liability accrued. Nor were they in privity of estate between January and October 4 of the 2001 tax year, or for 9 months of the period in which the 2001 tax liability accrued. The lack of privity of estate between Napleton and Vatterott means that Vatterott is not liable for any breaches of the lease terms prior to the October 5, 2001, assignment unless the parties contracted otherwise.

### Assignment Agreement

[4-6] The Assignment Agreement provides in part: "[Napleton] and [Omaha College] agree to terminate [Omaha College's] rights and obligations under the 1999 Lease and to assign [Omaha College's] rights and obligations therein to [Vatterott]." The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[11] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[12] When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.[13]

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[10] *Id.* at 409, 166 P. at 956 (quoting 16 R.C.L. *Landlord and Tenant* § 349 (1917)).

[11] *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[12] *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

[13] *Sayah v. Metropolitan Prop. & Cas. Ins. Co., supra* note 1.

The language of the Assignment Agreement is clear and unambiguous. Omaha College's rights and obligations under the 1999 lease were terminated as of October 5, 2001, the date the Assignment Agreement was executed. The Assignment Agreement does not provide that Vatterott is liable for any obligations arising prior to the date of assignment. Absent a provision obligating Vatterott for liabilities arising prior to the time Vatterott obtained its leasehold interest in the property, the lack of privity of estate in this case compels our conclusion that Vatterott is not liable for Omaha College's failure to fulfill Omaha College's obligations under the 1999 lease.

## CONCLUSION

For the reasons discussed above, we affirm.

AFFIRMED.

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# IN RE INTEREST OF MATTHEW P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MATTHEW P., APPELLANT.

745 N.W.2d 574

Filed February 29, 2008. No. S-07-649.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. ____: ____. 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.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Sarah P. Newell for appellant.

Gary Lacey, Lancaster County Attorney, Alicia B. Henderson, and, on brief, Michelle A. Paxton for appellee.

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

STEPHAN, J.

Matthew P. was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 2006) after the separate juvenile court of Lancaster County found he had committed an act which would constitute the felony offense of escape from official detention under Neb. Rev. Stat. § 28-912(1) (Reissue 1995). Matthew timely appealed his adjudication. We affirm.

## FACTS

In a December 1, 2006, dispositional order, the juvenile court committed Matthew to the custody of the Office of Juvenile Services (OJS) for "out of home placement at a group home level of care." Matthew's commitment was the result of a previous law violation. OJS placed him at a Lincoln group home. Matthew absconded from this placement twice within the first month. The group home informed OJS that it could no longer keep Matthew at the facility, and OJS therefore issued a detainer for his apprehension and detention,[1] colloquially referred to as a "parole hold." The detainer requested that the Lancaster County Youth Services Center (LCYSC) hold Matthew until a hearing could be held seeking to transfer him to a higher level of care. The OJS services officer assigned to Matthew described LCYSC as a "detention center," and the record indicates that it is a secure facility.

Matthew was detained at LCYSC on January 25, 2007. On February 2, a private transport service coordinated and paid for by OJS brought Matthew to a medical appointment in Lincoln. Matthew was transported to the appointment in restraints consisting of "leg irons and handcuffs with a belt." After the appointment, he ran away from the transport employee and was not apprehended until 2 or 3 weeks later.

The State filed a second supplemental petition in the pending juvenile proceeding alleging that Matthew was a minor as defined by § 43-247(2) by reason of his actions on February 2, 2007. The State alleged that Matthew had escaped from official detention in violation of § 28-912(1). After an evidentiary hearing, the juvenile court found that Matthew's actions constituted

[1] Neb. Rev. Stat. § 43-411 (Reissue 2004).

an escape as defined and contemplated by § 28-912(1). Matthew timely appealed this adjudication, and we moved the appeal to our docket on our own motion under our statutory authority to regulate the dockets of the appellate courts of this state.[2]

## ASSIGNMENT OF ERROR

Matthew's sole assignment of error is that the juvenile court erred in adjudicating him because he did not escape from official detention within the meaning of § 28-912(1).

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[3]

## ANALYSIS

Matthew was adjudicated under § 43-247(2), which gives the juvenile court jurisdiction over "[a]ny juvenile who has committed an act which would constitute a felony under the laws of this state." The State alleged that his actions were in violation of § 28-912(1), which provides:

> A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

This appeal turns on the question of whether Matthew was in "official detention" at the time he eluded the transport employee. We note that although the detainer for apprehension and detention issued by OJS is colloquially referred to as a "parole hold," Matthew was not on parole within the meaning of the Office of

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[3] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007); *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

Juvenile Services Act, which defines "parole" as "a conditional release of a juvenile from a youth rehabilitation and treatment center to aftercare or transferred to Nebraska for parole supervision by way of interstate compact."[4] Accordingly, the last clause of § 28-912(1) does not apply.

[2] In determining whether Matthew was under "official detention" as defined by § 28-912(1), we are guided by the familiar principle that 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.[5] The statutory definition of "official detention" is broad and encompasses a variety of circumstances. In this case, the relevant language in § 28-912(1) is "detention in or transportation to any facility . . . for persons alleged or found to be delinquent . . . or any other detention for law enforcement purposes."

On the date in question, Matthew was under the jurisdiction of the juvenile court as a result of his previous adjudication for committing an act which would constitute a law violation. He was committed to OJS, which is charged with oversight and control of certain state juvenile correctional facilities and programs.[6] At the time of his flight, he was placed at a juvenile detention facility and was in the process of being transported back to the facility from a medical appointment.

The fact that he was being held in this facility pursuant to an OJS detainer, as opposed to a court order, is of no significance. We have noted that adult criminal offenders who are in custody "pursuant to commitment by official proceedings" fall within the definitional scope of § 28-912(1).[7] Matthew's detention at LCYSC was likewise pursuant to official proceedings. A juvenile court retains jurisdiction "over any juvenile committed to [OJS] until such time that the juvenile is discharged from

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[4] Neb. Rev. Stat. § 43-403(5) (Reissue 2004).

[5] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007); *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[6] See Neb. Rev. Stat. § 43-404 (Reissue 2004).

[7] *State v. Farr*, 209 Neb. 163, 169, 306 N.W.2d 854, 858 (1981).

[OJS]."[8] At the time of commitment, the court is required to determine the initial level of treatment.[9] In this case, the court ordered initial treatment at a group home level. If OJS proposes to transfer a juvenile to a higher level of care, it must seek court approval, which can be given only after OJS establishes at a hearing that the change is in the best interests of the juvenile, with due consideration for public safety.[10] OJS can make an immediate temporary change without prior court approval under limited circumstances, including when a facility of placement which is not state owned has asked that the juvenile be removed.[11] That is what occurred in this case.

Matthew argues on appeal that because he was committed to OJS, his running away from the transport officer was simply "absconding" from an OJS commitment and was not an escape from official detention.[12] He alleges that his actions thus do not fall under § 28-912, but instead fall under Neb. Rev. Stat. § 43-410 (Reissue 2004), which provides in part:

> Any peace officer, juvenile parole officer, or direct care staff member of [OJS] has the authority to apprehend and detain a juvenile who has absconded or is attempting to abscond from a placement for evaluation or commitment to [OJS] and shall cause the juvenile to be returned to the facility or program or an appropriate juvenile detention facility.

He contends that if absconding from an OJS placement constituted an escape within the meaning of § 28-912, the provisions of § 43-410 would be unnecessary and redundant.

We are not persuaded by this argument. The placement or commitment of a juvenile to the custody of OJS does not necessarily result in official detention within the meaning of § 28-912(1). Juveniles adjudicated as delinquent may be placed

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[8] Neb. Rev. Stat. § 43-408(2) (Cum. Supp. 2006).

[9] *Id.*

[10] § 43-408(4)(a).

[11] § 43-408(4)(b).

[12] Brief for appellant at 14.

with OJS for evaluation to aid the court in disposition.[13] When committing an adjudicated juvenile to the custody of OJS, a court must order the "initial level of treatment."[14] Section 43-408(5) provides that "[i]f a juvenile is placed in detention after the initial level of treatment is determined by the committing court," the court is required to hold periodic status hearings. The same statute specifically provides that "[p]lacement of a juvenile in detention shall not be considered as a treatment service."[15] Thus, it is possible for a juvenile to abscond from an OJS placement or commitment without committing the offense of escape from official detention.

In this case, however, the facts clearly establish that Matthew was being held in detention pursuant to official proceedings when he fled from the transportation employee. Accordingly, the juvenile court did not err in adjudicating Matthew pursuant to § 43-247(2) as a child who has committed an act which would constitute a felony under the laws of this state. Finding no error, we affirm the judgment of the separate juvenile court.

AFFIRMED.

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[13] Neb. Rev. Stat. §§ 43-281 and 43-413 (Reissue 2004).

[14] § 43-408(2).

[15] § 43-408(5).

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RICHARD E. SCOTT, RESPONDENT.

745 N.W.2d 585

Filed March 7, 2008. No. S-97-584.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings. When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** In considering an application for reinstatement to the practice of law, the Nebraska Supreme Court owes a solemn duty to protect the

public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant.

3. ____. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.
4. **Disciplinary Proceedings: Proof.** A disbarred attorney has the burden of proof to establish, by clear and convincing evidence, good moral character to warrant reinstatement.
5. ____: ____. The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.
6. ____: ____. The more egregious the underlying misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.

Original action. Application for reinstatement denied.

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

David A. Domina, of Domina Law Group, P.C., L.L.O., for respondent.

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

PER CURIAM.

On June 20, 1997, we imposed a 1-year suspension on Richard E. Scott for his violation of several disciplinary rules.[1] A week later,[2] we disbarred Scott after he pled guilty to one count of filing a false tax return.[3]

In April 2007, Scott applied for reinstatement of his license to practice law in Nebraska. Counsel for Discipline filed a resistance to the application. We appointed a referee, who recommended that we readmit Scott contingent upon certain conditions. Counsel for Discipline filed exceptions to the referee's

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[1] *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997).

[2] *State ex rel. NSBA v. Scott*, 252 Neb. 749, 566 N.W.2d 741 (1997).

[3] I.R.C. § 7206(1) (2000).

recommendations. For the reasons that follow, we deny Scott's application for reinstatement.

## STATEMENT OF FACTS

Scott was admitted to the Nebraska bar on February 28, 1972. In October 1979, Scott joined a small collections and personal injury law firm in Lincoln, Nebraska, managed by Brian Watkins, an acquaintance of Scott's from law school. Scott and Watkins became partners and agreed to share the profits and expenses equally.

### 1-Year Suspension

On March 17, 1994, Scott was retained by Daniel Wheeler to represent him in a claim before the Nebraska Workers' Compensation Court against Wheeler's former employer and the State of Nebraska. Scott filed a petition on behalf of Wheeler in the Workers' Compensation Court.

Wheeler's trial was set for July 27, 1994. On July 7, Scott filed a motion for continuance, alleging that "the Plaintiff is in the State of Alaska for until [sic] the first week in August and will be unable to attend the hearing." The motion was sustained, and the trial date was continued until August 8. On August 8, neither Scott nor Wheeler attended the trial. Scott was attending a hearing in Kearney, Nebraska. Wheeler claimed he was never notified of the August 8 trial date or that Scott would not be attending. Because Scott could not attend the August 8 trial, Scott sent Watkins instead. Watkins requested that the court continue the trial until October because Wheeler was allegedly "in the State of Alaska until the first week of October 1994." The court denied Watkins' request and shortly thereafter entered an order dismissing Wheeler's case with prejudice.

In October 1994, Scott received a correspondence from the Department of Veterans Affairs (VA), informing Scott that it was claiming a subrogation interest in Wheeler's workers' compensation claim. Included with the letter were Wheeler's medical records from the VA hospital. In a letter dated November 7, 1994, Scott informed Wheeler of the subrogation claim and stated that he "will try and go forward with your case however, I'm certainly not making any guarantees." In December,

Wheeler requested information regarding his workers' compensation case. Scott responded by letter, explaining that because of the lateness of the information received from the VA, he was having a difficult time with the case. Scott said nothing to Wheeler about the prior dismissal of the case.

In January 1995, the VA requested an update on Wheeler's workers' compensation claim. Scott informed the VA that the case had been dismissed but that he was still working on the claim. Scott received another request for an update from the VA in April. In his response, Scott stated that "Wheeler's matter has been submitted to the Worker[s'] Compensation Court. To date, we have not received a result as yet, but will keep you informed as to the status of this claim." At the time of Scott's response, no new evidence had been submitted, nor was anything pending before the court. The VA made another request in October, seeking information regarding Wheeler's workers' compensation claim. In his response, Scott explained that Wheeler's workers' compensation claim "is going to be dismissed."

On December 26, 1995, Wheeler notified Scott that he was terminating Scott's representation. Wheeler filed a complaint against Scott with the Counsel for Discipline. Scott replied to the complaint in a letter dated January 23, 1996, stating:

> The Workers' Compensation case was scheduled and continued twice because of [Wheeler's] request. The final time the matter was set, . . . Wheeler did not show up, which was in August of 1994 and the matter was dismissed at that time. We would have had a very difficult time of proving our case, since we had no doctor tieing [sic] the injury to a work related accident and without his testimony I felt that there would be no need to go further.

This court found that in light of the appointed referee's findings, Scott's response to the complaint was

> not factually correct or was misleading in the following respects: (1) Wheeler never requested a continuance of his case; (2) Wheeler did not show up at the trial because he was never given notice of the trial date; and (3) the workers' compensation case was dismissed because the judge would not grant the request for continuance made at the time the trial was scheduled to begin, Watkins was not

> prepared for trial, and Scott failed to provide defendants with the mandatory disclosure statements.[4]

We also noted several other findings made by the referee, including:

> Scott misrepresented that Wheeler would be returning to Lincoln on a certain date, . . . Scott had no basis for stating a date upon which Wheeler would return and had a weak basis for concluding that Wheeler was in Alaska, and . . . Scott made a series of misrepresentations to representatives of Veterans Affairs with regard to the status of the workers' compensation case.[5]

We recognized that there were mitigating factors present. In particular, we noted that Scott's actions were done in an effort to maintain the viability of Wheeler's claim and not to benefit himself, that Scott did not receive a fee for representing Wheeler, and that Wheeler was not injured by Scott's conduct. We concluded, however, that "these mitigating factors fail to overcome the fact that Scott deliberately lied to a court and to [the VA]."[6] Accordingly, on June 20, 1997, Scott was suspended from the practice of law for 1 year.[7]

### Filing False Tax Returns

When Scott began working with Watkins in late 1979, Scott adopted Watkins' unethical procedures for handling funds received by the firm. Scott testified that as third-party checks were received by the firm to settle cases, the checks would be taken to the bank, with the client present, and the checks would be cashed. The client would receive his or her portion of the settlement, and the firm would take the remainder without ever recording the receipt of the income on the firm's books or reporting the income on Scott's or Watkins' tax returns. Similarly, when a client paid for the firm's services in cash, that

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[4] *State ex rel. NSBA v. Scott, supra* note 1, 252 Neb. at 703, 564 N.W.2d at 591.

[5] *Id.* at 703, 564 N.W.2d at 592.

[6] *Id.* at 704, 564 N.W.2d at 592.

[7] See *id.*

payment would not be recorded on the firm's books or on the appropriate tax return.

Scott testified that this pattern of failing to record income and misstating income on state and federal tax returns continued annually until the Internal Revenue Service (IRS) learned of the firm's fraudulent conduct in 1994. In 1994, the IRS interviewed Scott in connection with its investigation of his tax reporting. Scott testified that during the interview, he cooperated, answered the questions truthfully, and admitted to what he had done.

Several federal criminal charges were filed against Scott in a superseding indictment on August 21, 1996. Scott entered a plea of guilty to one count of the criminal indictment, and the remaining charges were dismissed. That count of the indictment had alleged that Scott willfully made and subscribed to a U.S. individual income tax return for the 1990 calendar year, which return was false "in that said return stated . . . that [Scott] had taxable income of $2,915.00, whereas, [Scott] well knew and believed that his taxable income . . . was at least $97,277.85 for the calendar year of 1990."

Judgment was entered against Scott, and he was sentenced to serve 1 year 1 day in federal prison. The judgment also contained a section entitled "Statement of Reasons for Sentence," which included the following: "The Court determines that the applicable guidelines are: . . . Restitution: $61,112.28." The court also explained in its judgment that a "[f]ine is waived because of [Scott's] inability to pay a fine, and because payment of a fine would interfere with [Scott's] ability to make restitution."

On June 2, 1997, Scott voluntarily surrendered his license to practice law, admitting that he violated Canon 1, DR 1-102(A)(3) and (4), of the Code of Professional Responsibility. On June 27, Scott was disbarred.[8] After completing his sentence of imprisonment, Scott returned to Lincoln.

## Applications for Reinstatement

In October 2005, Scott filed an application for reinstatement. Counsel for Discipline filed a resistance to Scott's application.

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[8] *State ex rel. NSBA v. Scott, supra* note 2.

This application was denied without a hearing. In April 2007, Scott again applied for reinstatement of his license and Counsel for Discipline filed another resistance to Scott's application. We appointed a referee who conducted an evidentiary hearing. At the hearing, Scott presented evidence regarding his work history following his release from prison. The record reflects that shortly after leaving prison, Scott worked for approximately 2 years for a central Nebraska feedlot. Scott was hired by the feedlot to assist the owners and their attorneys in the investigation of apparent fraud and embezzlement by the feedlot manager. Scott's duties included, among other things, analyzing and matching documents, invoices, and bank records, and then reporting his findings to the attorneys involved. After finishing his employment with the feedlot, Scott continued working as an investigator for a series of attorneys.

In 2005, Scott entered into a partnership with two other individuals and established a partnership called ABC Gaming that promoted gaming ventures on behalf of Indian tribes. The relationship between the partners ended after approximately 9 months when the other two partners allegedly failed to pay Scott income that was owed to him. At the time of the hearing in this case, the dispute over the alleged earnings was being litigated in Lincoln County, Nebraska.

Scott is currently working for an environmental firm in Lincoln that does ground water testing and lead remediation, among other things. Scott testified that since being disbarred in 1997, he has at no time given legal advice or engaged in the unauthorized practice of law.

With regard to making restitution, Scott testified that he has reached a settlement agreement with the State of Nebraska, Department of Revenue. Pursuant to the settlement agreement, Scott is making monthly payments of $150. Scott still owes the State of Nebraska approximately $18,000, but Scott testified that the State had informed him that if he were to pay a lump sum of $3,000 or $4,000, the entire amount would be settled.

As to the federal income tax obligation owed to the IRS, Scott testified that 5 years ago, he was informed that he owed approximately $300,000 to as much as $400,000 in taxes, interest, and penalties. The record reflects that Scott has not

made any payments to the IRS in relation to this amount. Scott testified that he has tried several times to negotiate a payment schedule and come to an agreed-upon balance with the IRS, but has been unsuccessful.

Scott explained that the IRS has not attempted to collect payments from him for more than 3 years. With regard to the $61,112.28 restitution, Scott testified that it has never been paid, nor has the IRS attempted to collect this amount. Scott recognizes that because he applied for reinstatement, the IRS will likely reinitiate collection proceedings against him. Scott stated that he would "welcome" the opportunity to reach an agreement with the IRS and would be willing to make his payments "[i]f the ability is there . . . ."

At the hearing, Scott's wife and a longtime friend testified in favor of Scott's reinstatement. Scott also offered several letters supporting his reinstatement, including letters from practicing attorneys, former employers, business associates, and a pastor. Scott has no criminal record other than the 1997 conviction which resulted in his disbarment.

Following the hearing, the referee recommended that we readmit Scott to the practice of law, contingent upon Scott's execution of a mutually agreeable repayment plan with the IRS, commencement of payments under the plan, and successful completion of the Nebraska bar examination. Counsel for Discipline filed exceptions to the referee's recommendation.

On January 10, 2008, the date of Scott's oral argument to this court, Scott filed a "Motion for Leave to Supplement Record and Report Developments." We granted Scott's motion and received his accompanying affidavit and attached exhibits.

## ASSIGNMENT OF ERROR

Counsel for Discipline takes exception to the referee's findings, which we summarize, that Scott currently possesses good moral character sufficient to warrant reinstatement and that Scott's present fitness will permanently continue in the future.

## STANDARD OF REVIEW

[1] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion

independent of the referee's findings.[9] When credible evidence is in conflict on material issues of fact, however, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[10]

## ANALYSIS

[2,3] As the court which disbarred Scott, we have inherent power to reinstate him to the practice of law.[11] We recognize, however, that in considering an application for reinstatement to the practice of law, this court owes a solemn duty to protect the public and the legal profession, which consideration must be performed without regard to feelings of sympathy for the applicant.[12] A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law.[13] The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.[14] In short, reinstatement after disbarment is difficult.[15]

[4-6] A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement.[16] The applicant must carry this burden by clear and convincing evidence.[17] The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's

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[9] *State ex rel. NSBA v. Kinney*, 274 Neb. 412, 740 N.W.2d 607 (2007).

[10] *Id.*

[11] See *State ex rel. Counsel for Dis. v. Mellor*, 271 Neb. 482, 712 N.W.2d 817 (2006).

[12] *Id.*

[13] *State ex rel. NSBA v. Kinney, supra* note 9.

[14] *State ex rel. Counsel for Dis. v. Mellor, supra* note 11.

[15] See *id.*

[16] *State ex rel. NSBA v. Kinney, supra* note 9.

[17] See, *id.*; Neb. Ct. R. of Discipline 10(J) and (V) (rev. 2005).

character.[18] It naturally follows that the more egregious the underlying misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.[19]

In June 1997, we suspended Scott from the practice of law for a period of 1 year for, among other things, deliberately lying to a court. Seven days later, we disbarred Scott after he pled guilty to one count of filing a false tax return. Scott now seeks reinstatement of his license. Despite the misconduct that led to Scott's disbarment, the referee recommended that Scott be reinstated.

The record reflects that since his release from prison, Scott has taken positive steps to reestablish himself in the community. Furthermore, Scott's testimony reflects that he now takes responsibility for his past mistakes and appears to be remorseful. However, while Scott's efforts in this regard are certainly commendable, we disagree with the referee's recommendation that Scott be reinstated to the practice of law at this time. We find the evidence of Scott's present moral character to be insufficient to overcome the heavy burden imposed by his past egregious misconduct.

For example, in *State ex rel. NSBA v. Kinney*,[20] an applicant for reinstatement had been disbarred after he kept fees that should have been turned over to his employer's law firm. Twenty years later, he sought reinstatement. In granting his application for reinstatement, we noted, among other things, that since his disbarment, the applicant had effectively addressed his drug and alcohol problems, made restitution to his employer for the misappropriated funds, and had become involved with many charitable organizations.

But in the present case, Scott has a significantly greater history of dishonest conduct. Scott committed a serious crime—he intentionally and grossly misstated his income and knowingly filed fraudulent tax returns for more than 10 years. Scott testified that he knew what he was doing was illegal, yet continued

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[18] See *State ex rel. NSBA v. Kinney, supra* note 9.

[19] *Id.*; *State ex rel. Counsel for Dis. v. Mellor, supra* note 11.

[20] *State ex rel. NSBA v. Kinney, supra* note 9.

his illegal conduct until he was finally caught by the IRS. The duration and repetitive nature of Scott's dishonest actions distinguishes this applicant from the applicant in *Kinney*. In short, we are very troubled by the fact that for more than a decade, Scott made a conscious and continuous effort to defraud the government. We further note that Scott's disbarment for filing fraudulent tax returns was not the first time Scott had been disciplined by this court. Unlike the applicant in *Kinney*, Scott, in an incident unrelated to his tax fraud, was given a 1-year suspension for, among other things, lying to a court.

Furthermore, in reinstating the applicant in *Kinney*, we specifically noted that restitution had been made. But here, Scott has failed to make a single payment in restitution to the IRS despite the fact that, including taxes, penalties, and interest, the total amount owed may be as high as $300,000 or $400,000. As justification for his lack of payment, Scott explained that the IRS has not attempted to collect the money from him for more than 3 years. While we recognize that Scott has made some payments to the State of Nebraska and recently made an effort to contact the IRS, before this time, insufficient effort was made. And more importantly, no actual restitution payments have been submitted to the IRS. We find Scott's restitution efforts to be inadequate.

Upon due consideration of the record, we conclude that given the egregious and prolonged nature of Scott's past dishonest conduct, his prior discipline, and his insufficient efforts to make restitution, Scott has not met his burden of establishing sufficient moral character to warrant reinstatement.

## CONCLUSION

We conclude on the basis of our independent review that Scott has not met his burden of showing by clear and convincing evidence that his license to practice law in Nebraska should be reinstated at this time. Scott's application is therefore denied.

APPLICATION FOR REINSTATEMENT DENIED.

HEAVICAN, C.J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. LOYD, APPELLANT.

745 N.W.2d 338

Filed March 7, 2008. No. S-06-1113.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

Appeal from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

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

MCCORMACK, J.

## NATURE OF CASE

Michael W. Loyd appeals from the county court's denial of his motion for absolute discharge on statute of limitations grounds. Loyd asserts the complaint filed against him was not filed within the 18-month statute of limitations set forth in Neb. Rev. Stat. § 29-110(1) (Reissue 1995). The county court denied Loyd's motion, and the district court affirmed.

## BACKGROUND

On June 18, 2001, Loyd was arrested and cited for driving under the influence of alcoholic liquor (DUI). On June 29, Loyd was charged in county court with second-offense DUI under Omaha Mun. Code, ch. 36, art. III, § 36-115 (1998). Loyd moved to quash the complaint, arguing that the penalty provisions of the ordinance are inconsistent with Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). On August 16, 2001, the county

court granted Loyd's motion to quash. The State filed an exception, and on January 24, 2003, we issued an opinion wherein we agreed that the provisions were inconsistent and overruled the State's exception.[1]

On March 18, 2003, Loyd was charged by complaint in the county court with second offense DUI in violation of § 60-6,196(2). Loyd filed a motion for absolute discharge, asserting that the complaint had not been filed within the 18-month statute of limitations set forth in § 29-110(1). Loyd also filed a supplemental motion to discharge based upon his federal and state constitutional rights to a speedy trial. On May 22, the county court denied Loyd's motion to discharge, and on December 4, the court denied Loyd's supplemental motion to discharge. Loyd appealed to the district court from both orders. The district court found no violation of Loyd's rights to a speedy trial, and, without discussing Loyd's statute of limitations argument, the district court affirmed the decision of the county court. Loyd then appealed to this court, and we affirmed.[2]

In *State v. Loyd*,[3] we pointed out that a motion to discharge is generally not the means by which a statute of limitations defense is raised in a criminal proceeding. We determined, however, that Loyd's motion to discharge was in substance a motion to quash, and we treated it as such. We further determined, however, that an order overruling a motion to quash raising a statute of limitations defense is not a final, appealable order. In addition, although the county court's order overruling Loyd's supplemental motion to discharge on speedy trial grounds was a final, appealable order, we determined it did not confer jurisdiction upon the Supreme Court to consider Loyd's statute of limitations arguments. Accordingly, we did not address those arguments. With regard to Loyd's speedy trial argument, we determined that because the delay relied upon by Loyd for his speedy trial argument occurred before he was

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[1] See *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003).

[2] See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[3] *Id.*

charged, Loyd's constitutional right to a speedy trial had not been implicated and that, therefore, his speedy trial argument was without merit.

Thereafter, Loyd was tried in the county court. On August 4, 2005, Loyd was found guilty of second-offense DUI. Loyd appealed to the district court the county court's finding that he was guilty of second-offense DUI and the county court's May 22, 2003, denial of his motion for absolute discharge. Loyd alleged that the March 18, 2003, complaint should have been dismissed because it was not filed within 18 months after the alleged criminal act took place. The district court affirmed the decision of the county court. Loyd now appeals to this court.

## ASSIGNMENT OF ERROR

Loyd asserts that the district court erred in failing to find that the March 18, 2003, complaint should be dismissed because it was not filed within 18 months after Loyd committed the alleged criminal act.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[4]

## ANALYSIS

The question before us in the present appeal is whether the March 18, 2003, complaint was timely filed. At the time, § 29-110(1) provided that no person shall "be prosecuted, tried, or punished for any misdemeanor or other indictable offense below the grade of felony . . . unless the indictment, information, or action for the same shall be found or instituted within one year and six months from the time of committing the offense." Section 29-110(1) further provided, however, that "[i]f any indictment, information, or suit is quashed . . . the time during the pendency of such indictment, information, or suit so quashed . . . shall not be reckoned within this statute

[4] *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

so as to bar any new indictment, information, or suit for the same offense."

Loyd was arrested for DUI on June 18, 2001. Based on that incident, a complaint was filed on June 29, charging Loyd with a violation of Omaha Mun. Code, ch. 36, art. III, § 36-115. That complaint was quashed by order of the county court on August 16, and, on appeal, we overruled the State's exception to the court's order.[5] The State then filed the March 18, 2003, complaint. This complaint is also based on Loyd's June 18, 2001, arrest, but charges Loyd with violation of § 60-6,196(2). Because this complaint was filed more than 18 months after Loyd's June 18 arrest, it is untimely unless the tolling provision under § 29-110(1) applied.

In order for the tolling provision under § 29-110(1) to apply, the subsequent indictment, information, or suit must charge the "same offense" as the prior indictment, information, or suit. The applicability of § 29-110(1) in the present case depends in part on whether "offense" constitutes the conduct of the defendant or the charge itself. We have not previously considered the definition of "offense" for purposes of § 29-110, and it has not been defined by the Legislature in this context.

[2] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.[6] In *State v. Stabler*,[7] a defendant was first convicted of refusing to submit to a chemical test and was then convicted of DUI based on the same conduct. The defendant appealed, arguing that the Double Jeopardy Clause barred his subsequent DUI conviction. This court affirmed the defendant's convictions, concluding the convictions did not constitute the same offense because they required different elements of proof. We explained that "[i]n determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts."[8] We further explained that

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[5] See *Loyd, supra* note 1.

[6] *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

[7] *State v. Stabler*, 209 Neb. 298, 306 N.W.2d 925 (1981).

[8] *Id.* at 300, 306 N.W.2d at 926.

> "a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. . . ."[9]

A review of §§ 36-115 and 60-6,196 reveals that they create the same offense. At the time of Loyd's citation, a DUI conviction under § 36-115 required proof that the defendant operated or was in actual physical control of a motor vehicle while (1) under the influence of alcoholic liquor or any drug, (2) having a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of blood, or (3) having a concentration of .10 of 1 gram or more by weight of alcohol per 210 liters of breath. These were the same elements of the crime of DUI under § 60-6,196. Accordingly, we conclude that the March 18, 2003, complaint filed against Loyd charging him with violating § 60-6,196 charged the same offense as the June 29, 2001, complaint filed against him asserting a violation of § 36-115.

Having determined that §§ 36-115 and 60-6,196 charged the same offense, we now turn to Loyd's argument on appeal. Loyd asserts that "pendency" under § 29-110 includes only that time the complaint was before the county court, or from June 29 through August 16, 2001, a total of 48 days. He maintains that "pendency" does not include the time period in which the State appealed to the district court and to this court the county court's order granting Loyd's motion to quash. As pointed out by the district court, under Loyd's logic, the statute of limitations to file a complaint against Loyd was extended from December 18, 2002, by 48 days, or until February 4, 2003. The district court actually states "February 3, 2003." However, counting 48 days forward from December 18, 2002, results in February 4, 2003. Because the second complaint was not filed until March 18, 2003, Loyd argues the complaint is barred by the statute of limitations.

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[9] *Id.* at 301, 306 N.W.2d at 926.

In the context of a condemnation case, we have analyzed the word "pending." We have stated that when an appeal is taken from the district court to the Supreme Court, "pending" means the time period from the lawsuit's inception until the final judgment.[10] In *Pieper v. City of Scottsbluff*,[11] we discussed in part Neb. Rev. Stat. § 76-720 (Cum. Supp. 1963), which addresses appeals by a condemnee from an award of an appraiser in an eminent domain action. In 1963, Neb. Rev. Stat. § 76-720.01 (Cum. Supp. 1963) was added and reads that "[t]he provisions of section 76-720 shall apply to any case now or hereafter pending an appeal from the award of the appraisers as provided in section 76-710." On appeal, the City of Scottsbluff argued that the amendments to § 76-710 applied only to an appeal from the award of an appraiser made in the county court to the district court and not when an appeal is taken from the district court to the Nebraska Supreme Court. Rejecting the city's argument, this court explained:

> The word "pending" means: "Begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary (3d ed.), p. 1345. See, also, Wentworth v. Town of Farmington, 48 N.H. 207 [(1868)]; Mauney v. Pemberton, 75 N.C. 219 [(1876)]; Ex parte Munford, 57 Mo. 603 [(1874)]; Cain v. French, 29 Cal. App. 725, 156 P. 518 [(1916)]. Therefore, the act applies when an appeal is taken from the district court to this court.[12]

We conclude that Loyd's case remained pending while on appeal to the district court and this court. The statute of limitations under § 29-110(1) was tolled during that period, and the March 18, 2003, complaint was timely filed.

## CONCLUSION

For the reasons discussed above, we affirm.

AFFIRMED.

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[10] See *Pieper v. City of Scottsbluff*, 176 Neb. 561, 126 N.W.2d 865 (1964).

[11] *Id.*

[12] *Id.* at 588-89, 126 N.W.2d at 880.

# Roy T. Holmes, individually, and Patricia G. Holmes, Conservator of the Estate of Roy T. Holmes, a protected person, appellees, v. State of Nebraska Department of Health and Human Services and Nancy Montanez, director of the Nebraska Department of Health and Human Services, appellants.

745 N.W.2d 578

Filed March 7, 2008. No. S-06-1141.

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. 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.
2. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
3. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independent of the court below and the administrative agency.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, John L. Jelkin, and, on brief, Douglas D. Dexter for appellants.

Joseph C. Byam, of Byam & Hoarty, for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Wright, J.

## NATURE OF CASE

This case involves the determination of a patient's ability to pay for mental health care provided by the Nebraska Department of Health and Human Services (DHHS). The issue is whether DHHS properly determined Roy T. Holmes' ability to pay for his care.

## SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. 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. *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

## FACTS

Holmes received inpatient treatment at the Norfolk Regional Center (NRC) from December 3, 2003, to April 21, 2004. He also received outpatient treatment at the NRC from May 4, 2004, to July 7, 2005.

On February 17, 2004, DHHS notified Patricia G. Holmes (Patricia), Holmes' mother and conservator, by letter that it had determined that Holmes was able to pay for his care at the NRC. DHHS informed Patricia that for each month Holmes was in treatment, she was obligated to pay Holmes' Social Security benefits ($1,071 in 2003; $1,087 in 2004), less a $50 personal needs allowance, plus 2 percent of his chargeable assets (which DHHS calculated to be $1,078) for the cost of his treatment at the NRC. DHHS determined Holmes' chargeable assets by deducting his credit card balance of $1,200 and his dependent deduction of $4,000 from the assessed value of his home, which was $59,100. Based on those calculations, Holmes' total chargeable assets were $53,900. DHHS determined that Holmes' "total ability to pay" for his care was $2,099 effective December 3, 2003, and $2,115 effective January 1, 2004, for each following month.

Patricia filed a "Written Appeal and Request for Hearing" with DHHS. She argued that DHHS' action against Holmes' Social Security benefits was barred by federal law and that she had no obligation to pay the Social Security benefits to DHHS.

At an administrative hearing on January 10, 2006, DHHS offered into evidence exhibit 22, a revised determination of

Holmes' ability to pay for his inpatient care, as well as DHHS' determination of Holmes' ability to pay for his outpatient care. DHHS' revised determination included the mortgage on Holmes' house as a liability, which changed his total liabilities from $1,200 to $49,216.34 and, therefore, decreased the amount of his chargeable assets from $1,078 to $117.67. Consequently, this reduced Holmes' total ability to pay for his inpatient care to $1,138.67 effective December 3, 2003, and $1,154.67 effective January 1, 2004, for each following month. Holmes' ability to pay for his outpatient care was determined by subtracting $730 from his Social Security benefits of $1,087 and then adding $117.67 (2 percent of his chargeable assets). This amounted to $474.67.

During the hearing, DHHS acknowledged that its calculations for inpatient and outpatient care did not take into account Holmes' monthly liabilities, including the monthly mortgage payment of $604.41 and the utilities for his house. However, DHHS' representative testified that DHHS had not been provided with that information and that even if provided with the information, DHHS would consider these monthly liabilities only in an undue hardship determination. Because Holmes had excess assets, he would not qualify for such a determination.

In response, Patricia offered into evidence exhibit 20, which provided the monthly calculations of Holmes' mortgage payment, his utilities, and his food. When asked if the new evidence rendered DHHS' calculations incorrect, DHHS' representative stated that she would have "some more questions that need to be answered" in relation to whether that would change her calculations.

DHHS' calculations of Holmes' ability to pay did not provide for the equity in his house to be set off from his chargeable assets because Holmes was "not living in home." DHHS regulations provide that "[c]hargeable assets of the client may exclude: . . . 2. The fair market value or equity in a home if it can be reasonably assumed that the client will, in the future, reside in the dwelling." See 202 Neb. Admin. Code, ch. 1, § 002 (2003).

To show that it would be reasonable to assume Holmes would not, in the future, reside in his house, DHHS offered

into evidence the NRC's admission record for Holmes dated December 3, 2003. Holmes gave his address as 3216 North 120th Court, Apartment No. 28, in Omaha, which was not the address of his house. A financial questionnaire dated December 9, 2003, stated that Holmes had been living at 3216 North 120th Court for a period of 5 to 6 months. Under the "HOME" section of the financial questionnaire signed by Holmes was the following: "Don't live in it[.] 2310 N. 48th St., Omaha, NE."

At the hearing, Patricia testified that Holmes did not presently live in the house. Patricia explained that Holmes had moved back into his house for a short time after he was released from the NRC, but that in June 2004, he moved into an apartment pursuant to a recommendation from his doctor. Patricia testified that an order authorizing the sale of Holmes' house was entered in July 2005, but that the house had not yet been sold. She stated that the house was listed through a real estate broker for around $95,000 and that even though the price had been reduced from $129,000, the broker had received no offers.

After the hearing, the parties submitted briefs. DHHS' director found that DHHS' calculations were consistent with the rules and regulations and therefore must be affirmed. The director stated that although the testimony of DHHS' representative was inconsistent, her final testimony was that the ability-to-pay calculations found in exhibit 22 were done correctly and that the "'liabilities'" set forth in exhibit 20 would be used only in an undue hardship determination.

Patricia appealed the director's decision to the Lancaster County District Court, claiming that DHHS' determination of Holmes' ability to pay was erroneous because DHHS did not consider all of Holmes' liabilities in determining his chargeable assets and his available unearned income.

The district court concluded that only events that occurred prior to February 2004 (when DHHS determined Holmes' ability to pay) were relevant to the determination of whether it was reasonable to assume Holmes would return to his house at some time in the future. The court found that as of February 2004, Holmes had, previous to his commitment to the NRC,

resided in the house for many years. It ignored the fact that Holmes listed an address that was different from the address of his house. It also ignored the financial questionnaire signed by Holmes that stated he had been living at an address different than his house for a period of 5 to 6 months.

The district court concluded that there was no evidence whether, as of February 2004, it was reasonable to assume that Holmes would return to his house at some time in the future. The court determined that pursuant to DHHS regulations, DHHS was required to conduct an analysis as to whether, at the time of its ability-to-pay determination in February 2004, Holmes might reasonably be expected to live in his house in the future, and that because DHHS had not done so, the case must be remanded so that DHHS could conduct such an analysis.

The district court also determined whether Holmes' monthly expenses, including his mortgage payment, should be taken into account by DHHS when considering his unearned income. It found that the "personal needs allowance" within the unearned income category "must consider monthly liabilities under the Department Rules." The court noted the record reflected that DHHS had not conducted a personal needs allowance review. Instead, DHHS had reduced Holmes' monthly Social Security payment by the amount of the standard of need allowance, even though the figure was placed on the line for room and board allowance of the outpatient form and on the line for personal needs allowance of the inpatient form. The court concluded that reducing Holmes' unearned income by the amount of his mortgage payment while reducing the value of the home by the amount of the mortgage would not result in allowing Holmes double credit for the same liability. Since the record did not reflect that a personal needs allowance analysis had been conducted, a remand was required.

On September 13, 2006, the district court remanded the case for further proceedings on the issue of whether it was reasonable in February 2004 for DHHS to assume that Holmes would, in the future, reside in his house and for a personal needs allowance analysis to be conducted, including consideration of monthly liabilities under DHHS rules.

## ASSIGNMENTS OF ERROR

DHHS and its director (hereinafter collectively DHHS) assign two errors: The district court erred (1) in ruling that DHHS had to perform an analysis of Holmes' ability to return to his house as of the time of the ability-to-pay determination and (2) in determining that the mortgage against the value of the house owned by Holmes must be considered as a liability and that the mortgage payments must be deducted from Holmes' unearned income.

## ANALYSIS

In general, DHHS is required to assess against a patient such part of the cost of the patient's care by a state hospital for the mentally ill as the patient is able to pay. See Neb. Rev. Stat. § 83-366 (Reissue 1999).

> [DHHS] shall determine the ability of a patient to pay by consideration of the following factors: (1) Taxable income reportable under Nebraska law; (2) the patient's age; (3) the number of his or her dependents and their ages and mental and physical conditions; (4) the patient's length of care or treatment; (5) his or her liabilities; and (6) his or her assets including health insurance coverage.

Neb. Rev. Stat. § 83-368 (Reissue 1999).

DHHS regulations further outline the process to be followed in determining the ability of a patient at a state regional center to pay for his or her own care. "Ability to pay" is defined as "the amount determined by [DHHS] that the client or legally responsible relative can pay monthly towards the cost of services." 202 Neb. Admin. Code, ch. 1, § 002.

When a patient has taxable income, DHHS "must first determine the ability to pay from his/her taxable income." 202 Neb. Admin. Code, ch. 1, § 009 (2003). "Taxable income" is defined as "Nebraska taxable income after allowance of Nebraska personal exemption credits which are converted to income." 202 Neb. Admin. Code, ch. 1, § 002.

If a patient has insufficient taxable income to pay the cost of care, DHHS "must consider his/her chargeable assets for the purpose of paying those costs." 202 Neb. Admin. Code, ch. 1, § 010.01 (2003). The "[c]hargeable assets of a client"

are defined to exclude "[t]he fair market value or equity in a home if it can be reasonably assumed that the client will, in the future, reside in the dwelling." 202 Neb. Admin. Code, ch. 1, § 002.

Finally, after taxable income and chargeable assets have been considered, unearned income is considered. 202 Neb. Admin. Code, ch. 1, § 010.03 (2003). Unearned income is defined as, but not limited to, Social Security benefits, railroad retirement benefits, military service benefits, unemployment compensation, disability benefits, workers' compensation, alimony, child support, and sick pay received on behalf of the client. 202 Neb. Admin. Code, ch. 1, § 002. Also considered in this process are liabilities, age, and the number of his or her dependents. 202 Neb. Admin. Code, ch. 1, § 008 (2003).

Because Holmes had no taxable income, DHHS first looked to his chargeable assets for the purpose of determining his ability to pay. DHHS determined that the equity in his house qualified as a chargeable asset. DHHS argues that implicit in its determination was that Holmes would not, in the future, reside in his house. It further claims that the evidence adduced at the administrative hearing supports a determination that it was reasonable to assume that Holmes would not return to his house in the future.

At oral argument, Holmes' attorney conceded that it was reasonable to assume Holmes would not return to his house. We conclude that the evidence supported this determination and that the district court erred in remanding the case for further consideration of this issue.

Next, DHHS assigns as error the district court's determination that DHHS must deduct Holmes' monthly mortgage payments from his unearned income. The issue here is whether DHHS is required to consider Holmes' monthly mortgage payment, utilities, and food costs when it calculated unearned income.

A portion of the Nebraska Administrative Code entitled "FACTORS CONSIDERED IN DETERMINING ABILITY TO PAY" states: "The client's ability to pay must be determined by [DHHS] based on his/her taxable income, chargeable assets, and unearned income. Liabilities, age, and the number of his/her dependents are also considered in this process." See 202

Neb. Admin. Code, ch. 1, § 008. In relation to the entire ability-to-pay regulatory scheme, there are three separate categories under which a client's ability to pay must be determined: taxable income, chargeable assets, and unearned income. Each of those categories may consider the client's liabilities, age, and number of dependents to the extent stated within the regulations.

The chargeable assets category states that it includes consideration of liabilities. The definition of "[c]hargeable assets of a client" excludes "[l]iabilities substantiated by the client." 202 Neb. Admin. Code, ch. 1, § 002. The definitions of "[t]axable income" and "[u]nearned income" do not mention the consideration of liabilities. 202 Neb. Admin. Code, ch. 1, § 002. Thus, through the express inclusion of liabilities in the "[c]hargeable assets" category and the exclusion of the term "liability" in both the "[t]axable income" and "[u]nearned income" categories, we conclude that the regulations intended that liabilities be considered only under the chargeable assets category.

[2,3] Our interpretation of these regulations is similar to that of a statute. Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996). The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusion independent of the court below and the administrative agency. See *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

However, this does not preclude liabilities from being considered elsewhere if the regulations allow for such consideration. DHHS regulations state: "At the request of the client or legally responsible relative, [DHHS] may consider other factors determined to be relevant in the interest of avoiding undue financial hardships. These factors may include average net monthly income, monthly liabilities, and federal poverty guidelines." 202 Neb. Admin. Code, ch. 1, § 008.03 (2003).

In the case at bar, Holmes did not request that DHHS consider his monthly liabilities, including his monthly mortgage payment, utilities, and food costs, until the time of the hearing. At the hearing, DHHS' representative testified that Holmes' monthly liabilities would be considered only in an undue

hardship determination. She testified that because Holmes had chargeable assets, he would not qualify for relief through the undue hardship review. Because we have concluded that it was reasonable to assume Holmes would not return to his house, we determine that Holmes had chargeable assets, and therefore, DHHS was not required to make an undue hardship determination.

In determining a client's ability to pay from unearned income, the regulations provide that "a client with unearned income or benefits must have the ability to pay the amount by which such unearned income or benefits exceed the sum of: 1. The personal needs allowance established by [DHHS]; and 2. The standard of need allowance under the Medicaid program." 202 Neb. Admin. Code, ch. 1, § 010.03.

DHHS determined that Holmes' personal needs allowance was $50 for time spent in inpatient care and $730 for time spent in outpatient care, and DHHS deducted these amounts from his unearned income accordingly. However, DHHS incorrectly labeled the $730 amount as only an allowance for room and board. The $730 amount represented both a personal needs allowance and a standard of need allowance for the time spent in outpatient care. See Neb. Rev. Stat. § 68-1006.01 (Reissue 2003) (providing that $730 standard of need allowance includes $50 personal needs allowance).

DHHS' representative testified that the $50 amount was a personal needs allowance and that a standard of need allowance was not available to inpatient clients. DHHS regulations provide that the personal needs allowance "is established by [DHHS] or based on Medical Assistance guidelines." 202 Neb. Admin. Code, ch. 1, § 002. The Medical Assistance guidelines used by the Department to establish the personal needs allowance were phrased as "standard of need for – Nursing Home, Public Institution for the Treatment of Mental Diseases and/or Mental Retardation" and provided for a $50 allowance.

Because of the way the Medical Assistance guidelines were phrased—including the term "standard of need"—the district court found that DHHS had made only a standard of need allowance assessment but had called it a personal needs allowance. In actuality, DHHS had calculated a personal needs allowance,

albeit confusingly. And since no standard of need allowance was available for inpatient care, DHHS' assessment of Holmes' personal needs allowance was the only allowance that DHHS was required to assess for inpatient care. Thus, DHHS was correct in determining that $50 should be deducted from Holmes' unearned income for the time he spent in inpatient care and that $730 should be deducted from Holmes' unearned income for the time he spent in outpatient care.

## CONCLUSION

The district court erred in requiring DHHS to perform an analysis of Holmes' ability to return to his house as of the time of the ability-to-pay determination made by DHHS and erred in remanding the case for a personal needs analysis. DHHS was correct in its determination of Holmes' ability to pay for his care from the NRC. We therefore reverse the judgment of the district court for Lancaster County and remand the cause with directions to reinstate the director's order.

REVERSED AND REMANDED WITH DIRECTIONS.

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# LARRY E. PETERSEN AND JOYCE A. PETERSEN, HUSBAND AND WIFE, APPELLEES, V. CENTRAL PARK PROPERTIES, INC., ET AL., APPELLEES, AND REALTY LINC, INC., DOING BUSINESS AS ERA REALTY CENTER, GARNISHEE-APPELLANT.

745 N.W.2d 884

Filed March 7, 2008. No. S-06-1289.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Judgments: Debtors and Creditors: Garnishment.** Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages.
3. **Garnishment: Pretrial Procedure.** As a general rule, a garnishee owes a duty to act in good faith and answer fully and truthfully all proper interrogatories presented to him.

4. ____: ____. A garnishee is expected to, in some appropriate manner, properly disclose all relevant facts within his knowledge at the time of submitting an answer concerning his indebtedness to the judgment debtor or concerning money or property of the judgment debtor then in his possession.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Todd V. Elsbernd, of Bradley, Elsbernd, Emerton, Andersen & Kneale, P.C., for appellant.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee Jennifer A. Bauer.

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

WRIGHT, J.

## NATURE OF CASE

Jennifer A. Bauer filed an application to determine the liability of the garnishee, Realty Linc, Inc., doing business as ERA Realty Center. Bauer sought to collect on a judgment entered against E.W. Skala. The Hall County District Court determined that Gary Thompson, president of Realty Linc, had not accurately answered garnishment interrogatories. The court entered judgment against Realty Linc in the amount of $19,137 plus costs. Realty Linc appeals.

## SCOPE OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

## FACTS

On May 13, 2004, the Merrick County Court entered a judgment on a promissory note for Larry E. Petersen and Joyce A. Petersen against four parties: Central Park Properties, Inc.; Roland E. Reynolds; Bauer; and Skala. The judgment with interest totaled $30,291.40. Bauer filed a cross-claim against Reynolds and Skala, and the court entered judgment for Bauer.

Reynolds and Skala were ordered to reimburse Bauer for any payments made by her against the judgment.

In order to collect on the cross-claim, Bauer sought to garnish wages from Skala, who was a real estate agent with Realty Linc. On September 8, 2006, a "Summons and Order of Garnishment in Aid of Execution" was filed in Hall County District Court naming Realty Linc as the garnishee. The judgment debtor was identified as Skala, and the judgment creditor was identified as Bauer. The summons informed Realty Linc that it was required by law to answer the attached interrogatories and to file them within 10 days. The summons indicated that Realty Linc was obligated to hold any wages due to Skala to the extent of the amount due and to pay to Skala the disposable earnings not subject to garnishment, as determined according to the interrogatories and instructions. If Realty Linc did not answer the interrogatories, it would be presumed to owe Skala the full amount of Bauer's claim. The amount due on the judgment was listed as $33,868.25.

Interrogatories were answered by Thompson, as president of Realty Linc. The first question on the interrogatory form asked if Skala, the judgment debtor, was currently in Thompson's employ. Thompson's response was "Yes." Thompson responded "No" to questions that asked if he owed Skala any money for wages on the date and time Thompson was served with the garnishment and if Realty Linc would owe earnings to Skala within the next 60 days. The interrogatories asked how often Skala was paid, and Thompson wrote in "Commission." In response to a question that asked for the judgment debtor's earnings for the pay period, Thompson wrote "Commission." The interrogatories then asked for the amount required by law to be deducted from the judgment debtor's earnings, for the judgment debtor's disposable earnings for the pay period, and for the portion of the judgment debtor's disposable earnings that were subject to the garnishment order. Thompson indicated "N/A" to each of the questions. The form directed Realty Linc to calculate the amount of disposable earnings by referring to the "Employer's Instruction Sheet." Such an instruction sheet is not included in the record before us.

Thompson replied "No" to additional questions asking whether any of Skala's earnings were currently withheld pursuant to any other order, such as a withholding order or a continuing lien. The form stated, "Based upon the above answers, the amount of wages being withheld on this garnishment is: ____." Thompson did not enter any amount. The interrogatories also asked if Realty Linc had any property belonging to Skala, or credits or monies owed to Skala, whether due or not, other than the earnings described previously. Thompson responded, "No." If the answer was "Yes," the form then asks the garnishee to specify whether it was property or to provide the "[a]mount of money or credits you owe the judgment debtor, other than earnings." It also asked for the "[d]ate the money or credits were due, or will be due."

After the interrogatories were filed, Bauer filed an application against Realty Linc, the garnishee, seeking to determine liability. She alleged that the answers and disclosures given by Thompson were not satisfactory, were wholly inadequate, and failed to provide the information requested in the garnishment. She sought judgment against Realty Linc in the sum of $33,868.25.

Thompson was ordered to appear in court to respond to Bauer's application. At a hearing on September 29, 2006, Thompson stated that he had completed and signed the interrogatories. He stated that Skala was an associate broker in Realty Linc's office in Grand Island, Nebraska, and, as such, Thompson considered Skala an independent contractor, not an employee of the corporation. When asked if Skala was in Thompson's employ, he stated, "[I]t depends on how you define, 'Employ.'" Thompson said he indicated "Yes" on the interrogatory asking whether Skala was in his employ without further explanation because there "was no opportunity to answer any other way."

Thompson stated that Skala was paid on commission by Realty Linc and that at the time Thompson completed the interrogatories, he was not aware that Skala was due to receive any commissions in the next 60 days. Thompson said he asked the company's comptroller if any funds had been received as a

result of any real estate closings, and Thompson was told no funds had been received. Thompson admitted that he would have owed earnings to Skala if there had been any real estate closings in the 60 days following completion of the interrogatories. At the time he answered the interrogatories, Thompson knew Skala had closings scheduled within the next 60 days, but he said he did not know that the company would owe Skala any money in that time period. Thompson had no specific reason to believe that any of the scheduled closings would not take place.

Thompson said that on average, Skala had received a commission at least monthly. Thompson stated that he completed the interrogatories to the best of his ability given the way the questions were drafted.

Alvin Avery, managing broker for the Woods Brothers Realty office in Grand Island, testified that for two properties that closed in the 3-week period prior to the hearing and in which Woods Brothers Realty was involved, Skala was the selling agent or listing agent. For those sales, Skala was entitled to commissions of approximately $3,357. Avery also provided information that Skala was involved in six additional closings between September 7 and 22, 2006. Avery said the customary fee arrangement in real estate allows the listing company to retain 60 percent of the commission and the selling company to receive 40 percent of the commission. He stated that the total of commissions due to Realty Linc for the eight properties sold in the 3-week period after September 7 equaled approximately $19,000.

The district court entered an order finding that based on testimony and evidence, Skala had generated commissions totaling $19,137 within 21 days of the date the interrogatories were answered by Thompson. It determined that Thompson knew or should have known that Skala had commissions to be paid within the 60 days following the completion of the interrogatories, in which Thompson denied that he owed Skala money. The court found that the answers given by Thompson were not accurate because Thompson owed Skala commissions at the time Thompson answered the interrogatories. The court entered

judgment in favor of Bauer and against Realty Linc in the sum of $19,137 plus costs.

## ASSIGNMENTS OF ERROR

Realty Linc assigns that the district court erred (1) in determining that Realty Linc, its agents, and its employees knew or should have known that Skala had commissions to be paid within 60 days following the completion of interrogatories from Bauer; (2) in finding that commissions/earnings were owed to Skala at the time Thompson answered the interrogatories on behalf of Realty Linc; (3) in finding that the answers given by Thompson were not answered in full and good faith; and (4) in ordering judgment in favor of Bauer and against Realty Linc in the sum of $19,137 plus costs of the action.

## ANALYSIS

The issue here is whether the district court erred in finding that Thompson, on behalf of Realty Linc, did not accurately answer the interrogatories. Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

We begin by briefly reviewing the garnishment procedure. When a judgment has been entered by a court, the judgment creditor may file an affidavit in the office of the clerk of the court where the judgment has been entered, stating that the judgment creditor has reason to believe that a person, partnership, limited liability company, or corporation has property of and is indebted to the judgment debtor. See Neb. Rev. Stat. § 25-1056(1) (Cum. Supp. 2006). The clerk then issues a summons setting forth the amount due on the judgment, interest, and costs as shown in the affidavit and requiring the garnishee to answer written interrogatories to be furnished by the judgment creditor. *Id*. A copy of the summons and order of garnishment must be sent by the judgment creditor to the judgment debtor by certified mail. Neb. Rev. Stat. § 25-1011(2) (Reissue 1995). The garnishee must answer the summons within 10 days from the date of service. § 25-1056(1).

When wages are involved, the garnishee must pay to the employee/judgment debtor all disposable earnings exempted from garnishment by statute. *Id*. Any disposable earnings that remain after such payment shall be retained by the garnishee until further order of the court. *Id*.

The judgment debtor may request a hearing if he or she believes the garnishment should not be allowed either because the funds sought are exempt or because the amount is not owed on the judgment. See § 25-1011(4)(c). Such a hearing must be held within 10 days of the request. § 25-1011(5).

The judgment creditor may apply to the court for an order transferring the nonexempt earnings withheld by the garnishee to the court for delivery to the judgment creditor if it appears from the garnishee's answer (1) that the judgment debtor was an employee of the garnishee, (2) that the garnishee otherwise owed earnings to the judgment debtor when the garnishment order was served, or (3) that earnings would be owed within 60 days and there is no written objection to the order or the answer of the garnishee filed. See § 25-1056(2).

State law also provides that the garnishee shall answer under oath all interrogatories concerning property or credits of the judgment debtor and that the garnishee shall disclose the amount owed to the judgment debtor. Neb. Rev. Stat. § 25-1026 (Reissue 1995). If the garnishee fails to answer the interrogatories, it is presumed that the garnishee is indebted to the judgment debtor in the full amount of the claim of the judgment creditor. Neb. Rev. Stat. § 25-1028 (Reissue 1995).

If the garnishee's answers to interrogatories are not satisfactory to the judgment creditor or if the garnishee does not comply with an order of the court by paying the money owed into the court, the judgment creditor may file an application for determination of the liability of the garnishee. See Neb. Rev. Stat. § 25-1030 (Reissue 1995). The application may controvert the garnishee's answer, or it may allege facts to show the existence of indebtedness of the garnishee to the judgment debtor. *Id*. The garnishee's answer and the application for determination of the liability of the garnishee constitute the pleadings

upon which trial as to the garnishee's liability shall be held. *Id*. Such a trial is conducted as a civil action. Neb. Rev. Stat. § 25-1030.02 (Reissue 1995).

If it is demonstrated at the trial of the garnishee's liability that the garnishee was indebted to the judgment debtor or had any property or credits of the judgment debtor in the garnishee's possession or under his control at the time of being served with the notice of garnishment, the garnishee is liable to the judgment creditor for the full amount of the judgment or for the amount of such indebtedness or property held by the garnishee. See *id*. The judgment creditor may then have a judgment against the garnishee for the amount of money due from the garnishee to the judgment debtor in the original action. *Id*.

In the case at bar, Bauer became the judgment creditor when she obtained a judgment against Skala, the judgment debtor, in the original action. Bauer sought to garnish Skala's wages from his employer, Realty Linc, the garnishee, by filing the summons for garnishment in aid of execution. Bauer claimed that Thompson, as Realty Linc's representative, had not adequately answered the interrogatories, and she filed an application against Realty Linc as garnishee to determine liability. A hearing was held to determine whether Thompson had satisfactorily responded to the interrogatories.

Thompson testified at the hearing that Skala was an independent contractor who received commissions when real estate closings occurred. Although Thompson indicated in the interrogatories that he did not owe Skala any money for wages and that he would not owe Skala any earnings within the next 60 days, Thompson admitted at the hearing that he knew there were closings scheduled within the next 60 days for properties either listed or sold by Skala. Even though Skala had on average received a commission at least monthly in the past, Thompson claimed he did not know that the company would owe Skala any money in the next 60 days. Avery, a real estate broker for another company in Grand Island, testified that Skala was involved in eight closings between September 7 and 22, 2006, with total commissions of approximately $19,000.

The district court determined that Thompson knew or should have known that Skala had commissions that would be paid within the 60 days following service of the interrogatories and that, therefore, Thompson's answers to the interrogatories were not accurate. The court entered judgment in favor of Bauer and against Realty Linc.

[2] Nebraska law requires the garnishee to answer written interrogatories furnished by the judgment creditor. Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Bauer established at the hearing that Realty Linc held commissions due to Skala, which in turn could be used to satisfy his debt to Bauer.

[3,4] At the hearing, Thompson equivocated about his answers to the interrogatories. He admitted that Skala was in his employ. But then Thompson sought to qualify the definition of "employ." He stated that he did not attempt to further explain the situation because there was no additional space provided on the form. He did not attempt to provide any explanation to suggest that Skala's compensation was solely in the form of commission and was based on pending real estate closings. As a general rule, a garnishee owes a duty to act in good faith and answer fully and truthfully all proper interrogatories presented to him. See *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948). The garnishee is expected to, in some appropriate manner, properly disclose all relevant facts within his knowledge at the time of submitting an answer concerning his indebtedness to the judgment debtor or concerning money or property of the judgment debtor then in his possession. *Id*.

The garnishment forms are uniform and are promulgated by this court. § 25-1011(3). The employers' instructions that accompany garnishment forms specifically state: "The term 'earnings' means compensation for personal services owing,

whether due or not, to the judgment debtor at the time of service of the Summons and Interrogatories, whether denominated as wages, salary, *commissions*, bonus, or otherwise . . . ." (Emphasis supplied.) Thompson knew or should have known that Skala would be due commissions for real estate sales within the next 60 days. The district court did not err in finding that commissions were owed to Skala at the time the interrogatories were answered. There was competent evidence to support the district court's finding that Skala had generated commissions totaling $19,137 within 21 days of the date the interrogatories were answered by Thompson and that Thompson's answers were not accurate because he owed Skala commissions at the time Thompson answered the interrogatories.

Realty Linc also appears to object to the district court's determination that Realty Linc was liable to Bauer in the amount of $19,137, rather than solely the amount of commissions earned by Skala. Section 25-1028 provides that if the garnishee fails to answer, it is presumed that the garnishee is indebted in the full amount of the judgment creditor's claim. This is a rebuttable presumption. See *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). In this case, although Realty Linc answered the interrogatories, the court found that the answers were not accurate. Though this failure to accurately answer the interrogatories may have potentially subjected Realty Linc to a judgment in the full amount of $33,868.25, Realty Linc's appearance at the hearing to determine liability defeated this claim. See *id*. Thus, the most Bauer could garnish is the amount Realty Linc owed Skala, as shown by the pleadings and evidence. See *id.* The only evidence as to the value of the closings that took place within the 60-day period after the interrogatories were issued came from Avery, the broker of another real estate firm. Avery stated it was customary for agents to split the commissions. However, Realty Linc did not offer any evidence concerning the division of commissions. Avery testified that Skala was involved in eight closings between September 7 and 22, 2006, with total commissions of approximately $19,000. The district court entered judgment against Realty Linc for

$19,137 plus costs. The court's findings have the effect of a jury's findings and will not be set aside on appeal unless clearly wrong. See *id*.

## CONCLUSION

There is no evidence that the judgment in this case was clearly wrong. The judgment of the district court is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. STEPHEN L. SMITH, RESPONDENT.

745 N.W.2d 891

Filed March 7, 2008. No. S-07-397.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. 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 or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
3. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
6. ____. An attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is a grave matter and a threat to the credibility of attorney disciplinary proceedings.
7. ____. The failure of a respondent to answer the formal charges subjects the respondent to a judgment on the formal charges filed.

8. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
9. **Disciplinary Proceedings.** The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of disbarment.

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

Stephen L. Smith, pro se.

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

PER CURIAM.

## NATURE OF CASE

The office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against respondent, Stephen L. Smith, a member of the Nebraska State Bar Association. Respondent did not file an answer or otherwise respond to the formal charges. Relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2005). We granted the motion in part and heard oral argument. The sole issue before the court is the appropriate discipline to be imposed.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 22, 1994. The formal charges alleged that respondent violated certain disciplinary rules and his oath of office as an attorney. The charges related to respondent's representation of Thomas J. Kawa.

In February 2005, Kawa hired respondent to represent him on several matters, and Kawa delivered a check for $3,000 as a deposit. The formal charges alleged that respondent did not deposit the funds into his attorney trust account. On April 6, 2006, Kawa filed a grievance against respondent with relator, alleging, in part, that respondent had failed to provide an accounting of Kawa's advance payment. Relator sent respondent a copy of Kawa's grievance letter on April 12, and respondent

was asked to provide a written response. When no response had been received by May 15, relator sent a second request. Again, relator received no response from respondent, and a third letter was sent on June 9.

Respondent provided his initial response to Kawa's grievance on June 19, 2006. In it, respondent provided an accounting of payments from his trust account purportedly related to Kawa's cases. However, two of the payments allegedly made from respondent's trust account were dated prior to the time he received any funds from Kawa: a check dated December 21, 2003, and a check dated May 12, 2004. Respondent's accounting showed that a total of $3,289.37 had been withdrawn from his trust account purportedly for expenses related to Kawa's cases.

On July 13, 2006, relator sent respondent a letter asking him to provide evidence of the date on which he deposited Kawa's advance payment into respondent's trust account and to explain the withdrawal of $289.73 in excess of the $3,000 paid by Kawa. Respondent was asked to respond by July 21.

No response was received, and relator filed a formal grievance pursuant to Neb. Ct. R. of Discipline 9(D) (rev. 2001) on September 1, 2006. Notice was sent to respondent by certified mail. Respondent provided a written response on September 20, but it did not answer the questions raised by relator, including the date on which respondent deposited the $3,000 paid by Kawa into his trust account, the withdrawal of $472.28 from the trust account before respondent received any funds from Kawa, and the withdrawal from the trust account of $289.37 in excess of the $3,000 paid by Kawa.

Relator again wrote to respondent on September 22, October 11, and November 2, 2006. Respondent was informed that if he failed to respond, relator would seek temporary suspension of respondent's license to practice law. On November 8, respondent provided copies of his monthly bank statements related to the attorney trust account. The records showed no deposit that corresponded with the $3,000 payment made by Kawa. The statements indicated that the balance was at various times below the amount that should have remained from Kawa's funds.

According to relator, the review of the bank statements showed that respondent was improperly using the trust account as a business account or as his personal checking account by leaving personal funds in the account and using the account to pay personal expenses.

On November 14, 2006, relator wrote to respondent to request additional information about Kawa's funds and the use of respondent's trust account. Respondent was directed to respond by November 22. He did not respond until January 24, 2007.

Upon the recommendation of the Committee on Inquiry of the Second Disciplinary District, formal charges were filed against respondent on April 16, 2007. The charges stated that respondent's acts and omissions that occurred prior to September 1, 2005, constituted violations of his oath of office as an attorney and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), and Canon 9, DR 9-102(A)(1) and (2). Those acts and omissions that occurred after September 1, 2005, constituted violations of respondent's oath of office as an attorney and Neb. Ct. R. of Prof. Cond. 8.4 (rev. 2005). On May 22, 2007, respondent was personally served with a summons and formal charges. Respondent did not file an answer to the charges. On August 29, this court granted in part relator's motion for judgment on the pleadings, finding that "respondent has violated Code as alleged in formal charges."

## STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

## ANALYSIS

The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007). An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges. *State ex rel. Counsel for Dis. v. Jones*,

270 Neb. 471, 704 N.W.2d 216 (2005). The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered. See *id.*, citing disciplinary rule 10(I).

The formal charges alleged that respondent violated the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The formal charges also alleged that respondent violated rule 8.4 of the Nebraska Rules of Professional Conduct, which states:

> RULE 8.4 MISCONDUCT
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
>
> . . . .

(d) engage in conduct that is prejudicial to the administration of justice.

[2] 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 or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

[3,4] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.* To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.*

Relator suggests that the appropriate sanction in this case is disbarment. Respondent did not respond to the initial requests by relator until more than 2 months had passed and after relator had sent three letters asking for a response to Kawa's grievance. Respondent's first response indicated he had made payments out of his trust account prior to the date he received funds from Kawa. Relator asked for additional information about the trust account, and again, respondent did not respond. Respondent was sent notice that the grievance letter had been upgraded to a formal grievance on September 1, 2006, and he did not respond until September 20. The response did not answer relator's questions about the deposit of Kawa's funds into the trust account, about the withdrawal of funds prior to the receipt of Kawa's deposit, or about the withdrawal of an amount in excess of Kawa's deposit.

Relator sought additional records on September 22, 2006, and again, respondent did not respond until three requests had been made. When respondent provided copies of his monthly bank statements on November 8, a review showed that there was no record of the $3,000 deposit from Kawa and that the

trust account had fallen below the balance it should have had on more than one occasion. On November 14, relator asked respondent to address concerns that arose from the review of the trust account bank statements. Respondent did not answer until January 24, 2007. And respondent did not file an answer to the formal charges or to the motion for judgment on the pleadings.

[5,6] This court has stated that responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate disrespect for this court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005). We have also held that an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is a grave matter and a threat to the credibility of attorney disciplinary proceedings. *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000).

Disciplinary rule 9(E) provides in part:

> Upon receipt of notice of a Grievance from the Counsel for Discipline, the member against whom the Grievance is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the Grievance, or a response stating that the member refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

In addition, Neb. Ct. R. of Discipline 3(B) (rev. 2005) provides that acts or omissions by a member which violate the Nebraska Rules of Professional Conduct (or the Code of Professional Responsibility if the act or omission occurred prior to September 1, 2005) shall be grounds for discipline.

[7] Thus, respondent is subject to discipline for his failure to timely and adequately respond to requests for information from relator. The failure of a respondent to answer the formal charges subjects the respondent to a judgment on the formal charges filed. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

[8] The only information we have before us from respondent is his brief. In it, he attempts to provide an explanation for the problems with his trust account. The majority of respondent's brief blames Kawa for respondent's difficulties. The two apparently had a business arrangement that ended in litigation which is still pending. However, we have held on numerous occasions that a party's brief may not expand the evidentiary record. *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007). Respondent did not provide any of this information prior to the filing of formal charges.

The formal charges alleged that respondent violated the disciplinary rules related to preserving the identity of funds and property of a client and engaged in conduct that is prejudicial to the administration of justice. Respondent was unable to provide an adequate explanation of how he disbursed funds from his trust account prior to receiving a deposit from Kawa and of how he disbursed more than $3,000 from the account. In fact, his bank records did not show a corresponding deposit of $3,000.

Issues related to trust accounts are serious matters, and this court has ordered the disbarment of attorneys who violated disciplinary rules regarding trust accounts, mishandled client funds, and failed to cooperate with the Counsel for Discipline during disciplinary proceedings. See, *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005); *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003); *State ex rel. Special Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

[9] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Counsel for Dis. v. Dortch, supra*. The record in this case does not allow us to consider any of respondent's allegations related to Kawa as mitigating factors, and we find no evidence of any such factors in the record. This is the result, in part, of respondent's failure to answer requests for information from relator.

Respondent failed to provide an adequate explanation for the discrepancies in his trust account related to the representation

of Kawa. Respondent's actions demonstrate disrespect for this court's disciplinary jurisdiction. These actions also indicate a lack of concern for the protection of the public, the profession, and the administration of justice.

We have considered the undisputed allegations of the formal charges and the applicable law. Upon due consideration, the court finds that respondent should be disbarred from the practice of law in the State of Nebraska.

## CONCLUSION

The court finds that respondent violated DR 1-102(A)(1), DR 9-102(A)(1) and (2), rule 8.4, and his oath of office as an attorney. We conclude that disbarment is the appropriate sanction.

It is therefore the judgment of this court that respondent be disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses has been entered by this court.

JUDGMENT OF DISBARMENT.

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# COLLETTE THONE AND ANTHONY THONE, APPELLANTS, V. REGIONAL WEST MEDICAL CENTER ET AL., APPELLEES.

745 N.W.2d 898

Filed March 14, 2008. No. S-05-1556.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.

3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, the plaintiff must show (1) the applicable standard of care, (2) that the defendant(s) deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.
6. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** As a general matter, expert testimony is required to identify the applicable standard of care.
7. **Malpractice: Expert Witnesses: Presumptions.** A party can make a prima facie case of professional negligence even without expert testimony in cases where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.
8. **Malpractice: Testimony: Proof.** Lay testimony may suffice to establish a defendant's deviation from the standard of care.
9. **Malpractice: Physicians and Surgeons: Proximate Cause: Damages.** In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
10. **Expert Witnesses: Proximate Cause.** Expert testimony is almost always required to prove proximate causation.
11. **Malpractice: Expert Witnesses.** Causation in professional negligence cases may be inferred without expert testimony if the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently obvious to laypersons.
12. ____: ____. Whether a causal link is sufficiently obvious that it may be inferred under the common-knowledge exception is a separate inquiry from whether a defendant's negligence is sufficiently plain that it, too, may be inferred by laypersons.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Brian M. Mumaugh and Gregory R. Piche, of Holland & Hart, L.L.P., for appellants.

William M. Lamson, Jr., and Molly M. Lukenbill, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

HEAVICAN, C.J.

## I. INTRODUCTION

Collette Thone and her husband, Anthony Thone, brought suit against the Regional West Medical Center (RWMC) and Drs. Glen Forney, Jeffrey Holloway, and Thomas White for alleged negligence in treating Collette Thone for complications related to a previously installed gastric band. RWMC and the physicians (collectively appellees) moved for summary judgment.

The district court granted appellees' motion on the theory that the Thones had failed to meet their requirement of providing expert testimony to support their claims. The Thones appeal, arguing that the lack of expert testimony is not fatal to their case. Because we conclude that the Thones' failure to provide expert testimony on proximate causation is fatal to their claim, we affirm the district court's grant of summary judgment.

## II. BACKGROUND

On approximately December 10, 2001, Collette had a gastric band installed by Drs. Holloway and Forney at RWMC in Scottsbluff, Nebraska. The gastric band limits the quantity of food that can be digested at one time and is intended to relieve a patient's obesity.

On May 16, 2002, while vacationing in Loveland, Colorado, Collette experienced severe abdominal pain and nausea, apparently caused by particles of food which were unable to pass through the band. She initially went to a local hospital, but was transferred to RWMC that same day. The parties dispute what transpired in the 5 days after Collette arrived at RWMC. It is clear, however, that on May 21, Dr. Holloway performed an exploratory laparoscopic procedure and discovered that Collette had a perforation in her stomach lining in the vicinity of the gastric band. Holloway immediately removed the gastric band and repaired the perforation. Collette was discharged from RWMC on May 30.

The Thones filed their complaint against appellees on May 14, 2004, alleging various acts of negligence by the medical center and its physicians with regard to diagnosing and treating Collette's ailments. Appellees moved for summary judgment. In support of their motion, appellees offered affidavits

by Drs. Forney and White, both of whom stated that none of the named defendants had violated the applicable standard of care. The Thones' responsive evidence consisted of two affidavits: one from Collette herself and one from Collette's mother. Collette's affidavit consisted of quoted excerpts from a manual supplied by BioEnterics Corporation (BioEnterics), a manufacturer of gastric bands, immediately followed by Collette's own commentary explaining how appellees deviated from that particular instruction. A photocopy of the manual was attached to Collette's affidavit.

Appellees objected to both affidavits, and the district court sustained the objections. Finding that the Thones failed to offer any admissible evidence to support their claim of medical malpractice and that the Thones' allegations of negligence were not the sort that could be inferred without proof under the so-called common-knowledge exception, the district court granted appellees' motion for summary judgment.

## III. ASSIGNMENTS OF ERROR

The Thones generally assign that the district court erred in concluding they had failed to demonstrate the existence of a triable issue of fact as to the negligence of appellees. Specifically, the Thones argue the district court erred by failing to recognize that (1) appellees' negligence was so palpable that it could be recognized by laypersons without expert proof under the common-knowledge exception and (2) the statements in Collette's affidavit and the attached BioEnterics manual provide admissible proof of appellees' negligence and thereby render expert testimony unnecessary.

## IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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.[1]

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[1] See *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

[2] A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.[2] If the moving party makes such a case, the burden then shifts to the nonmoving party to produce admissible contradictory evidence which raises a genuine issue of material fact.[3] If it cannot, summary judgment should be granted.

[3,4] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[4] In conducting our review, we are mindful of the fact that on questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[5]

## V. ANALYSIS

The overarching issue in this appeal is whether the Thones carried their burden to raise a genuine issue of material fact that appellees committed medical malpractice when treating Collette for complications involving her gastric band. In support of their motion for summary judgment, appellees offered affidavits from Drs. Forney and White, two of the named defendants. In their affidavits, the physicians offered that in their expert opinions, neither they nor any other defendant had committed medical malpractice under the applicable standard of care. Further, the physicians concluded that any acts or omissions by themselves or any other defendant did not proximately cause Collette's injuries.

[5] At the summary judgment stage, it is well settled that such self-supporting affidavits suffice to make a prima facie

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[2] See *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

[3] See *id.*

[4] See *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[5] *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

case that the defendants did not commit medical malpractice.[6] As such, Forney and White's affidavits shifted the burden to the Thones to provide sufficient evidence to establish a prima facie case of medical malpractice.[7] To make such a case, a plaintiff must show (1) the applicable standard of care, (2) that the defendant(s) deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.[8] We discuss each element in turn.

### 1. Standard of Care

[6] As a general matter, expert testimony is required to identify the applicable standard of care.[9] The Thones offered no expert testimony, but they attempt to account for this fact by arguing that two exceptions make expert testimony unnecessary for several of their claims. First, the Thones argue that expert testimony is unnecessary to determine whether it was negligent for appellees to wait 5 days before treating Collette because such a delay is so plainly improper that negligence may be inferred under the common-knowledge exception. Second, the Thones argue that expert testimony is unnecessary to show that appellees were negligent in diagnosing and treating Collette because an instruction manual printed by the manufacturer of Collette's medical device set the standard of care. We address each argument separately.

#### (a) 5-Day Delay and Common-Knowledge Exception

[7] We have long recognized that a party can make a prima facie case of professional negligence even without expert testimony in cases where "the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen."[10] This

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[6] See, e.g., *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001); *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

[7] See *Wagner, supra* note 6.

[8] See *Casey, supra* note 6 (citing *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000)).

[9] See *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000).

[10] *Halligan v. Cotton*, 193 Neb. 331, 336, 227 N.W.2d 10, 13 (1975).

common-knowledge exception is limited to cases of extreme and obvious misconduct. Examples include failure to remove a surgical instrument from a patient's body following a procedure or amputating an incorrect limb.[11]

In contrast, we have been reluctant to apply the common-knowledge exception in cases where the alleged professional misconduct was less than obvious without some degree of technical knowledge. For example, in *Fossett v. Board of Regents*, a plaintiff attempted to invoke this exception by arguing that her physician was negligent for failing to remove a large amount of "bilious peritoneal fluid" which he discovered in her abdomen during an unrelated procedure.[12] We declined to apply the exception in *Fossett* because doing so would incorrectly assume that "the trier of fact is capable of determining whether it is accepted medical practice for a surgeon to leave bodily fluid where it is found in a patient during an operation."[13]

The Thones rely on the common-knowledge exception for their claim that appellees left Collette vomiting blood and in excruciating pain for 5 days without taking any action. Although not as extreme as leaving a surgical instrument in a patient or removing the wrong limb, a 5-day delay under such circumstances is far more akin to those scenarios than what was presented in *Fossett*. An authoritative treatise on medical malpractice supports this conclusion: "[N]o expert testimony is required in order to show that the failure to attend a patient altogether does not constitute reasonable care when common sense indicates that, without attention, the patient may suffer serious consequences."[14]

The Maryland Supreme Court concluded that negligence could be inferred under the common-knowledge exception when a physician failed to attend to a patient who was struck by an automobile and, although manifesting few outward indications of trauma, was therefore likely to have suffered severe internal

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[11] *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

[12] *Fossett, supra* note 9, 258 Neb. at 708, 605 N.W.2d at 469.

[13] *Id.*

[14] 1 David W. Louisell & Harold Williams, Medical Malpractice § 8.05[4] at 8-81 (2007).

injuries.[15] Similarly, the Louisiana Supreme Court found that an on-call physician was obviously negligent for failing to come to the hospital despite being informed that a patient had a medical emergency which required his attention.[16]

These cases support the conclusion that negligence may be inferred when a physician fails to timely attend to a patient who bears serious injuries. We therefore hold that a layperson could infer that a reasonable physician, acting with the care and skill of other physicians in the community, would not neglect a patient vomiting blood and in severe abdominal pain. As such, the Thones' failure to provide expert testimony does not foreclose a finding of negligence with respect to appellees' alleged failure to promptly diagnose and treat Collette.

(b) Negligent Treatment and
Manufacturer-Instruction Exception

The Thones next argue that expert testimony is unnecessary to set the standard of care for their claims that appellees were negligent in treating and diagnosing Collette's complications. The Thones contend that compliance with an instruction manual supplied by BioEnterics, the alleged manufacturer of Collette's gastric band, is itself the proper standard of care for diagnosing and treating complications related to the band. In making this argument, the Thones invoke what might, for the sake of convenience, be called the manufacturer-instruction exception to expert testimony.

On the theory that reasonable physicians do not deviate from instructions supplied by the manufacturers of drugs or devices, a number of courts hold that even without expert testimony indicating whether the instructions set the standard of care, a physician's failure to follow those instructions is prima facie evidence of negligence.[17] A minority of courts reject the idea that

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[15] *Thomas v. Corso*, 265 Md. 84, 288 A.2d 379 (1972).

[16] *Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713 (La. 1986).

[17] See, e.g., *Rodriguez v. Jackson*, 118 Ariz. 13, 574 P.2d 481 (Ariz. App. 1977); *Garvey v. O'Donoghue*, 530 A.2d 1141 (D.C. 1987); *Ohligschlager v. Proctor Comm. Hosp.*, 55 Ill. 2d 411, 303 N.W.2d 392 (1973); *Terrebonne v. Floyd*, 767 So. 2d 758 (La. App. 2000); *Nolan v. Dillon*, 261 Md. 516, 276 A.2d 36 (1971).

a manufacturer's instruction constitutes prima facie evidence of the standard of care. Instead, these courts hold that when unaccompanied by expert testimony, a manufacturer's instructions provide only "'some evidence'" of the standard.[18]

Because the Thones cannot avoid summary judgment unless they make out a prima facie case of medical malpractice,[19] the difference between these two views is significant in this case. We need not choose between these views here, however, because we conclude that the BioEnterics manual is not sufficient to trigger the manufacturer-instruction exception. Our conclusion is predicated on the fact that cases applying the manufacturer-instruction exception involved either a physician's alleged failure to follow instructions for the use of drugs[20] or a medical attendant's failure to follow specific operating instructions for basic medical instruments such as an electrosurgical mole remover,[21] a heating pad,[22] and a wound stapler.[23] In contrast, the Thones' allegations—and the instructions in the BioEnterics manual—primarily relate to diagnosing and treating complications involving the gastric band.

The Louisiana Court of Appeal was presented with a similar situation in *Vinson v. Salmon*.[24] There, a burn victim claimed that compliance with an article in a medical journal describing the proper treatment for burns was the standard of care under a Louisiana case applying the manufacturer-instruction exception. The court disagreed: "The *Terrebone*[25] case involved

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[18] *Craft v. Peebles*, 78 Haw. 287, 300, 893 P.2d 138, 151 (1995). See, *Morlino v. Medical Center*, 152 N.J. 563, 706 A.2d 721 (1998); *Spensieri v. Lasky*, 94 N.Y.2d 231, 723 N.E.2d 544, 701 N.Y.S.2d 689 (1999); *Grayson v. State By Children's Hosp.*, 838 P.2d 546 (Okla. Civ. App. 1992); *Ramon By and Through Ramon v. Farr*, 770 P.2d 131 (Utah 1989).

[19] See *Cerny, supra* note 2.

[20] See, e.g., *Rodriguez, supra* note 17 (Streptomycin); *Garvey, supra* note 17 (Tobramycin); *Ohligschlager, supra* note 17 (Sparine).

[21] *Monk v. Doctors Hospital*, 403 F.2d 580 (D.C. Cir. 1968).

[22] *Burke v. Pearson*, 259 S.C. 288, 191 S.E.2d 721 (1972).

[23] *Christiana v. Sudderth*, 841 So. 2d 911 (La. App. 2003).

[24] *Vinson v. Salmon*, 786 So. 2d 913 (La. App. 2001).

[25] *Terrebonne, supra* note 17.

the specific timing of a drug dosage. In contrast, the present matter involves *more complex medical issues, including the appropriateness of the diagnosis and treatment provided by* [*the treating physician*]. Thus, the cited case is not persuasive support of plaintiff's position."[26] Like the Louisiana Court of Appeal, we recognize that treating and diagnosing a patient involves a multitude of variables and extrinsic considerations which make such activities highly complex. This suggests that a physician's decisions regarding treatment and diagnosis should not be scrutinized according to a rigid set of black-letter instructions. We therefore conclude that without expert testimony, the BioEnterics manual has no bearing on the standard of care governing appellees' decisions about how to diagnose and treat Thone's ailments.

The Thones also rely on the manufacturer-instruction exception for their claim that appellees were negligent in failing to convey the BioEnterics manual's warnings about the dangers of using nonsteroidal anti-inflammatory drugs (NSAIDs) after the band was installed. The manual specifically indicates that such drugs ought to be used "with caution" because they can increase the risk that the stomach lining around the device will erode. Collette was using a prescription anti-inflammatory when she had the device installed and claims appellees knew this yet never warned her about the dangers of such use.

However, the rationale behind the manufacturer-instruction exception is that a reasonable physician would not violate a manufacturer's specific instructions when using a drug or device. Even if we were to agree that the manufacturer-instruction exception should apply in the context of patient counseling, we note that the BioEnterics manual does not specifically instruct physicians to warn patients about the risks of combining NSAIDs with gastric bands. In fact, the manual does not even instruct physicians to discontinue use of such medications; it simply advises that they be used cautiously. As a result, no reasonable argument can be made that appellees violated an explicit instruction in the BioEnterics manual by not advising Collette of the dangers of continuing to use NSAIDs.

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[26] *Vinson, supra* note 24, 786 So. 2d at 916 (emphasis supplied).

In sum, the lack of expert testimony does not preclude the Thones from proving the standard of care with respect to their claim that appellees were negligent in waiting 5 days to treat Collette. Pursuant to the common-knowledge exception, a layperson can infer that a reasonable physician would not wait 5 days before rendering aid to a patient in Collette's condition.

However, the BioEnterics manual does not trigger the manufacturer-instruction exception in this case. As such, the lack of expert testimony proves fatal to the Thones' claims that appellees committed negligence by deviating from the instructions set forth in the BioEnterics manual when attending to Collette's ailments. We therefore turn to a discussion of the other two elements of a prima facie case of medical malpractice as they relate to the Thones' delay-of-treatment claim.

### 2. Deviation From Standard of Care

Having concluded that expert testimony is unnecessary to prove that a reasonable physician would not leave a patient vomiting blood and languishing in pain for a period of 5 days without some care, the next issue is whether the Thones can raise a genuine issue as to whether appellees deviated from that standard of care. More precisely, the specific issue is whether the Thones provided sufficient evidence that appellees in fact failed to treat Collette for the 5-day period between May 16 and 21, 2002.

In discussing medical malpractice claims, some courts make the blanket holding that expert testimony is necessary for all three elements, including the element concerning the defendant's deviation from the standard of care.[27] Other courts are more particular and hold that "[e]xpert testimony is generally required in medical malpractice cases to establish the standard of care and to prove causation, except where the lack of reasonable care or the existence of proximate cause is apparent to the average layman from common knowledge or experience."[28] The

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[27] See, e.g., *Travers v. District of Columbia*, 672 A.2d 566 (D.C. 1996).

[28] *Williamson v. Amrani*, 283 Kan. 227, 244, 152 P.3d 60, 72 (2007). See, also, *Cox v. Jones*, 470 N.W.2d 23 (Iowa 1991); *Rodriguez v. Clarke*, 400 Md. 39, 926 A.2d 736 (2007).

rationale is that the standard of care and proximate causation tend to involve highly technical matters "outside the knowledge of the average person without specialized training."[29] As such, other than a situation in which the applicable standard of care or causation are sufficiently obvious that they may be inferred without proof, establishing those two elements either requires expert testimony or, in the case of the standard of care, a manufacturer's instruction. We have also indicated that a physician's own admission may suffice to establish the standard of care or proximate causation.[30]

In contrast, however, identifying a *deviation* from an established standard of care has the potential to be much more straightforward. In many cases, proof that the physician deviated from an established standard may require nothing more than some credible testimony from a lay witness that the physician did or did not conform to the standard. For example, in *Healy v. Langdon*,[31] the plaintiff, James Healy, submitted an affidavit in which he asserted that his wife's physician failed to properly inform the Healys of the risks associated with her chemotherapy. Healy had already presented evidence suggesting that a reasonable physician would have advised a patient of the risks associated with chemotherapy. Although Healy was a layperson, we held that his affidavit was sufficient to raise a genuine issue of fact as to whether the physician in fact deviated from the standard of care by not properly informing the Healys of the risks involved.[32]

[8] The result in *Healy* supports the conclusion that lay testimony may suffice to establish a defendant's deviation from the standard of care. We need not resolve here whether the ability to establish the deviation element with lay testimony is an exception or the norm. Instead, we simply conclude that this case presents a situation in which lay testimony alone is sufficient to show a deviation from the standard of care.

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[29] *Perkins v. Susan B. Allen Memorial Hosp.*, 36 Kan. App. 2d 885, 888, 146 P.3d 1102, 1105-06 (2006).

[30] *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

[31] *Id.*

[32] See *id.*

We have already established that a reasonable physician would not leave a patient in severe abdominal distress for 5 days without taking some remedial measures, absent clear justification. Identifying a deviation from this standard would require nothing more than testimony from a witness with personal knowledge as to whether appellees did in fact neglect Collette for 5 days.

As was true in *Healy*, it appears the only admissible evidence on this point is Collette's own affidavit in which she asserts that she was neglected by appellees during the 5-day period. Although appellees dispute this assertion, we must view the facts in a light most favorable to the Thones, the nonmoving party, by giving them the benefit of the doubt in factual disputes.[33] We hold that Collette's assertions of neglect create a genuine issue of material fact. We turn, therefore, to the third and final element of the Thones' medical malpractice claim—proximate causation.

### 3. Proximate Causation

[9] Appellees offered expert testimony indicating that any acts or omissions of appellees were not the proximate cause of Collette's injuries. This evidence shifted the burden to the Thones to provide contrary evidence on the issue of proximate causation.[34] In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.[35]

[10-12] Expert testimony is almost always required to prove proximate causation. Nevertheless, as with the standard of care, the common-knowledge exception applies to proximate causation in professional negligence cases. Thus causation may be inferred without expert testimony if the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently

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[33] See *Plowman, supra* note 4.

[34] See, *Cerny, supra* note 2; *Casey, supra* note 6.

[35] *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004).

obvious to laypersons.[36] We note, however, that whether a causal link is sufficiently obvious that it may be inferred under the common-knowledge exception is a separate inquiry from whether a defendant's negligence is sufficiently plain that it, too, may be inferred by laypersons. As such, it does not necessarily follow that causation can be inferred pursuant to the common-knowledge exception simply because a physician's negligence might be so inferred.

Given their total lack of expert testimony in this case, the Thones can only survive summary judgment if the injuries to Collette's gastrointestinal system so obviously stem from appellees' alleged 5-day delay in treating her that the causal link may be inferred even by laypersons.

In addressing this question, we are persuaded by *Parker v. Central Kansas Medical Center*,[37] a case in which a patient who suffered injuries to her abdomen and colon during a horse riding accident sued a physician because the physician had refused to operate on her. The plaintiff in *Parker* asserted that, among other things, the physician's "refusal to examine, diagnose, or treat" her was obviously the cause of her injuries under the common-knowledge exception.[38] The court disagreed, noting that "without expert testimony, a jury of laypersons would not be competent to decide whether any of plaintiff's post-accident complications were caused by [the physician's] conduct or whether such complications were merely the result of her injuries sustained as a consequence of the horse riding accident."[39]

The same can be said of this case. Without expert testimony, it would be impossible for a layperson to conclude that Collette's ultimate injuries were caused specifically by a 5-day delay in treating her. There is nothing to rebut the suggestion that Collette would have suffered the same amount of harm no

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[36] See, *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991); *Williamson, supra* note 28.

[37] *Parker v. Central Kansas Medical Center*, 178 F. Supp. 2d 1205 (D. Kan. 2001).

[38] *Id.* at 1214.

[39] *Id.*

matter how diligent appellees had been. Therefore, despite their ability to satisfy the elements in their prima facie case concerning the standard of care and appellees' deviation from it, summary judgment was nonetheless appropriate given the Thones' lack of evidence on the issue of proximate causation.

## VI. CONCLUSION

The Thones attempt to account for their lack of expert testimony on the proper standard of care by invoking the common-knowledge and manufacturer-instruction exceptions. We conclude that the BioEnterics manual does not establish the standard of care. As such, summary judgment was proper for the Thones' negligence claims based on the alleged failure to follow the manufacturer's instruction manual.

The Thones have raised a genuine question of material fact that appellees' 5-day delay in treating Collette was negligent under the common-knowledge exception. However, we nonetheless find that their failure to provide expert testimony on the issue of proximate causation is fatal to this claim. We therefore affirm the district court's summary judgment.

AFFIRMED.

CONNOLLY, J., participating on briefs.

STEPHAN, J., not participating.

GERRARD, J., concurring.

I agree with the majority regarding the general legal principles applicable to this case and with the affirmance of the district court's summary judgment. But my review of the record leads me to a different analytical framework. The majority opinion identifies the plaintiffs' two theories of recovery as (1) the "Negligent Treatment" that was allegedly inconsistent with the manufacturer's instructions and (2) the "5-Day Delay" in treatment after Collette Thone's symptoms developed. I agree with the majority that the plaintiffs did not present sufficient evidence to sustain either theory. But I reach that conclusion for different reasons.

To begin with, I find it unnecessary to address the standard of care for the "negligent treatment" claim because the record clearly establishes the plaintiffs' lack of competent evidence with respect to causation. Collette's affidavit asserts that the

defendants departed from the alleged "standard of care," i.e., the manufacturer's instructions for the gastric band, in several ways. In particular, the plaintiffs claim that the defendants did not warn Collette of the risks associated with the procedure or the use of anti-inflammatory drugs, did not immediately remove the band or perform an x ray after her symptoms presented, did not perform an upper gastrointestinal tract x ray (GI) preoperatively or before band inflation or adjustment, and performed her first adjustment less than 6 weeks after her operation. Collette asserted in her affidavit that "[h]ad Defendants gone in and removed the band at the onset of [her] vomiting and abdominal pain, the band could have been removed via laparoscopy, rather than cutting [her] open from the top to the bottom of her stomach."

But those are precisely the sort of conclusions that must be supported by expert medical testimony. As the majority opinion observes, causation may be inferred without expert testimony only if the causal link between the defendants' negligence and the plaintiff's injuries is sufficiently obvious to laypersons. And neither Collette nor her mother, as lay witnesses, are qualified to establish a causal link between the plaintiffs' damages and any of the defendants' claimed deviations from the manufacturer's instructions. For example, a determination of whether Collette's gastric band could have been immediately removed by laparoscopy, rather than more invasive surgery, is beyond her expertise as a lay witness. Whether a preoperative GI would have prevented Collette's complications is beyond her expertise. And Collette does not aver that her decision to have the band installed, or any subsequent actions, would have been different had she been more informed of the risks associated with the procedure.

In short, there is no competent evidence in the record to rebut the defendants' evidence that their alleged deviations from the manufacturer's instructions did not proximately cause the plaintiffs' damages. And given that, I see no need to opine on the more difficult question whether the manufacturer's instructions were evidence of the standard of care.

I also have a different view with respect to the plaintiffs' claim of damages from a "5-day delay" in treating Collette's injuries.

She alleged, supported by her affidavit, that she endured pain and suffering during the 5 days between May 16, 2002, when she was admitted to the hospital, and the May 21 exploratory laparotomy and removal of the gastric band. According to the majority opinion, the plaintiffs' evidence would support a finding that the defendants completely failed to treat Collette during that time and that this lack of treatment breached the standard of care.

However, I read the record differently on this issue. In particular, I do not believe that the plaintiffs presented competent evidence of a breach of the standard of care. The defendants' affidavits averred the following sequence of events:

> On December 10, 2001, [Collette] underwent placement of a laparoscopic adjustable gastric band. On May 16, 2002, [she] ate some foods that would not go through the band and experienced a prolonged episode of intense esophageal spasms and retching which lasted for approximately 16 hours. She was seen in a Loveland, Colorado emergency room, and then transferred to the office of Western Surgical Group. There, Dr. Holloway examined her and removed all of the fluid from her band. He then admitted her to [RWMC] with orders for her to have nothing by mouth.
>
> At RWMC, [Collette] was monitored, and given IV fluids, and pain medications. When her symptoms continued, an upper GI was performed, and reportedly indicated an obstruction at the level of the band, which appeared to have migrated distally. [Collette] was scheduled for a revision of her lap band. Due to a change in [Collette's] condition, however, Dr. Holloway instead performed a laparoscopy followed by an exploratory laparotomy on May 21, 2002. Finding that there was a gastric perforation, he removed the adjustable gastric band, and performed a partial gastric resection.
>
> [Collette] was dismissed from the hospital on May 30, 2002. By that time, she was ambulating without difficulty, had good pain control, and was tolerating her diet well. Testing at that time revealed no evidence of any gastric leak.

Admittedly, Collette's affidavit avers, quite generally, that when she was admitted to the hospital, "[t]he Defendants waited five days before the[y] did anything." But that statement appears in her affidavit as a response to quoted sections of the manufacturer's instructions, which identify circumstances under which *removal* of the gastric band may be necessary. Read in context, it is obvious that the statement that the defendants "waited five days before the[y] did anything" means that despite her symptoms, the defendants waited 5 days to remove the gastric band—not that the defendants did absolutely *nothing* to diagnose or treat Collette while she was hospitalized.

And the plaintiffs' complaint alleges, consistent with the defendants' evidence, that Collette was admitted to the hospital on May 16, 2002, and that Dr. Holloway drained the fluid from the gastric band. (The band is placed around the stomach and inflated with sterile saline to create the proper stoma diameter, and the stoma size can be adjusted postoperatively by injecting or aspirating saline.) The plaintiffs also alleged that x rays were taken on May 19 and reviewed on May 20. In sum, the allegations in the plaintiffs' complaint are consistent with the defendants' evidence and contradict the possibility that the defendants completely failed to treat Collette during her initial 5-day hospital stay.

In short, the defendants presented evidence that when Collette presented, they deflated her gastric band and admitted her to the hospital for observation. When she did not improve, diagnostic procedures were performed and the defendants performed surgery and removed the gastric band. The plaintiffs' complaint is consistent with this account, and I do not read Collette's affidavit as contradicting it. In other words, the factual issue presented by this record is *not* whether the defendants completely failed to treat Collette—it is whether the defendants' treatment met the standard of care.

Therefore, it was the plaintiffs' burden to present evidence contradicting the defendants' evidence that their treatment did not breach the standard of care. More specifically, it was the plaintiffs' burden to present expert medical testimony to support a finding that the defendants' treatment fell below the standard of care. The plaintiffs' claim, essentially, is that the defendants

should not have waited 5 days to remove Collette's gastric band. That claim must be supported by expert opinion. Without it, the plaintiffs did not rebut the defendants' prima facie case that they did not breach the standard of care during the 5-day span at issue.

For those reasons, I conclude that the plaintiffs failed to show a genuine issue of material fact precluding judgment as a matter of law, and I concur in the judgment.

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## In re Ervin W. Blauhorn Revocable Trust. Orville Blauhorn, Trustee, appellee, v. Nancy L. Cockle et al., appellants.

746 N.W.2d 136

Filed March 21, 2008. No. S-06-531.

1. **Trusts.** The interpretation of the terms of a trust is a question of law.
2. **Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
3. **Decedents' Estates: Taxation: Appeal and Error.** An appellate court reviews estate tax apportionment proceedings de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Taxation: Intent.** Congress' general intent with respect to the federal estate tax is that it be governed by state law and that absent contrary congressional enactments, state law govern the allocation of tax burden.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Appeal from the County Court for Merrick County: Linda S. Caster Senff, Judge. Affirmed.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellants.

Steven E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellee.

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

HEAVICAN, C.J.

## I. INTRODUCTION

The primary issue presented by this case is the interpretation of the revocable trust of Ervin W. Blauhorn. In particular, this court is faced with the question of whether Ervin's trust specifically waived the apportionment of the estate tax against the beneficiaries of property received from the estate of Ervin's wife, Bonnie Blauhorn.

## II. FACTS

The facts of this case are generally undisputed. This appeal centers on the revocable trusts of Ervin and Bonnie, a married couple. There were no children born of Ervin and Bonnie's marriage; however, the couple had many nieces and nephews. Ervin's sister had married Bonnie's brother, and five children were born of that marriage. These five individuals—Nancy L. Cockle, Janet M. Bridges, Ronald L. Scharvin, Linda K. Frank, and Kathleen A. Felker (referred to collectively as the Scharvins)—are related to both Ervin and Bonnie by blood and are the appellants in this action. In addition, Ervin had at least 13 other nieces and nephews. It appears that these 13 individuals, collectively the Blauhorns, were related by blood only to Ervin.

Ervin and Bonnie set up their estate plan by the use of a qualified terminable interest property (QTIP) trust that qualified for the marital deduction. The purpose behind this plan was to avoid federal estate tax liability upon the death of the first of the couple. However, this tax would later be imposed on the estate of the surviving spouse.

Bonnie died on January 27, 1997. Her credit shelter and QTIP trust provided generally that Ervin would receive the income from the trust property during his life and that at his death, the property would go to the Scharvins. Ervin and Janet were the copersonal representatives of Bonnie's estate and cotrustees of Bonnie's trusts. No federal estate tax was due upon Bonnie's death.

On December 17, 1997, Ervin executed a will, as well as the Ervin W. Blauhorn Revocable Trust Agreement, which was subsequently amended on three occasions. Pursuant to this will and trust, the Blauhorns were to inherit Ervin's property. Ervin died on December 26, 2001. At some point during the administration of Ervin's estate, the Scharvins were asked to pay a portion of the tax due from the estate, but refused to do so. The Scharvins based this refusal on article X of Ervin's trust agreement, which they argued evinced an intention on Ervin's part to waive any right of reimbursement against the Scharvins. Article X provides:

> All the debts against Settlor's estate shall be paid as soon after Settlor's death as can conveniently be done. County inheritance tax shall be payable from the share of each beneficiary. Federal or state estate tax payable by Settlor's estate shall be allocated as follows with no right of reimbursement from any recipient or beneficiary of any such property whether or not such property passes under this Will. First the amount of the exemption equivalent for the unified credit available under the Internal Revenue Code at the time of Settlor's death shall be subtracted from the amount devised to the residual heirs of Settlor's estate. Then the federal and state estate tax shall be allocated among the remaining beneficiaries according to the remaining balance received.

On April 10, 2003, Ervin's trustee filed a petition to register and interpret the trust, requesting the county court to order the Scharvins to reimburse the trust $97,189 for federal estate tax paid and $11,644.55 for inheritance tax paid. On December 20, 2005, the county court granted the trustee's request with respect to the federal estate tax and entered judgment in favor of the trust for $97,189. This amount was calculated by subtracting from Ervin's actual tax liability the amount of tax that would have been owed by Ervin's estate had his estate not also included Bonnie's assets. Then, on April 12, 2006, the county court entered an order determining the state inheritance tax owed by the various beneficiaries of both Ervin's and Bonnie's estates (i.e., the Scharvins and the Blauhorns). The Scharvins appeal, and the trust cross-appeals.

## III. ASSIGNMENTS OF ERROR

On appeal, the Scharvins argue, renumbered and restated, that the county court erred in (1) ordering the Scharvins to reimburse the trust for federal estate tax paid, (2) considering the affidavit of Clifford Messner, (3) ordering the Scharvins to reimburse the trust for Nebraska inheritance tax paid, (4) granting the trust's motion for summary judgment, and (5) denying the Scharvins' motion for summary judgment.

On cross-appeal, the trust argues that the county court should have awarded prejudgment interest.

## IV. STANDARD OF REVIEW

[1,2] The interpretation of the terms of a trust is a question of law.[1] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.[2]

[3] An appellate court reviews estate tax apportionment proceedings de novo on the record.[3]

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

## V. ANALYSIS

### 1. Ervin's Trust Did Not Specifically Waive Allocation of Tax

#### (a) Federal Estate Tax

In their first assignment of error, the Scharvins argue the county court erred in ordering them to reimburse the trust for a portion of the federal estate tax paid by the trust. We note at the outset that the Nebraska estate tax is not at issue in this appeal. The Scharvins argue that article X of Ervin's trust agreement waived any right of recovery against them and that instead, the full estate tax should be paid by the Blauhorns as beneficiaries under Ervin's trust. In particular, the Scharvins draw

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[1] See, *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

[2] See *Smith v. Smith, supra* note 1.

[3] See *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988).

[4] *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007).

our attention to the following language in article X: "[T]ax payable by Settlor's estate shall be allocated as follows with no right of reimbursement from any recipient or beneficiary of any such property whether or not such property passes under this Will."

Some background as to the estate law principles at play is helpful to a full understanding of the issue presented by this case. Prior to 1981, the Internal Revenue Code permitted a maximum marital deduction of 50 percent of the value of the estate to the first spouse to die.[5] This deduction was only available if the surviving spouse was given control over the disposition of the marital property at the time of the surviving spouse's death.[6] This all changed with the Economic Recovery Tax Act of 1981, which essentially created the QTIP trust.[7] In discussing the need for the QTIP trust, the 11th Circuit has observed:

> As divorce and remarriage rates rose, Congress became increasingly concerned with the difficult choice facing those in second marriages, who could either provide for their spouse to the possible detriment of the children of a prior marriage or risk under-endowing their spouse to provide directly for the children. In the Economic Recovery Tax Act of 1981, Congress addressed this problem by creating the QTIP exception to the terminable property rule. According to the House of Representatives Report, the QTIP trust was designed to prevent a decedent from being "forced to choose between surrendering control of the entire estate to avoid imposition of estate tax at his death or reducing his tax benefits at his death to insure inheritance by the children."[8]

The current allowance for QTIP trusts is found in I.R.C. §§ 2044 and 2056(b)(7)(B) (2000).

As the facts above indicate, Bonnie and Ervin's estate plan employed a QTIP trust. Bonnie, as the first to die, left a life interest in her property to Ervin with the remainder interest

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[5] *Matter of Will of Adair*, 149 N.J. 591, 695 A.2d 250 (1997).

[6] *Id.*

[7] *Id.*

[8] *Estate of Shelfer v. C.I.R.*, 86 F.3d 1045, 1049 (11th Cir. 1996).

to the Scharvins. No tax was paid on Bonnie's estate. When Ervin died, his property was left to the Blauhorns, while the life interest he held in Bonnie's property was extinguished and the Scharvins received full ownership of the property. Tax was owed (and eventually paid) by Ervin's estate. It is reimbursement for a portion of this tax which is at issue in this case.

Section 2207A of the Internal Revenue Code is instrumental in answering this question. That section provides in relevant part:

> **(a) Recovery with respect to estate tax**
>
> **(1) In general**
>
> If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—
>
> (A) the total tax under this chapter which has been paid, exceeds
>
> (B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.
>
> **(2) Decedent may otherwise direct**
>
> Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.[9]

Prior to 1997, § 2207A(a)(2) provided only that "**Decedent may otherwise direct by will**[.] Paragraph (1) shall not apply if the decedent otherwise directs by will."[10]

[5] As an initial matter, we note that Congress' general intent with respect to the federal estate tax is that it be governed by state law and that absent contrary congressional enactments,

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[9] I.R.C. § 2207A(a) (2000).

[10] I.R.C. § 2207A(a)(2) (1994).

state law governs the allocation of tax burden.[11] However, we conclude that § 2207A directly applies to the question presented by this appeal and, as such, is a contrary congressional enactment. As a result, we conclude that § 2207A preempts any applicable state law to the extent that state law might purport to deal with the payment of *federal* estate tax *attributable to QTIP*.[12]

Under § 2207A, Ervin's estate is entitled to recover from the Scharvins the tax paid by the estate that would not have been owed had Bonnie's property not been included in Ervin's estate. But § 2207A does provide an exception for Ervin that if he, by will or trust, "otherwise direct[ed]" by "specifically indicat[ing] an intent to waive any right of recovery under this subchapter," then no recovery is allowed.

The question of whether a decedent "otherwise direct[ed]" has previously been addressed by other jurisdictions. For example, in *Matter of Estate of Gordon*,[13] the court, in interpreting the pre-1997 version of § 2207A, concluded that specific reference to QTIP was required in order to "'otherwise direct . . . by will.'" Other jurisdictions have followed suit.[14] Our research

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[11] *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L.E. 106 (1942).

[12] See, e.g., *Cleveland v. Compass Bank*, 652 So. 2d 1134 (Ala. 1994); *In re Estate of Klarner*, 113 P.3d 150 (Colo. 2005); *In re Probate of Will of Lee*, 389 N.J. Super. 22, 910 A.2d 634 (2006). Cf. *Matter of Estate of Meyer*, 702 N.E.2d 1078 (Ind. App. 1998) (finding that § 2207B dealing with reimbursement resulting from retained life interest preempted state law).

[13] *Matter of Estate of Gordon*, 134 Misc. 2d 247, 248, 510 N.Y.S.2d 815, 816 (1986).

[14] See *Firstar Trust Co. v. First Nat. Bank of Kenosha*, 197 Wis. 2d 484, 541 N.W.2d 467 (1995). But see *In re Estate of Miller*, 230 Ill. App. 3d 141, 595 N.E.2d 630, 172 Ill. Dec. 269 (1992) (interpreting pre-1997 version of § 2207A). Cf., *In re Estate of Klarner, supra* note 12 (where § 2207A also preempted state estate tax, specific reference to QTIP trust or § 2207A required in order to waive recovery of state estate tax); *Matter of Will of Adair, supra* note 5, 149 N.J. at 604, 659 A.2d at 257 (under state statute, court concluded generalized language regarding payment of tax was insufficient to "evidence[] an intent[] to exonerate"); *Matter of Estate of Gordon, supra* note 13 (in addition to concluding that specific reference required under § 2207A for federal estate tax, court concluded that such reference was also required under state estate tax).

has revealed no cases interpreting the current, i.e., 1997, version of § 2207A. We note, however, that the current version is more specific than its predecessor with respect to waiver. We conclude, therefore, that the 1997 amendment only reinforces the correctness of prior decisions.

[6] In addition, a plain reading of the statute supports requiring a specific reference to QTIP. 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.[15] Section 2207A provides that "an intent to waive any right of recovery *under this subchapter*" must be specifically made. (Emphasis supplied.) A plain reading of the language shows that some reference to "this subchapter," in other words, § 2207A(a), is necessary in order to show a testator's intent to waive the right to recovery.[16]

The language of article X of Ervin's trust agreement, which was signed after the effective date of the current version of § 2207A, indicated that there was to be no right of reimbursement against recipients or beneficiaries. However, we conclude that such was insufficient to waive the trust's right of reimbursement under that section. As is detailed above, this is so because there was no reference to § 2207A, or even to the QTIP trust or property, in article X, and thus no language "specifically indicat[ing] an intent to waive any right of recovery under this subchapter" as required by § 2207A. The county court did not err in ordering the Scharvins to reimburse the trust for a portion of the federal estate tax paid by the estate, and the Scharvins' first assignment of error is without merit.

(b) Affidavit of Clifford Messner

In their second assignment of error, the Scharvins argue that the county court erred in considering the affidavit of Clifford Messner. Messner was an attorney for Ervin's estate. In his affidavit, Messner averred that he was the attorney who

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[15] *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[16] See, also, H.R. Rep. No. 105-220 (1997), 105th Cong., 1st Sess., *reprinted in* 1997 U.S.C.C.A.N. 1129; 26 C.F.R. § 20-2207A-1(e) (2007).

prepared the federal estate tax return for the estate. A copy of that return was attached to the affidavit and indicated that a total of $131,229 was paid in federal estate tax. Also attached to the affidavit was a copy of a federal estate tax return completed without the inclusion of Bonnie's property that passed under her QTIP trust. That calculation shows the federal estate tax due without the inclusion of Bonnie's property would have been $34,040.

The Scharvins contend that this affidavit and an unverified allegation in the petition to register and interpret the trust are the only evidence of the amount "supposedly due and owing . . . for the federal estate tax."[17] The Scharvins argue that while Messner's affidavit states that Messner is an attorney, "it does not set forth his expertise in preparing federal estate tax returns or indicate that the calculations were correctly made."[18] As such, the Scharvins argue that the affidavit was not competent under Neb. Rev. Stat. § 25-1334 (Reissue 1995).

[7] Section 25-1334 provides in part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

The Scharvins' argument is without merit. Messner, as the attorney who actually completed the federal estate tax return for the estate, was competent to testify to the amount he calculated as being due on that return. In addition, Messner was competent to testify about the alternative calculation he performed wherein he omitted Bonnie's property from the estate.

The Scharvins' complaint seems to be that there is nothing to suggest that Messner's calculations were correct. However, Messner's calculations were the only evidence of the tax imposed upon the estate or of the amounts that would have been due without the inclusion of Bonnie's property in the estate. In opposing the trust's motion for summary judgment, the Scharvins had the opportunity to enter into the record evidence showing that Messner's calculations were incorrect. No

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[17] Brief for appellants at 16.

[18] *Id.*

such evidence was introduced. As such, the county court did not err in considering Messner's affidavit. The Scharvins' second assignment of error is also without merit.

(c) Nebraska Inheritance Tax

In their third assignment of error, the Scharvins argue that the county court erred in assessing Nebraska inheritance tax against them. We have considered the Scharvins' assignment of error and conclude that it is without merit.

(d) Remaining Assignments of Error

Because the county court did not err in finding that the trust was entitled to reimbursement for federal estate tax and inheritance tax, we conclude that the two remaining assignments of error—that the county court erred in granting the Blauhorns' motion for summary judgment while denying the Scharvins' motion—are without merit.

2. Cross-Appeal

Ervin's trustee has filed a purported cross-appeal in this case. While the trustee's cross-appeal is noted on the cover of the brief and set forth in a separate division of the brief, the brief submitted contains no assignments of error. Neb. Ct. R. of Prac. 9D(4) (rev. 2006) requires that briefs on cross-appeal be "prepared in the same manner and under the same rules as the brief of appellant." And rule 9D(1)(e) requires "[a] separate, concise statement of each error a party contends was made by the trial court . . . ." Because the trust's brief on cross-appeal does not comply with our rules, we need not address the cross-appeal.

## VI. CONCLUSION

We conclude that the county court did not err in granting the trust's motion for summary judgment and denying the Scharvins' motion. The Scharvins are required to reimburse the trust for $97,189, and they are also required to pay a portion of the inheritance tax as found by the county court. The order of the county court is affirmed.

Affirmed.

# Stanley W. Wolski, Jr., appellant, v. Josephine Walsh Wandel, appellee.

746 N.W.2d 143

Filed March 21, 2008. No. S-06-1039.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.
4. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney 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.
5. **Attorney and Client.** The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
6. **Malpractice: Attorney and Client.** Although the general standard of conduct required of an attorney is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.
7. **Attorney and Client: Expert Witnesses.** Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.
8. **Summary Judgment: Proof.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant would be entitled to judgment if the evidence were uncontroverted at trial.
9. ____: ____. Once the party moving for summary judgment makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
10. **Attorney and Client: Compromise and Settlement.** The decision to settle a controversy is the client's. In order to meaningfully make that decision, a client must have the information necessary to assess the risks and benefits of either settling or proceeding to trial.

11. **Attorney and Client.** A lawyer should exert his or her best efforts to ensure that the decisions of a client are made only after the client has been informed of relevant considerations.

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

E. Dean Hascall for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

STEPHAN, J.

This is a professional negligence action brought by Stanley Wolski, Jr., against attorney Josephine Walsh Wandel. Wolski appeals from an order of the district court for Douglas County granting Wandel's motion for summary judgment and dismissing the action. The question presented is whether there is a genuine issue of material fact with respect to Wolski's allegation that Wandel was negligent in representing him in a prior action which was concluded by a settlement. We conclude that there is not and affirm the judgment of the district court.

## BACKGROUND

### UNDERLYING CASE

In June 2000, Wolski retained Wandel to represent him in a dispute with his sister, Rosemary Parriott, regarding ownership of real property located in Cass County, Nebraska. The controversy arose from the conveyance of two tracts of farmland totaling 119 acres. On December 30, 1974, and January 9, 1975, Wolski's parents conveyed the two tracts by warranty deed to Wolski. Another warranty deed, dated January 14, 1975, transferred the same 119 acres from Wolski to Parriott as "Trustee." This deed did not identify the trust, name a beneficiary, or describe the trust in any other way. Wolski had a longstanding dispute with Parriott regarding income from the property, and in 2000, he retained Wandel to "break" any trust and secure fee simple title in the 119 acres purportedly held in trust. Wandel

filed a petition for declaratory judgment for Wolski in Cass County District Court, naming Parriott as the sole defendant. The petition sought to set aside any trust agreement and the warranty deed from Wolski to Parriott. It also requested that Parriott be ordered to give an accounting with respect to funds generated by the property.

The parties conducted extensive discovery. In her deposition, Parriott testified that the trust was originally drafted by an attorney retained by her father. In his deposition, that attorney denied drafting a trust instrument but recalled that at the time of the conveyance to Parriott, Wolski's parents were concerned about Wolski's having title in his name because of "creditors or marriage or something" and that it was "anticipated that there would be a deed back" from Parriott to Wolski. No trust agreement existing at the time of the 1975 conveyance from Wolski to Parriott was ever located.

Parriott testified that the original trust was amended on May 29, 1982, by a document entitled "Amendments of Trust Agreement." The amendment was signed by Wolski as grantor and Parriott as trustee and provides that the trust would be irrevocable, that Wolski would have a life estate in the real property, and that the remainder would pass to Parriott or her lineal heirs. The signatures on this document were not notarized.

Discovery in the case also disclosed that Wolski was married in 1982, several months after the date of the amendment. On September 8, 1987, Parriott was appointed guardian and conservator for Wolski. In that capacity, she brought a successful action to annul his marriage. The record reflects that the conservatorship was terminated in 1995 and that the guardianship was terminated in 1997.

During the pendency of the underlying suit against Parriott, Wandel filed a motion for the appointment of a guardian ad litem for Wolski, alleging that his mother, who had previously acted as his "natural Guardian," was unable to attend trial or assist him due to deterioration of her health. Attached to the motion were medical records showing that Wolski had certain disabilities affecting his mental capacity and speech. The court sustained the motion and appointed attorney Thomas Harmon as guardian ad litem for Wolski on August 21, 2001. Upon

his appointment, Harmon conducted an investigation which included interviews with Wolski, Parriott, various members of their family, and attorneys who had represented the parties in the past. According to Harmon, Wolski told him that he wanted to ensure that he always had a place to live and that he would have money for living expenses.

At a November 2, 2001, hearing, the parties advised the court that they had settled the case. Under the terms of the settlement read into the record at that time, the parties agreed to establish a conservatorship for Wolski, with Harmon to serve as conservator. Wolski was granted a life estate in the 119-acre tract, with the remainder to Parriott or her lineal heirs. The settlement also provided that any condemnation award or any other proceeds received from an invasion of Wolski's life estate would be shared equally by Wolski and Parriott and that they would also share the lease payments made with respect to a sand and gravel lease of the property. Harmon stated on the record that he believed this settlement agreement was "fair and reasonable and in [Wolski's] best interests" and asked the court to approve it. Parriott also asked the court to approve the settlement. The court received testimony from a clinical psychologist who had recently examined Wolski and concluded that appointment of a guardian and conservator for him would be appropriate.

In a subsequent order, the court approved the settlement agreement and awarded Wolski a life estate in the real property and awarded the remainder interest to Parriott and her lineal heirs, subject to the condition that mineral lease payments and condemnation awards with respect to the property were to be divided equally between the parties. Parriott deeded the property to Harmon, as Wolski's conservator. Through his current attorney, Wolski unsuccessfully sought to vacate the order approving the settlement.

## Professional Negligence Action

Wolski then commenced this action against Wandel, alleging that she breached her duty to Wolski by "failing to use the degree of skill and care ordinarily used by Nebraska licensed attorneys" in several particulars, all relating in some way to the settlement of the litigation against Parriott. Wolski claimed

damages based upon the difference in value of fee simple title to the real property and the life estate which he received in the settlement. Wandel filed an answer in which she denied the allegations of negligence and asserted affirmative defenses. Wandel specifically alleged that "after many discussions with counsel and his Guardian Ad Litem, [Wolski] approved the settlement agreement" in the prior action.

Wandel moved for summary judgment, and Wolski moved for partial summary judgment on the issue of liability. The district court initially denied Wandel's motion, noting that she had not made a prima facie showing that she had met the standard of care, but did not rule on Wolski's motion at that time. Wandel then filed a renewed motion for summary judgment, and the court conducted a hearing on that motion and Wolski's motion for partial summary judgment. At this hearing, Wandel offered the affidavit of attorney Michael D. Jones, which was received without objection. Wolski offered additional evidence, which was also received.

The court entered an order denying Wolski's motion, granting Wandel's motion, and dismissing the action. It noted that Wandel had made a prima facie showing in support of her motion for summary judgment and that Wolski had failed to demonstrate the existence of a genuine issue of material fact. Wolski perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Wolski assigns, restated, that the district court erred in determining that there was no genuine issue of material fact as to whether Wandel breached the standard of care and in granting Wandel's motion for summary judgment.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

## ANALYSIS

[3,4] A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.[4] Wolski claims that Wandel was negligent in recommending settlement of the litigation against Parriott instead of proceeding to trial. In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney 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.[5]

[5-7] In this case, we focus on the second element: neglect of a reasonable duty. The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.[6] Although this general standard is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard

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[2] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[3] *Id.*

[4] *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

[5] See, *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

[6] *Bellino v. McGrath North, supra* note 5; *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

is a question of fact.[7] Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.[8] This is so because a jury cannot rationally apply a general statement of the standard of care unless it is made aware of what a reasonable attorney would have done in similar circumstances.[9] An exception to this general rule is that where the evidence and circumstances are such that recognition of the alleged negligence may be presumed to be within the comprehension of laypersons, no expert testimony is required.[10]

[8] As the party moving for summary judgment, Wandel was required to make a prima facie case by producing enough evidence to demonstrate that she would be entitled to judgment if the evidence were uncontroverted at trial.[11] Wandel met this burden by offering the affidavit of Jones, an attorney practicing in Omaha with experience in the area of business, trusts, probate, and estate planning. In his affidavit, Jones stated that he had reviewed documents from the underlying litigation in which Wandel represented Wolski, as well as certain pleadings and discovery documents generated in this case. Based upon this review and his professional knowledge and experience, Jones expressed his opinion that the outcome of the underlying litigation was uncertain, that the settlement was a reasonable resolution of the dispute, and that Wandel's recommendation of the settlement "was within the standard of care for attorneys in Omaha, Douglas County, Nebraska at the time of the settlement." He further stated: "[I]t is my opinion with a reasonable degree of certainty that . . . Wandel's conduct and legal advice to her client . . . Wolski . . . met or exceeded the standard of care required of an attorney in Omaha, Douglas County, Nebraska at the time of her representation of . . . Wolski in all material respects."

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[7] See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

[8] *Id.*

[9] See *id.*, citing *Gibson v. Talley*, 162 Ga. App. 303, 291 S.E.2d 72 (1982).

[10] *Boyle v. Welsh, supra* note 7.

[11] See, *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005); *Boyle v. Welsh, supra* note 7.

[9] Once the party moving for summary judgment makes a prima facie case, as Wandel did here, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[12] This case does not fall within the exception to the general rule requiring expert testimony to prove that an attorney was negligent, in that a layperson could not be expected to know, without the assistance of expert testimony, whether an attorney was negligent in counseling a client to settle litigation of the type involved here. Thus, in order to defeat Wandel's motion for summary judgment, Wolski was required to present an expert's opinion contradicting Jones' opinion that Wandel's performance had met the standard of care.

There is evidence from three attorneys concerning Wandel's representation of Wolski. Ronald E. Reagan, a practicing attorney and retired district judge, was retained by Wolski's attorney to review documents and "formulate some opinions as to whether or not . . . Wandel had breached any particular duty or standard of care." His deposition was taken by Wandel's attorney prior to the date of Jones' affidavit, and thus his testimony is not directly responsive to Jones' opinions. Reagan testified that Wandel owed the same duty to Wolski and to Harmon as Wolski's guardian ad litem. He criticized Wandel for not providing certain "relevant information" about the underlying litigation to Harmon and opined that if Harmon had been given this information, he would not have concluded that the settlement was in Wolski's best interests. Reagan testified that, in his opinion, the underlying case should have been tried and that Wolski would have prevailed. Reagan did not specifically express an opinion that Wandel breached the applicable standard of care.

Harmon testified by deposition, taken prior to that of Reagan, and also by an affidavit sworn after Reagan's deposition. In the affidavit, Harmon stated that after his appointment as guardian ad litem, he had a meeting with Wolski and Wandel and two other meetings with Wolski, to discuss the pending case and Wolski's desires concerning its outcome. He stated that despite Wolski's speech impediment, Harmon was able to

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[12] See, *Cerny v. Longley, supra* note 11; *Boyle v. Welsh, supra* note 7.

"communicate with him sufficiently to understand his desires, wishes and position on the issues we discussed." Harmon further stated that he conducted several interviews and reviewed court records before reaching an independent determination that the settlement was in Wolski's best interests. Harmon stated that he had reviewed Reagan's deposition and that Reagan was incorrect regarding the information he possessed at the time of the settlement. Harmon stated that he had all of the information which Reagan said should have been provided to him, either as a result of his own investigation or from conversations with Wandel, with the exception of one document. Harmon stated that after reviewing this document, which was attached to Reagan's deposition, he would not have considered it relevant to the case or the proposed settlement. He concluded: "I therefore believe I was aware of all the relevant matters . . . Reagan erroneously assumed [that] I did not know and needed to be advised of by . . . Wandel." Harmon did not express an opinion that Wandel breached the applicable standard of care.

The record also includes Wandel's deposition, in which she responded to questions concerning her representation of Wolski. The deposition does not include any admissions of professional negligence.

We conclude that Wolski did not meet his burden of demonstrating the existence of a genuine issue of material fact. Reagan's testimony falls short of this objective. Although Reagan expressed criticism of certain aspects of Wandel's representation, he did not specifically opine that her performance deviated from the applicable standard of care. In a medical malpractice case, we have held that an expert's testimony that a surgical procedure should have been performed in a different manner did not constitute evidence that the defendant had departed from the applicable standard of care in performing the surgery in the way that he did.[13] We noted that if the expert believed that there had been a deviation from the standard of care, "it would have been a simple matter . . . to have said exactly that."[14] Reagan's "criticism" of Wandel was

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[13] *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976).

[14] *Id.* at 272, 237 N.W.2d at 852.

similarly insufficient as evidence of professional negligence. At most, Reagan's testimony establishes that his evaluation of the underlying case differed from that of Wandel. It is not uncommon for lawyers to have differing views about the merits of a contested case, and such a difference of opinion between lawyers does not necessarily mean that one of them has been negligent in evaluating the case. Reagan's testimony does not establish that Wandel's professional performance fell below that expected of lawyers of ordinary skill and capacity under similar circumstances.[15]

[10,11] The decision to settle a controversy is the client's.[16] In order to meaningfully make that decision, a client must have the information necessary to assess the risks and benefits of either settling or proceeding to trial.[17] A lawyer should exert his or her best efforts to ensure that the decisions of a client are made only after the client has been informed of relevant considerations.[18] Under the Code of Professional Responsibility which governed lawyers' conduct at the time of Wandel's representation, Wandel was required to look to Harmon, as guardian ad litem, to make decisions concerning settlement on behalf of Wolski.[19] The record includes an expert's opinion that Wandel complied with the standard of care in advising Harmon with regard to the settlement, and Wolski has presented no expert opinion to the contrary. There is no genuine issue of material fact as to the allegations of professional negligence.

## CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting Wandel's motion for summary judgment and dismissing this action. We affirm the judgment of the district court.

AFFIRMED.

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[15] See *Bellino v. McGrath North, supra* note 5.

[16] *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999), citing Code of Professional Responsibility, Canon 7, EC 7-7 and 7-8.

[17] See *id.*

[18] See *id.*

[19] See Code of Professional Responsibility, Canon 7, EC 7-12.

# Dale D. Clark, appellee, v. Larry L. Clark et al., appellants.

746 N.W.2d 132

Filed March 21, 2008. No. S-06-1254.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Stanton County, Robert B. Ensz, Judge, on appeal thereto from the County Court for Stanton County, Philip R. Riley, Judge. Judgment of District Court affirmed.

Charles L. Caskey for appellants.

Jeffrey L. Hrouda for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

## NATURE OF CASE

In 1993, Rolland L. Clark and Libbie I. Clark, husband and wife, entered into a land sale contract with their son, Larry L. Clark; Larry's wife, Reta M. Clark; and Larry's son, James D. Clark (collectively the appellants). The agreement provided that upon the death of Rolland and Libbie, one-half of the balance remaining on the agreement would be payable to Dale D. Clark, another son of Rolland and Libbie, and one-half would be payable to the appellants as joint tenants with the right of survivorship. This case involves a dispute between Dale and the appellants regarding one-half of the balance remaining on the agreement at the time of Libbie's death. The principal issue is whether one-half of the balance remaining became Dale's as a nonprobate transfer or whether it passed to Larry under the terms of Libbie's will.

## BACKGROUND

On September 27, 1993, Rolland and Libbie entered into an agreement with the appellants wherein Rolland and Libbie

agreed to sell approximately 140 acres of property to the appellants for $56,000. Under the terms of the agreement, the appellants agreed to pay Rolland and Libbie yearly installments of $5,600 until the principal balance was paid in full. The contract further provided:

> In the event of the death of Rolland L. Clark and Libbie I. Clark, the payments due under this agreement shall be paid one-half to Dale D. Clark and one-half to Larry L. Clark and Reta M. Clark, husband and wife, and James D. Clark, as joint tenants with right of survivorship.

On September 27, the subject property was conveyed to the appellants by a warranty deed executed by Rolland and Libbie. The deed, however, was held in escrow, along with the agreement, until performance of the terms of the agreement by the appellants.

Rolland died in 1999, and Libbie died in 2000. Libbie, who died testate, was survived by Dale, Larry, and another child, Audrey Wiegel. Under the terms of her will, Libbie devised her estate to Larry. The will provided in relevant part:

> I give and devise all of the rest, residue and remainder of my estate to my son, Larry Clark, in recognition of all of the help he has given to me during my lifetime. . . .
>
> I have previously made very generous gifts to Dale Clark and I have also helped Audrey Wiegel. For this reason, I have made no provision for them in this will.

The will also appointed Larry as personal representative of Libbie's estate.

At the time of Libbie's death, the balance remaining under the agreement was $16,900. The appellants, however, made no further payments on the agreement. Nevertheless, the appellants filed a warranty deed with the register of deeds in Stanton County on February 1, 2000.

Thereafter, Dale brought the present action to recover one-half of the balance remaining under the terms of the agreement, $8,450, plus interest. Following a trial on the matter, the county court for Stanton County entered judgment against the appellants in the amount of $11,349.19. On appeal, the district court affirmed the decision of the county court. The appellants now appeal the district court's decision.

## ASSIGNMENTS OF ERROR

The appellants assert, restated, that the district court erred in affirming the county court's decision. More specifically, the appellants assert that the district court erred in affirming the county court's (1) finding that Dale is entitled to one-half of the balance of the agreement as a nonprobate transfer, (2) failure to allow the doctrine of merger, and (3) failure to find that Dale should have filed a claim in the probate of Libbie's estate.

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[1]

## ANALYSIS

### Nonprobate Transfer

The appellants first assert that the district court erred in affirming the county court's determination that Dale is entitled to one-half of the balance remaining under the agreement as a nonprobate transfer.

Article 27 of the Nebraska Probate Code governs nonprobate transfers.[2] Section 30-2715 provides:

> (a) A provision for a nonprobate transfer on death in a . . . mortgage, promissory note, certificated or uncertificated security, . . . or other written instrument of a similar nature is nontestamentary. This subsection includes a written provision that:
>
> (1) money or other benefits due to . . . a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing . . . .

Under the terms of the agreement in the present case, Rolland, Libbie, and the appellants contracted for the sale of land, the balance of which was to be paid in annual installment payments. In *Mackiewicz v. J.J. & Associates*,[3] we addressed the nature of the contracts for the sale of land in that case

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[1] *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007).

[2] See Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 1995).

[3] *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

and concluded that they were to be treated as mortgages. In *Mackiewicz*, property was sold to a purchaser under separate, recorded installment land contracts. According to the terms of the contracts, the purchaser paid money down on the property and agreed to pay the balances in three subsequent installments. The deeds for the property were placed in escrow, and under the terms of the land contracts, the warranty deeds were to be delivered to the purchaser upon payment in full of the purchase price.

We explained:

> [I]t is "generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage." . . .
>
> As with the terms used in describing a mortgage, this court has repeatedly termed a purchaser's interest under an executory land contract as both a "security" and a "lien" upon the land.[4]

The agreement between Rolland, Libbie, and the appellants is nearly identical in nature to the land contracts at issue in *Mackiewicz*. According to the terms of the agreement, Rolland and Libbie agreed to sell land to the appellants. The appellants in turn agreed to pay annual installments until the principal balance was paid in full. The parties agreed that the principal balance would draw interest and that an executed warranty deed would be placed in escrow and delivered to the appellants upon performance by the appellants of the agreement. In the event of default by the appellants, the agreement provided that "the entire debt hereby secured" would become immediately due and payable and the agreement liable to foreclosure.

Section 30-2715 applies to provisions in mortgages, security, or other written instruments of a similar nature. As noted in *Mackiewicz*, "Because this court has uniformly recognized that a seller in a land contract retains the title as security for the unpaid purchase money and has an equitable lien on the land to the extent of the debt, a seller has, for all intents and purposes, a purchase-money mortgage."[5] Accordingly, we conclude that

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[4] *Id.* at 574, 514 N.W.2d at 618-19 (citations omitted).

[5] *Id.* at 579, 514 N.W.2d at 621.

the transfer to Dale of one-half of the balance remaining under the agreement was a nonprobate transfer within the meaning of § 30-2715.

### Doctrine of Merger

[2] The appellants next assert that the district court erred in affirming the county court's failure to allow the doctrine of merger. The record reveals that the doctrine of merger was not addressed by either the county court or the district court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.[6] Therefore, we do not address this assignment of error.

### Filing of Claim in Probate of Libbie's Estate

Finally, the appellants assert that the county court erred in failing to find that Dale should have filed a claim in the probate of Libbie's estate, and that the district court erred in affirming. The transfer to Dale of one-half of the balance remaining under the agreement in this case was a nonprobate transfer. As such, it was not necessary for Dale to file a claim against Libbie's estate. We find this assignment of error to be without merit.

## CONCLUSION

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

Affirmed.

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[6] *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007).

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State of Nebraska, appellee, v.
Terrence K. Gorup, appellant.

745 N.W.2d 912

Filed March 21, 2008. No. S-07-450.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause

to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous.

2. **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.
3. **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.
4. **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.
5. **Search and Seizure: Proof.** Where a search following an illegal entry is justified based on alleged consent, a court must determine whether that consent was voluntary, and in addition, the court must determine whether the illegal entry tainted that consent.
6. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Evidence must be excluded as fruit of the poisonous tree if it is discovered by the exploitation of illegal police conduct.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Judgment vacated, and cause remanded with directions.

Ann C. Addison-Wageman for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Before trial, Terrence K. Gorup moved to suppress evidence of methamphetamine found in his apartment. He alleged that the search of his apartment violated his constitutional rights. The district court overruled his motion. Following a bench trial, Gorup was convicted of possession of a controlled substance, methamphetamine, a Class IV felony. He appeals his conviction and sentence.

## SCOPE OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

## FACTS

In July 2006, the Bellevue Police Department conducted an investigation of Gorup, who was suspected of dealing narcotics from his apartment. When it was discovered that Gorup had a warrant outstanding for failure to appear on a previous drug violation, two detectives formulated a plan to go to Gorup's apartment and conduct a "knock-and-talk investigation" with Gorup concerning suspected drug trafficking. Their objective was to obtain Gorup's consent to search his apartment.

On July 31, 2006, the detectives arrived at Gorup's apartment in an unmarked police vehicle. As they approached the apartment, a male was seen leaving. When asked if Gorup was home, the man replied in the affirmative. The man returned to the apartment, opened the door, and informed Gorup that someone was there to see him. Gorup appeared and began to exit the apartment. As he approached the threshold of the doorway, a detective informed Gorup that he was under arrest. At that point, Gorup, who was standing directly outside his apartment door, was placed in handcuffs. He was not transported from the scene immediately because a marked police car was not available.

While standing at the door, a detective noticed a person sitting on a couch inside the apartment. He also observed some blade-edged weapons. Gorup informed the detectives that a couple of people were in the apartment. After waiting for a uniformed officer to arrive, the detectives performed what they described as a "protective sweep" of the apartment. The individuals in the apartment were escorted to the living room. A detective then performed what he described as a "search incident to arrest." In doing so, he searched a "small black zippered-type case" located on a table just inside the doorway, 4 or 5 feet away from Gorup. The case was not zipped shut, and inside, the

detective saw "a couple [of] bags" that he recognized from his "training and experience as [being] methamphetamine." He left the bags inside the case on the table.

During this time, Gorup remained in the hallway with his hands cuffed behind his back. It is unknown whether Gorup could observe the detectives' activity. One detective testified that a wall probably would have obstructed Gorup's view of the detectives' activity inside the apartment. Though not specified in the record, the parties stated at oral argument that this activity continued for about 30 minutes.

After this search, one of the detectives directed the uniformed officer to escort Gorup to the marked police car. The same detective followed Gorup to the car, and while Gorup was seated in the police car, the detective requested Gorup's consent to search the apartment. Gorup was informed several times that he did not have to provide his consent. The detective testified that Gorup gave his consent to a search of the apartment.

This subsequent search revealed several items of contraband in addition to the bags of methamphetamine in the black zippered case. After the search, the detective returned to the police car and read Gorup his *Miranda* rights. The detective told Gorup about the black zippered case. Gorup admitted that he knew of the case but denied that it was his. The detective stated Gorup told him that Gorup had been selling methamphetamine to raise money so he could move from his apartment.

Before trial, Gorup moved to suppress all items of physical evidence seized from his apartment. The district court overruled the motion. The court found that the initial warrantless search of Gorup's apartment was not lawful as a protective sweep and might have been unlawful as a search incident to arrest. It found that the subsequent consent to the search of the apartment was voluntary and therefore served as an adequate basis for the seizure of the "hygiene case" and the contents thereof. It found that although Gorup knew that the detectives had entered his apartment, he did not know whether incriminating evidence had been found when he gave his consent to search the apartment.

After a stipulated bench trial, the district court convicted Gorup of possession of a controlled substance, methamphetamine, and

sentenced him to a term of 1 to 3 years' imprisonment, granting him credit for 249 days spent in jail awaiting disposition of this charge.

## ASSIGNMENT OF ERROR

Gorup assigns that the district court erred in overruling his motion to suppress and admitting at trial the evidence obtained from the search of his apartment.

## ANALYSIS

Gorup asserts that the district court should have granted his motion to suppress based on federal and state constitutional grounds. In essence, he argues that his consent was involuntary and an exploitation of the prior illegal search. He claims he reasonably believed that there was nothing to be gained by denying consent to search his apartment because he had already witnessed the detectives search the apartment prior to asking for his consent.

[2-4] 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. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). 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. *Id.*; *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. *Id.*

The district court found that the protective sweep of Gorup's apartment was unlawful and that the search incident to a valid arrest might have been unlawful. It concluded, however, that the warrantless search of the black zippered case was lawful under the inevitable discovery doctrine because Gorup's consent was voluntary. The district court reached the issue of the validity of Gorup's consent, but it did not definitively determine whether the search incident to a valid arrest exception applied. If the district court had concluded that the first search was valid, it

would not have needed to analyze the validity of Gorup's consent to the subsequent search. For the purposes of our analysis of the validity of the consent, we will infer that the district court found that the search incident to a valid arrest exception did not apply. Thus, the issue presented on appeal is whether Gorup's consent to the subsequent search was valid.

[5] Where a search following an illegal entry is justified based on alleged consent, a court must determine whether that consent was voluntary, and in addition, the court must determine whether the illegal entry tainted that consent. *U.S. v. Robeles-Ortega*, 348 F.3d 679 (7th Cir. 2003). These two questions are not the same, and "'consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality.'" *State v. Lane*, 726 N.W.2d 371, 378 (Iowa 2007) (quoting 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 8.2(d) (4th ed. 2004)). Therefore, in analyzing this consent to search, there are two issues presented: (1) the voluntariness of the consent under the totality of the circumstances and (2) exploitation under the fruit of the poisonous tree doctrine. See *State v. Lane, supra* (citing 4 LaFave, *supra*, § 8.2).

The district court found Gorup's consent was voluntary because the detective had advised Gorup that he could refuse consent and Gorup had not been confronted with any evidence from the prior search. However, the court erred in failing to consider the appropriate factors to determine whether the search was an exploitation of the prior illegality.

[6] Evidence must be excluded as fruit of the poisonous tree if it is discovered by the exploitation of illegal police conduct. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The phrase "fruit of the poisonous tree" refers to indirect or secondary evidence obtained as a result of a prior illegality. See *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). Under the doctrine, the "fruits" of the prior illegal police conduct are excluded if they were an exploitation of that prior illegality. See, *Wong Sun v. United States, supra*; *State v. Lane, supra*. The question is "'whether, granting establishment of the primary illegality, the

evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun v. United States*, 371 U.S. at 488.

The Court in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), identified the factors to consider in deciding whether the earlier illegal arrest contaminated the defendant's confession: (1) the temporal proximity between the illegal arrest and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Subsequently, courts have found that a confession is analogous to consent in these circumstances and applied these factors to determine if a consent was an exploitation of a prior illegality. See, *U.S. v. Robeles-Ortega, supra*; *State v. Lane, supra*.

In *State v. Lane, supra*, the court stated that consideration must be given to a variety of factors, including but not limited to those described in *Brown v. Illinois, supra*. The relevant factors will vary depending upon the facts of a particular case. We point out in summary that the purpose of the above analysis is to determine whether under all the circumstances presented, the consent was obtained by exploitation of the prior illegal search.

The district court should have considered the above factors in determining whether Gorup's consent was obtained by the exploitation of the detectives' prior search. Thus, we remand the cause for consideration of such factors.

We pause here to acknowledge that we have not decided whether the first search was a valid search incident to an arrest and was therefore an exception to the warrant requirement. The district court did not decide that question, and therefore, we also remand the cause for a hearing on the issue whether the search incident to valid arrest exception applied to the first search.

## CONCLUSION

Whether the search incident to the arrest was a valid exception to the warrantless search is an issue which the district court should have addressed when ruling on the motion to

suppress filed by Gorup. Additionally, the district court should have considered the appropriate factors described herein to determine whether Gorup's consent was an exploitation of the prior search. We therefore vacate the judgment of conviction and sentence, and we remand the cause for a new hearing on Gorup's motion to suppress consistent with this opinion.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

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BRANDON POWELL, APPELLEE, V. ESTATE GARDENERS, INC., AND AUTO OWNERS INSURANCE, ITS WORKERS' COMPENSATION INSURER, APPELLANTS.

745 N.W.2d 917

Filed March 21, 2008. No. S-07-855.

1. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Workers' Compensation.** The Nebraska Workers' Compensation Act is designed to compensate an injured worker for the loss of earning capacity caused by the injury.
3. ____. The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.
4. **Workers' Compensation: Time.** Where the worker has insufficient work history to be able to calculate his or her average weekly income based on as much of the preceding 6 months as he or she worked for the same employer, then what would ordinarily constitute that employee's week's work and, thus, that employee's average weekly income should, if possible, be estimated by considering other employees working similar jobs for similar employers. Where available, such similar employees' work records should be considered for the 6-month period prior to the accident.

Appeal from the Workers' Compensation Court. Reversed and remanded for further proceedings.

Jon S. Reid and Molly M. Lukenbill, of Lamson, Dugan & Murray, L.L.P., for appellants.

Ryan C. Holsten and Brynne E. Holsten, Senior Certified Law Student, of Atwood, Holsten & Brown, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

On August 22, 2005, Brandon Powell was hired by Estate Gardeners, Inc., as a crewmember paid at the rate of $12 per hour. When he was hired, Powell understood that his hours would vary from day to day, but that he would average 50 to 60 hours per week during busy periods. Powell was injured on his first day of work after working 11.25 hours. The only issue in this case is the proper method of determining Powell's "average weekly income," as defined by Neb. Rev. Stat. § 48-126 (Reissue 2004).

## FACTS

Estate Gardeners is in the business of residential landscape design, installation, and maintenance. Michael Becker, the chief executive officer and co-owner of Estate Gardeners, testified that the busiest time of the year for the company is from April to July. Then, there is a "slow down" in July and August, followed by a "fall rush" from the end of September into October. Employees would "try to work 40 hours a week typically in the regular season." During busier periods, it was "perfectly feasible" that employees might work 50 to 60 hours a week, Monday through Saturday. Becker explained that this is an "upper limit," however, because it was company policy that employees not exceed 60 hours per week. Employees are occasionally asked to work Saturdays, but they never worked on Sundays.

According to Becker, winter was the most unpredictable time for the company. If the winter was mild, then they worked fairly regularly, but, if not, there were weeks when they could not work at all. The company does do snow removal, paving, and other projects when possible. Becker stated that in the 14 years that Estate Gardeners had been in operation, his employees had never worked continuously throughout the winter at a rate of 40 hours or more per week. Still, if there was work, they would try to keep the "key people busy and employed with us

[year round] so that we have them come back the next season." Becker explained that the employees with the most seniority would get the first hours available.

Becker testified that his wife had analyzed timesheets for employees who had worked year round from the period of May through the following March. Becker does not specifically state what years he is referring to, but states that this period involved the "entire year surround[ing]" Powell's injury. The actual data is not in evidence, but Becker testified that the average number of hours per week of these employees who worked year round was "in the 30s."

A letter to Powell from Estate Gardeners' workers' compensation insurer indicates that the average hours of other crewmembers for the week of August 22 to 26, 2005, was 41. The following week's average was 45 hours, but this increase was attributed to the loss of Powell.

Becker stated that at the time he hired Powell, he discussed with Powell the "seasonality" of the work. He made no guarantees about winter work, but indicated to Powell that those "who showed the most initiative and the most promise would be the ones who got those hours in the winter."

Powell had prior experience in the landscape industry and knew that available working hours vary and are somewhat dependent on the weather. According to Powell, Becker told him that while he "could not guarantee hours," he "could give [Powell] approximately 50 to 60 hours a week." Powell stated more specifically that Becker told him he would "typically" be able to work 50 to 60 hours per week. These hours would generally be worked Monday through Friday. Powell was also told that "they occasionally worked Saturdays, but not that often."

Powell's home was located approximately 1 hour 15 minutes from Estate Gardeners' office. Powell explained, however, that he accepted a job with Estate Gardeners over other offers from local landscaping companies because he thought the overtime made the longer commute worthwhile. Powell stated that he was aware that he might not be working 50 to 60 hours per week in the winter, but that Becker "also said there was plenty of work to do in the wintertime" because he had contracts to put in "paver" driveways.

When he was injured, Powell had worked 11.25 hours. A letter from Estate Gardeners' workers' compensation insurer indicates that 2.5 of those hours were consumed by filling out paperwork required of new employees and traveltime to the jobsite. After the injury, Powell waited in the foreman's truck for 4 or 5 minutes until the rest of the crew finished the job and was ready to go home. Estate Gardeners' workers' compensation insurer calculated Powell's average weekly wage in accordance with the 41-hour workweek that Powell's coworkers worked the week Powell was injured. The insurer thus calculated Powell's average weekly wage as $492 and voluntarily paid workers' compensation benefits at a rate of $328 per week. Powell disputed the insurer's weekly wage calculation and filed a petition in the Workers' Compensation Court alleging a weekly wage of $600.

The single judge of the Workers' Compensation Court referred to the testimony regarding Becker and Powell's understanding of the hours Powell would work, as well as the evidence as to the average hours worked by other Estate Gardeners' employees. The judge explained that he had reviewed statements that hours varied from 30 to 50 hours per week. Without delineating the precise basis of his calculation, the judge then concluded that Powell had shown, by a preponderance of the evidence, that Powell's average weekly wage would encompass a normal and customary work period of 45 hours per week. At $12 per hour, this resulted in an average weekly wage of $540 per week and temporary total disability benefits of $360 per week.

Powell appealed the single judge's determination to the review panel. He argued that the average weekly wage determination was in error and that the single judge had failed to issue a reasoned decision pursuant to Workers' Comp. Ct. R. of Proc. 11(A) (2006). Estate Gardeners and its insurer cross-appealed. The review panel considered the question of Powell's weekly wage to be a matter of law. The panel stated that Powell's contract for hire was for "continuous" employment "in excess of 40 hours per week." It determined that under § 48-126, because the only evidence was that Powell worked 11.25 hours for 1 day before his injury and the evidence was that he would normally work 5 days per week, the panel was obligated to

determine Powell's average weekly wage by multiplying 11.25 by $12 per hour by 5 days, for a total weekly wage calculation of $675. Estate Gardeners and its workers' compensation insurer appeal.

## ASSIGNMENTS OF ERROR

The appellants assert that (1) the review panel erred in finding that Powell's average weekly wage should be based upon 56.25 hours a week and (2) the single judge erred in failing to provide a clearly and concisely stated explanation of its rationale for its decision.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[1]

## ANALYSIS

Compensation for total disability is calculated at 66⅔ percent "of the wages received at the time of injury."[2] "Wages," in turn, are defined by § 48-126, which provides in relevant part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer . . . . The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime; *Provided*, that if the

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[1] *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

[2] Neb. Rev. Stat. § 48-121 (Reissue 2004).

> insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then such overtime shall become a part of the basis of determining compensation benefits.

The parties seem to agree that Powell's job as a landscaping crewmember was nonseasonal[3] and that it was continuous.[4] Neither party challenges the review panel's conclusion to this effect. For purposes of this appeal, then, we assume that Powell's employment was nonseasonal and continuous and, like the parties, focus our analysis on the last two sentences of § 48-126, which describe the method of calculating average weekly wage for nonseasonal, continuous employees who are paid by the hour.

The question presented is how to calculate an "average weekly income" for an hourly employee when that employee's contract for hire contemplated a varying number of hours and when the employee was injured on the first day of work. This is a question of statutory interpretation, which, as a question of law, is determined by our court independently of the courts below.[5]

Powell argues that the review panel was correct in extrapolating an average weekly wage from the number of hours of Powell's 1 day of work, by multiplying these hours by Powell's expectation of working 5 days per week. According to Powell, this calculation method is mandated by § 48-126 when it states that average weekly wage should be calculated "using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer."

We disagree. As noted by the court in *Riley v. Indus. Comm.*,[6] provisions basing an average wage on past earnings presuppose

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[3] See, *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983); *Hiestand v. Ristau*, 135 Neb. 881, 284 N.W. 756 (1939); *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N.W. 546 (1934).

[4] *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988); *Weitz v. Johnson*, 143 Neb. 452, 9 N.W.2d 788 (1943); *Carlson v. Condon-Kiewit Co.*, 135 Neb. 587, 283 N.W. 220 (1939).

[5] See *Knapp v. Village of Beaver City, supra* note 1.

[6] *Riley v. Indus. Comm.*, 9 Ohio App. 3d 71, 458 N.E.2d 428 (1983).

the usual circumstance where the claimant has been employed during the period upon which the average is calculated. This is not to say that a calculation cannot be made when the employee has not worked for the full preceding 6 months described in § 48-126. In a case such as this, however, where the employee has worked less than even a single week, it is impossible to calculate an "average weekly income" based simply upon "as much of the preceding six months as he or she worked for the same employer."

An "average" is generally obtained by adding several quantities together and then dividing this total by the number of quantities.[7] But even if we were to accept an "average" based on a single quantity, that quantity under § 48-126 would be a week and not a day. We do not have even 1 week from which to base an average *weekly* wage in this case. The court in *Miller v. Industrial Commission*,[8] in considering a provision fixing compensation upon the employee's average *monthly* wage, similarly explained, "The import of the word 'average' . . . is that there must be a base period of more than one month upon which to determine a claimant's wage."

What Powell supports, and what the review panel did, was not to determine the average weekly income based upon "as much of the preceding six months as he or she worked." The court instead *assumed* that Powell would have worked exactly 11.25 hours every day of a 5-day workweek without analyzing whether this was in fact likely. The review panel then projected this assumption into the past to create an average weekly income through a mathematical calculation it apparently believed was mandated by the plain language of § 48-126. We conclude that by conducting such a limited projection, the review panel did not follow the strict language of § 48-126. It also ignored other language of the statute pertinent to these admittedly unique circumstances.

Most workers' compensation statutes in other jurisdictions make explicit provision for scenarios where the employee has not worked for a sufficient period of time for an average

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[7] See *Concise Oxford American Dictionary* 55 (2006).

[8] *Miller v. Industrial Commission*, 113 Ariz. 52, 54, 546 P.2d 19, 21 (1976).

income to be calculated based upon that employee's past earnings.[9] The most common type of wage basis statute allows that where the employee has not worked "substantially the whole" of the normal period, then the average wage may be based on employees of the same class working the necessary period in the same or similar employment and place.[10]

In the event that this formula cannot be fairly applied, most statutes also expressly provide a "catchall" provision, allowing other methods of calculation in order to achieve a result that is a reasonable representation of the earning capacity of the injured employee.[11] As explained by Professor Larson, the goal of any average income test is to produce an honest approximation of the claimant's probable future earning capacity.[12] In the case of temporary disability, as opposed to permanent disability, courts agree that at the very least, the goal is to ascertain the claimant's expected short-term wage.[13]

Section 48-126 does not provide direction as explicit as other states' statutory schemes. It does, however, emphasize that the average weekly wage for an hourly employee is to be based on "his or her average weekly income for the period of time *ordinarily* constituting his or her week's work." (Emphasis supplied.) It further states that the calculation of an average weekly wage "shall also be made with reference to the average earnings of a working day of *ordinary* length." (Emphasis supplied.)

In prior Nebraska case law, we have explained that the addition of the language "'*ordinarily* constituting his or her week's work'" precludes an automatic mathematical calculation based on the past 6 months' work.[14] Thus, abnormally low output or weekly hours due to illness or vacation will not be averaged

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[9] See 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 93.01 (rev. ed. 2007).

[10] See *id.* at 93-6.

[11] See *id.* at 93-9.

[12] See *id.*, §§ 93.01[1][e], 93.01[1][f], and 93.02[2][d].

[13] See *id.*, § 93.02[3][d].

[14] *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 167, 459 N.W.2d 533, 536 (1990) (emphasis supplied). Accord *Clifford v. Harchelroad Chevrolet, supra* note 4.

in.[15] As explained by the Nebraska Court of Appeals in *Griffin v. Drivers Mgmt., Inc.*,[16] the "key" to such cases is our emphasis on "not distorting" the employee's average weekly wage.

If there can be no "ordinary" working hours for a particular employee based upon his or her actual, individual work history, then it may be necessary, if possible, to extrapolate an "ordinary length" and a period "ordinarily constituting his or her week's work" from coworkers in the same position for the same employer.[17] Using data from coworkers to estimate the employee's ordinary week's work is simply a fairer approximation, to both employees and employers, than to multiply a single day's hours by 5 days a week when the job contemplates variable hours. The statute does not, as already discussed, mandate an inflexible calculation based only upon the injured employee's work history. Nor does the statute prohibit evidence of similar employees in similar employment.

In *Berry v. Walker Roofing Co.*,[18] the court was likewise faced with a situation where an employee was injured after completing only a few hours of piecework. The statutory scheme did not explicitly provide the method for calculating an average wage under such circumstances. The court held that it could determine the employee's average weekly wage by inferring the wages the employee "'*could have earned*.'"[19] The court held that it could make this determination based on the wages actually paid to another employee doing similar work.

In so doing, the court explained that the object of the wage determination is to arrive at a fair approximation of the employee's probable future earning power, which has been impaired or destroyed because of injury. The compensation judge can, of necessity, use only the information that is available. Under

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[15] See, also, *Arbtin v. Puritan Mfg. Co.*, 13 Neb. App. 540, 696 N.W.2d 905 (2005).

[16] *Griffin v. Drivers Mgmt., Inc.*, 14 Neb. App. 722, 731, 714 N.W.2d 749, 757 (2006).

[17] See § 48-126.

[18] *Berry v. Walker Roofing Co.*, 473 N.W.2d 312 (Minn. 1991).

[19] *Id.* at 315 (emphasis supplied), quoting *Johnson v. D. B. Rosenblatt, Inc.*, 265 Minn. 427, 122 N.W.2d 31 (1963).

the circumstances presented where the employee was injured shortly after beginning his employment, a wage calculation based on the average weekly wage of that employee's coworkers was simply "more reliable than a speculative extrapolation of [the injured employee's] earning capacity based on a few hours of work."[20]

[2,3] Like other workers' compensation acts, the Nebraska Workers' Compensation Act is designed to compensate an injured worker for the loss of earning capacity caused by the injury.[21] Our court must apply a liberal construction to the act to carry out its spirit and beneficent purposes.[22] Certainly, had Powell been injured on his first day of work on a shortened day during the winter, or had he been injured after only part of his day's work, he would not be urging that § 48-126 must be interpreted to mandate a mathematical extrapolation of that day's work multiplied by 5 days a week. Such a calculation would not be an accurate reflection of Powell's temporary loss of earning capacity and thus would not carry out the beneficent purposes of the act.

[4] We conclude that where the worker has insufficient work history to be able to calculate his or her average weekly income based on "as much of the preceding six months as he or she worked for the same employer," then what would "ordinarily" constitute that employee's week's work and, thus, that employee's "average weekly income" should, if possible, be estimated by considering other employees working similar jobs for similar employers.[23] Where available, such similar employees' work records should be considered for the 6-month period prior to the accident.

From the record before us, we cannot determine the average week's work of Powell's other crewmembers for the 6 months preceding Powell's accident. We therefore reverse the order of the review panel and remand the cause for further proceedings

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[20] *Id.* at 316.

[21] See *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

[22] See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

[23] See § 48-126.

in accordance with this opinion. Having so concluded, we need not address the appellants' remaining assignment of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# IN RE ESTATE OF RICHARD N. COOPER, DECEASED.
# JOE M. RICHARDSON, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD N. COOPER, DECEASED, ET AL., APPELLEES, V. FIRST TENNESSEE BANK, NATIONAL ASSOCIATION, APPELLANT.

746 N.W.2d 653

Filed March 28, 2008. No. S-06-1016.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
5. ____: ____. When confronted with a statutory construction issue, an appellate court resolves the issue independently and irrespective of the lower court's conclusion.
6. ____: ____. An appellate court's role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
7. ____: ____. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
8. **Statutes: Decedents' Estates: Claims: Attorney and Client.** Giving the language in Neb. Rev. Stat. § 30-2486 (Reissue 1995) a consistent, harmonious, and sensible construction, it is apparent that the filing of a claim is a separate and distinct act from the initiation of a legal proceeding to pursue payment of the claim. Therefore, the filing of a claim does not commence an action and does not in and of itself require the services of an attorney.
9. **Attorneys at Law: Words and Phrases.** The term "practice of law" includes the trial of causes in court and the preparation of pleadings to be filed in court.
10. **Decedents' Estates: Executors and Administrators: Claims: Notice.** The filing of a statement of claim is an administrative step by which the personal representative is advised, in accordance with the probate statutes, of the identities of the creditors and the amounts of their claims.
11. **Rules of the Supreme Court: Attorneys at Law: States.** Neb. Ct. R. of Prof. Cond. 5.5(c) (rev. 2004) permits a lawyer who is licensed to practice in another

> state but has not been admitted to practice in Nebraska to nonetheless on a temporary basis perform certain legal actions in this jurisdiction, so long as those actions "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

Appeal from the County Court for Douglas County: LYN V. WHITE, Judge. Reversed and remanded with directions.

Richard J. Gilloon, Michelle B. Miller, Charles D. Humble, and Bradley B. Mallberg, of Erickson & Sederstrom, P.C., for appellant.

Kristopher J. Covi, Lisa M. Lehan, and J. Terry Macnamara, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Joe M. Richardson.

Michael D. Kozlik, of Harris Kuhn Law Firm, L.L.P., for appellee W.G. Yates & Sons Construction Company.

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

MILLER-LERMAN, J.

## NATURE OF CASE

In this probate proceeding involving the estate of Richard N. Cooper, appellee W.G. Yates & Sons Construction Company (Yates), a claimant, moved to strike two documents entitled "Statement of Claim" and "Demand for Notice" filed by or on behalf of another claimant, appellant First Tennessee Bank, National Association (First Tennessee), because neither document had been filed by an attorney licensed to practice law in Nebraska. Following an evidentiary hearing, the county court for Douglas County determined that the filing of these documents constituted the unauthorized practice of law in violation of Neb. Rev. Stat. § 7-101 (Reissue 1997), sustained Yates' motions, and ordered both the statement of claim and the demand for notice stricken from the file.

First Tennessee appeals. We conclude that neither the filing of the statement of claim by a manager of First Tennessee nor the filing of the demand for notice by First Tennessee's Tennessee attorney who was not admitted in Nebraska constituted the unauthorized practice of law in Nebraska, and we therefore

reverse the county court's order and remand the cause with directions to reinstate both filings.

## FACTS

As an initial matter, we note that the events giving rise to this appeal occurred prior to the adoption of the Nebraska Supreme Court's Rules Governing the Unauthorized Practice of Law, which became effective on January 1, 2008. Accordingly, we do not refer to these rules.

There is essentially no dispute with regard to the material facts. Decedent Cooper died testate on November 3, 2005. He was survived by his wife and several children. Cooper's last will and testament was admitted to probate in the county court on November 17.

The record reflects that First Tennessee is a national banking association with its principal place of business in Memphis, Tennessee. First Tennessee asserts that it is a claimant of Cooper's estate. On January 17, 2006, Christopher D. Brown, the manager of special assets for First Tennessee, filed a statement of claim on behalf of First Tennessee against Cooper's estate in the amount of $1,035,537.32. Brown completed the claim by filling in the blanks on a prepared form identified as "NCLE Form 313 Statement of Claim" (Form 313). Brown is not an attorney, and he is not licensed to practice law in Nebraska.

On March 2, 2006, Kristen C. Wright, an attorney in Memphis, filed a demand for notice on behalf of First Tennessee, requesting that all orders and other filings relevant to the Cooper estate be sent to Wright or another attorney at Wright's office address in Memphis. Wright is not licensed to practice law in Nebraska, and at the time she filed the demand for notice, she had not sought admission pro hac vice.

On June 2, 2006, Yates, another claimant of the Cooper estate, filed a motion to strike First Tennessee's statement of claim on the basis that it was signed and filed by an individual who was not authorized to practice law in Nebraska. On June 27, Yates filed a similar motion to strike the demand for notice because it was signed and filed by an individual who was not authorized to practice law in Nebraska.

On June 20, 2006, and continuing on July 27, the county court held an evidentiary hearing on both motions. The record reflects that the hearing also concerned matters not relevant to the instant appeal. The county court received into evidence certain affidavits and other documents relative to the motions to strike.

In an order dated August 18, 2006, the county court concluded that both the filing of the statement of claim and the demand for notice constituted the unauthorized practice of law in Nebraska. In reaching this decision, the county court referred to the unauthorized practice of law statute, § 7-101, which provides in pertinent part as follows:

> [N]o person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding.

With regard to Brown's filing of the statement of claim, the county court noted that First Tennessee is a corporation and that corporations cannot appear pro se in Nebraska courts. In its analysis, the county court relied upon the probate code, Neb. Rev. Stat. § 30-2484 (Reissue 1995), and concluded that Brown's filing of the claim on behalf of First Tennessee constituted the "commencement of a proceeding" on behalf of First Tennessee, and thus violated § 7-101. Section 30-2484 provides, inter alia, that "[f]or purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim."

With regard to Wright's filing of the demand for notice, although not specifically citing Neb. Ct. R. of Prof. Cond.

5.5(c) (rev. 2005) in its order, the county court appeared to rely on the rule when it concluded that Wright's filing of the demand for notice violated § 7-101. Rule 5.5(c) provides, in pertinent part, as follows:

> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> . . . .
>
> (4) . . . arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The county court determined that Wright's filing of the demand for notice "[d]id not arise out of and [is] not reasonably related to [her] practice as [an] attorney . . . in a jurisdiction in which [she is] admitted to practice . . . ."

The county court sustained Yates' motions and ordered First Tennessee's statement of claim and demand for notice struck. First Tennessee appeals.

## ASSIGNMENTS OF ERROR

On appeal, First Tennessee assigns three errors that can generally be summarized as claiming that the county court erred (1) in determining that the filing of the statement of claim constituted the unauthorized practice of law and in striking the statement and (2) in determining that the filing of the demand for notice constituted the unauthorized practice of law and in striking the demand.

## STANDARDS OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007). On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

## ANALYSIS

*The Filing of a Statement of Claim in a Probate Proceeding Does Not Constitute the Practice of Law.*

For its first assignment of error, First Tennessee claims that the county court erred as a matter of law when it concluded that the statement of claim filed on behalf of First Tennessee by Brown, one of First Tennessee's employees, constituted the unauthorized practice of law. First Tennessee asserts that the filing of the statement of claim did not constitute the commencement of a proceeding or action but instead is an administrative matter designed to advise the personal representative of the nature and amount of a claim against the estate. Given the purpose of the statement of claim, First Tennessee argues that the statement of claim can be filed by a claimant or a representative of the claimant without the assistance of counsel and that such a filing does not constitute the practice of law and does not violate § 7-101. We agree.

First Tennessee refers us primarily to Neb. Rev. Stat. § 30-2486 (Reissue 1995) of the probate code and § 7-101, the unauthorized practice of law statute, in support of its argument. Yates and the county court refer to these statutes and to § 30-2484. We consider these statutes and the jurisprudence thereunder in connection with First Tennessee's argument relating to the filing of the statement of claim.

[3-7] In interpreting the provisions of Nebraska's statutes, we are guided by familiar canons of statutory construction. Statutory interpretation presents a question of law. *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007). Absent anything to the contrary, we will give statutory language its plain and ordinary meaning. *Id*. When confronted with a statutory construction issue, we resolve the issue independently and irrespective of the lower court's conclusion. *Id*. Our role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible. *Id*. When possible, we will try to avoid a statutory construction that would lead to an absurd result. *Id*.

Section 30-2486 governs the manner by which claims are presented against a decedent's estate and provides as follows:

> Claims against a decedent's estate may be presented as follows:
>
> (1) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.
>
> (2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his or her death.
>
> (3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice the court, on petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

During oral argument, the parties agreed that the form referred to in § 30-2486(1) that was used in this case is Form 313.

As quoted above, § 30-2486(1) provides that a "claimant may file a written statement of the claim." Yates argued, and the county court agreed, that the filing of a claim constituted the initiation of a legal proceeding requiring the services of an attorney, and because a corporation cannot appear pro se in litigation, a lawyer licensed in Nebraska must file a statement of claim on

behalf of a corporation. The county court's conclusion that the filing of a statement of claim commenced a proceeding is not warranted by § 30-2486, other statutes, or our jurisprudence.

[8] Although § 30-2486(1) provides that a "claimant may file a written statement of the claim," nothing in the language of the statute precludes the filing of a statement of claim directly by an individual or a corporate claimant. More important, elsewhere in the statute, subsection (3) distinguishes between the filing of a claim under subsection (1) and the commencement of a subsequent proceeding to obtain payment of the claim. Also relevant is § 30-2486(2), which provides that a claimant under subsection (1) may thereafter commence a proceeding to obtain payment. Giving the language in subsections (1) through (3) a consistent, harmonious, and sensible construction, see *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007), it is apparent that the filing of a claim is a separate and distinct act from the initiation of a legal proceeding to pursue payment of the claim. Therefore, the filing of a claim does not commence an action and does not in and of itself require the services of an attorney.

We note that our conclusion that the filing of a claim under § 30-2486(1) does not commence a proceeding is supported by the comment to Uniform Probate Code § 3-804, on which § 30-2486 is based. The comment states:

> The filing of a claim with the probate court . . . does not serve to initiate a proceeding concerning the claim. Rather, it merely serves to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it . . . .

See Unif. Probate Code § 3-804, comment, 8 U.L.A. 236 (1998).

Our conclusion that the filing of a statement of claim does not commence an action or proceeding for purposes of § 7-101 is consistent with the reasoning employed by other jurisdictions. In *Summit Pool Supplies, Inc. v. Price*, 461 So. 2d 272, 274 (Fla. App. 1985), the Florida intermediate court of appeals stated:

> [T]he filing of a statement of claim against an estate is not an appearance in court or the filing of a "pleading" and therefore is not the practice of law. The filing of a statement of claim in an estate proceeding requires no action by the court. It is merely a procedural step in the administration of an estate whereby the personal representative is advised, within the statutorily limited time, who the creditors are and what their claims amount to. Thus, the filing of a statement of claim is nothing more than presenting a bill to the personal representative in the manner required by the statute.

Similarly, in *In re Estate of Piper*, 59 Ill. App. 3d 325, 327, 375 N.E.2d 477, 479, 16 Ill. Dec. 604, 606 (1978), the intermediate court of appeals in Illinois stated:

> Policy considerations support the decision that the filing of a claim against a decedent's estate does not constitute the practice of law. The purpose of the statutory provisions involved here is to facilitate early settlement of the estates of deceased persons. . . . To require that the claim of a corporate creditor be filed by an attorney would counter the informal, summary proceedings established by the legislature. The requirement would greatly increase the expense of filing a claim and could discourage the filing of relatively small but just claims.

Finally, in the related context of the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1995), we have noted in effect that the filing of claims facilitates and expedites the

> proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate. [T]he probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and project a probable time at which the decedent's estate will be ready for distribution.

*In re Estate of Feuerhalm*, 215 Neb. 872, 874-75, 341 N.W.2d 342, 344 (1983).

To the extent the county court relied on § 30-2484, in addition to § 30-2486 just discussed, as a basis to conclude that the filing of a claim constituted the commencement of a proceeding, that reliance was also misplaced. Section 30-2484 provides that "[f]or purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim." The language of § 30-2484 draws a distinction between the filing of a claim and the commencement of a separate proceeding. Further, § 30-2484 provides that although not equivalent, the filing of a claim shall be treated as the "equivalent" of commencement of a proceeding for statute of limitations purposes. We observe that application of § 30-2484 is "[f]or purposes of any statute of limitations" and that by its terms, is limited to the context of determining whether the statute of limitations on a claim has run. Thus, the equating of the filing of a claim to the commencement of proceedings is limited to the statute of limitations context, and we have effectively so held in *Mulinex v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[9] Having noted that nothing within the relevant probate statutes necessitates the conclusion that the filing of a statement of claim constitutes the commencement of an action or proceeding requiring representation by an attorney and that therefore the probate statutes do not require the conclusion that the filing of a statement of claim constitutes the practice of law, we next analyze whether the remainder of our jurisprudence relative to the practice of law requires such a conclusion. We have stated that the term "practice of law" includes the trial of causes in court and the preparation of pleadings to be filed in court. See *State, ex rel. Wright, v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936). We have also stated that

> the practice of law would include . . . legal advice to persons represented by the defendant as to their rights in such cases, the direct and cross-examination of witnesses, the argument had to the court as to the legal rights of persons represented by the defendant, and all matters incident and necessary to the trial of said cases in the justice court. . . .
>
> . . . "It is the character of the act, and not the place where it is performed, which is the decisive factor."

See *State, ex rel. Hunter, v. Kirk*, 133 Neb. 625, 628, 276 N.W. 380, 382 (1937). See, also, *Spier v. Thomas*, 131 Neb. 579, 269 N.W. 61 (1936) (defining "practice of law" to include legal advice and counsel with regard to validity and legality of matters).

[10] The filing of a statement of claim in an estate proceeding requires no action by or in the court. Although a claim is filed with the probate court, it is not considered a pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 7(a) (rev. 2004) (listing allowable "pleadings" as complaint, answer, reply, answer to cross-claim, third-party complaint, and third-party answer, and stating generally that "[n]o other pleading shall be allowed"). In this regard, we have stated that "the county court acts merely as a depository of the [statement of] claim." *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 546, 463 N.W.2d 312, 316 (1990). The filing of a statement of claim is an administrative step by which the personal representative is advised, in accordance with the probate statutes, of the identities of the creditors and the amounts of their claims. Although a form for the presentation of a claim is prescribed by rule, see § 30-2486(1), legal skill is not required to complete the form. See, *Summit Pool Supplies, Inc. v. Price*, 461 So. 2d 272 (Fla. App. 1985); *In re Estate of Piper,* 59 Ill. App. 3d 325, 375 N.E.2d 477, 16 Ill. Dec. 604 (1978).

In the instant case, Brown took the administrative steps of preparing or causing to be prepared the statement of claim, signing it, and submitting it for filing with the probate court. Under these circumstances, we conclude that Brown's filing of a statement of claim does not constitute the practice of law described in § 7-101. The county court erred as a matter of law when it concluded that Brown's filing of the statement of claim on behalf of First Tennessee constituted the unauthorized practice of law and ordered the statement of claim struck. Such order is reversed.

*The Filing of a Demand for Notice in a Probate Proceeding by an Attorney Not Licensed to Practice Law in This State Is Not the Unauthorized Practice of Law.*

For its second assignment of error, First Tennessee claims that the county court erred as a matter of law when it concluded

that the demand for notice filed on behalf of First Tennessee by one of First Tennessee's lawyers, who is not admitted in Nebraska, constituted the unauthorized practice of law. First Tennessee argues in effect that the county court misconstrued rule 5.5(c)(4) of the Nebraska Rules of Professional Conduct governing the unauthorized practice of law when the court concluded that Wright's filing of the demand for notice violated the unauthorized practice of law statute, § 7-101. We agree with First Tennessee that the county court erred.

[11] We note that the conduct complained of involves an attorney and occurred after September 1, 2005, and thus is governed by the Nebraska Rules of Professional Conduct. As noted above, rule 5.5(c) permits a lawyer who is licensed to practice in another state but has not been admitted to practice in Nebraska to nonetheless on a temporary basis perform certain legal actions in this jurisdiction, so long as those actions "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Rule 5.5(c) describes activities that although performed by a lawyer not licensed to practice in this state, nonetheless do not violate § 7-101.

We have not had occasion to construe rule 5.5(c)(4). However, we find guidance in the comments that follow the rule. Comment [5] states in part:

> There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts.

Comment [13] states:

> Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted . . . . These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Finally, comment [14] states as follows:

> Paragraph . . . (c)(4) require[s] that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction.

We consider the factors listed in the comment quoted immediately above. The record reflects that First Tennessee is a Tennessee banking corporation, with its principal place of business in Memphis, Tennessee, the same city and state where Wright, the Tennessee lawyer who filed the demand for notice, maintains her law practice. First Tennessee is a client of Wright. The request for notice sought to have copies of all filings made in the underlying estate case mailed to Wright in the same state where she offices and First Tennessee has its principal place of business. The "risk" involved to either the client, the public, or the courts was de minimis. The filing of the request for notice was effectively an administrative matter and did not in and of itself involve either rendering a legal opinion to First Tennessee or engaging in a legal contest on behalf of First Tennessee in Nebraska. Given these facts, we conclude that the county court erred as a matter of law when it determined that Wright's filing of the demand for notice constituted the unauthorized practice of law under either rule 5.5(c) or § 7-101 and ordered the demand struck. We reverse such order.

## CONCLUSION

For the reasons stated above, we conclude that the county court erred as a matter of law when it concluded that Brown's filing of the statement of claim and Wright's filing of the demand for notice, each on behalf of First Tennessee, constituted the unauthorized practice of law in violation of § 7-101

and in striking the statement and demand. Accordingly, we reverse the county court's order and remand the cause with directions to reinstate both filings.

REVERSED AND REMANDED WITH DIRECTIONS.

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## STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. R.J. REYNOLDS TOBACCO COMPANY ET AL., APPELLEES.

746 N.W.2d 672

Filed March 28, 2008. No. S-06-1027.

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. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 1995), 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. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.
6. **Arbitration and Award.** A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.
7. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
8. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
9. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
10. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.

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

Jon Bruning, Attorney General, David Cookson, and Frederick J. Coffman for appellant.

Patrick O'Brien, of Butler, Galter, O'Brien & Boehm, and, of Counsel, Robert J. Brookhiser and Elizabeth B. McCallum, of Howrey, L.L.P., for appellees Commonwealth Brands, Inc., et al.

Michael F. Coyle and Danene J. Tushar, of Fraser Stryker, P.C., L.L.O., and Thomas J. Frederick, of Winston & Strawn, L.L.P., for appellee Philip Morris USA, Inc.

Gerald Friedrichsen and Andrew M. Bath, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees R.J. Reynolds Tobacco Company and Lorillard Tobacco Company.

Stephen R. Patton, P.C., and Douglas G. Smith, of Kirkland & Ellis, L.L.P., for appellee R.J. Reynolds Tobacco Company.

Gayle Rosenstein, of Weil, Gotshall & Manges, L.L.P., for appellee Lorillard Tobacco Company.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Miller-Lerman, J.

## NATURE OF CASE

The sole issue presented in this appeal, aside from the propriety of the exercise of our appellate jurisdiction, is whether the current dispute between the State of Nebraska and various tobacco companies is subject to arbitration under the arbitration provisions of the Master Settlement Agreement (the MSA) to which the State and the tobacco companies are parties. The State of Nebraska ex rel. Jon Bruning, Attorney General, filed a complaint in the district court for Lancaster County seeking a declaration that a downward adjustment to an annual payment to be made by the tobacco companies to the State under the MSA should not be allowed. The court determined that the terms of the MSA required that the issue raised in the complaint should be decided by arbitration. The district court entered an

order compelling arbitration and dismissed the complaint. The State appeals. We affirm.

## STATEMENT OF FACTS

The State of Nebraska and various other states and jurisdictions (the settling states) are parties to the MSA with various tobacco companies, including, inter alia, R.J. Reynolds Tobacco Company; Philip Morris USA, Inc.; and Lorillard Tobacco Company (collectively the tobacco companies). The parties entered into the MSA in 1998 after various states separately sued the major U.S. tobacco companies to recover costs the states had incurred in treating smoking-related illnesses. The State of Nebraska had sued the tobacco companies in the district court for Lancaster County. A consent decree was entered in the district court in December 1998 approving the MSA. State ex rel. Stenberg v. R.J. Reynolds Tobacco Co., Lancaster County District Court, docket 573, page 277. The above-named tobacco companies were the original parties to the MSA; approximately 40 other tobacco companies subsequently joined as parties to the MSA.

The MSA requires, inter alia, that the tobacco companies make an annual payment to the settling states to offset public health costs. The annual payment is determined each year by an independent auditor who is required to follow a complex formula set forth in the MSA. Each tobacco company pays its share of the determined amount into a single escrow account, and the independent auditor allocates a share of the total to each settling state. The independent auditor is given the responsibility for calculating and determining the amount of all payments owed by the tobacco companies under the MSA, including any adjustments, reductions, and offsets, as well the allocation of such payments. Because the auditor is required to determine various calculations, the MSA in § XI(d)(5) permits the independent auditor to make certain assumptions.

A concern of the parties to the MSA was that tobacco manufacturers who did not participate in the MSA would have an unfair market advantage over participating tobacco companies because such nonparticipating manufacturers would not be required to contribute to the annual payment and would not

be subject to marketing and advertising restrictions placed on the participating tobacco companies pursuant to the MSA. To address such concerns, the MSA provides for a "Non-Participating Manufacturer" (NPM) adjustment if certain market and economic conditions exist. The NPM adjustment is a downward adjustment to the annual payment which is otherwise to be made by the participating tobacco companies to the states. The NPM downward adjustment is made if (1) the participating tobacco companies collectively suffer a loss-of-market share to the nonparticipating manufacturers and (2) an economic consulting firm determines that the disadvantages the participating tobacco companies experienced as a result of the provisions of the MSA were a significant factor contributing to the loss-of-market share. However, even when such conditions exist, specific states may avoid the NPM downward adjustment by enacting and enforcing statutes imposing certain requirements on the nonparticipating manufacturers. To the extent a settling state establishes that it had a qualifying statute in effect and that it "diligently enforced" such statute, that settling state's allocated share of the annual payment is not reduced by the NPM adjustment. When it is determined that a NPM adjustment is required for a particular year, the NPM adjustment is to be applied against payments due in a later year.

The present case involves a dispute over an NPM adjustment for the year 2003. The independent auditor determined that no NPM downward adjustment should be applied for the year 2003. In response, the tobacco companies have disagreed and asserted that the NPM adjustment should have been applied to reduce their annual payments due in 2006. In reaching its NPM-related determination, the independent auditor had concluded that the participating tobacco companies had collectively experienced a qualifying loss-of-market share and that the economic consulting firm had determined that the provisions of the MSA had been a significant factor contributing to such loss-of-market share, but that the settling states had presumably diligently enforced their qualifying statutes. The tobacco companies generally assert that in making the determination that no NPM adjustment should be applied, the independent auditor made a finding that each settling state had enacted a qualifying statute,

but that the independent auditor had simply assumed but failed to find that each settling state had diligently enforced its qualifying statute. The tobacco companies disputed the independent auditor's refusal to apply the NPM adjustment based on a mere presumption of diligent enforcement. The settling states take the position that all the settling states had enacted qualifying statutes that were in full force and effect and that therefore, no NPM downward adjustment was warranted. In view of this dispute, the tobacco companies withheld a portion of the annual payment for 2006.

The settling states filed actions in their respective jurisdictions seeking to compel the tobacco companies to pay the full annual payment. The State of Nebraska filed the present action giving rise to this appeal in the district court for Lancaster County seeking a declaration that in 2003, the State had diligently enforced its qualifying statutes, Neb. Rev. Stat. §§ 69-2702 and 69-2703 (Reissue 2003), and that therefore, no NPM adjustment should be applied to the State's share of the annual payment from the tobacco companies.

In response to the State's complaint, the tobacco companies moved the court to compel arbitration and to dismiss or stay the declaratory judgment action pending the outcome of such arbitration. The tobacco companies asserted that the MSA required arbitration of disputes regarding the independent auditor's calculation of annual payments. The tobacco companies relied in part on § XI(c) of the MSA. Section XI is titled "Calculation and Disbursement of Payments" and subsection (c) provides:

> Resolution of Disputes. Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determination made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge. Each of the two sides to the dispute shall select one

> arbitrator. The two arbitrators so selected shall select the third arbitrator. The arbitration shall be governed by the United States Federal Arbitration Act.

The district court agreed with the tobacco companies' argument that the issues in this case were subject to arbitration. The court noted that § VII(a) of the MSA provided that as to the State of Nebraska, the district court for Lancaster County retained exclusive jurisdiction for the purposes of implementing and enforcing the MSA and that except as provided in other sections of the MSA including the arbitration provision in § XI(c), the court was the only court to which disputes under the MSA as to the State of Nebraska were to be presented. The court concluded, however, that it did not have jurisdiction over "matters arising from or relating to Section XI(c)." The court concluded that the determination of whether a settling state diligently enforced its qualifying statute was an integral part of the independent auditor's calculations under the MSA and as such the determination was subject to the binding arbitration requirement of § XI(c). The court therefore ordered arbitration and dismissed the State's action.

The State appeals the order. We granted the tobacco companies' petition to bypass the Nebraska Court of Appeals.

## ASSIGNMENT OF ERROR

The State asserts that the district court erred in ordering the parties to arbitrate the issue of whether the State had diligently enforced its qualifying statute during the year 2003 and in dismissing the action.

## 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. *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

[2] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

## ANALYSIS

*The Order Compelling Arbitration and Dismissing the Action Is Final and Appealable.*

[3] We note first that before this appeal was moved to this court's docket, the tobacco companies moved the Court of Appeals for summary dismissal on the basis of lack of appellate jurisdiction. The tobacco companies argued that the order compelling arbitration was not a final, appealable order. The Court of Appeals declined to decide the issue in summary fashion and therefore overruled the motion for summary dismissal. 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. *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007). We determine that the order compelling arbitration and dismissing the declaratory judgment action is a final order and that this court has jurisdiction to consider the appeal.

The tobacco companies assert that although § XI(c) of the MSA provides that arbitration under the MSA shall be governed by the federal Arbitration Act (the FAA), 9 U.S.C. §§ 1 to 307 (2000 & Supp. V 2005), the issue whether a state court's order regarding arbitration is an appealable order is a question of state law. In this regard, they direct our attention to Nebraska's Uniform Arbitration Act which provides in Neb. Rev. Stat. § 25-2620 (Reissue 1995) that appeals may be taken from certain orders regarding arbitration and that although § 25-2620 lists an order denying an application to compel arbitration as appealable, the statute does not specifically list an order compelling arbitration. The tobacco companies therefore claim that this court lacks jurisdiction. We do not agree.

In a previous case involving arbitration governed by the FAA, we held that an order denying a motion to compel arbitration under the FAA is a final, appealable order. *Webb v. American Employers Group,* 268 Neb. 473, 684 N.W.2d 33 (2004). We stated that to determine whether such an order involving the FAA is appealable, "we must first apply our state procedural rules to determine if the order is final for purposes of appeal and then determine whether the result of that inquiry would undermine the goals and policies of the FAA." 268

Neb. at 481, 684 N.W.2d at 41. We apply a similar analysis to determine whether an order compelling arbitration under the FAA and dismissing a declaratory judgment action is a final, appealable order.

[4] Under Neb. Rev. Stat. § 25-1902 (Reissue 1995), 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. *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007); *Webb, supra*. In the present case, the district court entered an order compelling arbitration. In addition to compelling arbitration, the district court dismissed the State's declaratory judgment action rather than merely staying the action pending arbitration. Because "the contractual benefit of arbitrating the dispute between the parties [under the FAA] as an alternative to litigation" is ordinarily a substantial right, see *Webb*, 268 Neb. at 481, 684 N.W.2d at 41, and because the court dismissed the declaratory judgment action, we determine that under § 25-1902, the order was a final order of the first type, i.e., one which affected a substantial right and which determined the action and prevented a judgment. The order to dismiss the action determined the action and prevented the State from receiving the declaratory judgment that it sought. We therefore conclude that under § 25-1902, the order is a final order for purposes of appeal.

We further determine that our conclusion that the order is final and appealable does not undermine the goals and policies of the FAA. We note that in cases decided under the FAA, federal courts have held that an order compelling arbitration and dismissing, rather than staying, the action is appealable. In *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000), the U.S. Supreme Court held that where the trial court "has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of [9 U.S.C.] § 16(a)(3) [of the FAA], and therefore appealable." Because the content of the order in this case if rendered by a federal court

would be final and appealable under the FAA, we conclude that our determination that the order at issue is final and appealable under state law does not undermine the goals and policies of the FAA.

Because the order compelling arbitration and dismissing the State's action for declaratory judgment is a final order, we conclude that this court has jurisdiction over this appeal. We therefore proceed to consider the merits of the appeal.

*The MSA Requires the Arbitration of Disputes Regarding the Determination of Diligent Enforcement of a Qualifying Statute, and the District Court Properly Ordered Arbitration and Dismissed the Action.*

The State asserts that the district court erred in ordering arbitration of the dispute regarding the State's diligent enforcement of its qualifying statute. The State generally argues that under the MSA, the dispute is subject to judicial resolution in the court designated in the MSA, rather than to arbitration. We conclude that the MSA requires that the dispute at issue in this case is subject to arbitration and that therefore, the district court did not err in ordering arbitration and dismissing the case.

We note first that the issue in this appeal has been considered in courts in numerous other settling states and that almost without exception, such courts have held that the MSA requires arbitration of the dispute. See *State v. Philip Morris*, 179 Md. App. 140, 151 n.10, 944 A.2d 1167, 1173 n.10 (2008) (listing most recent decisions and stating that of courts in 45 states and Puerto Rico having decided the issue, all but one determined that dispute was subject to arbitration). Such courts were applying the same language of the MSA that is at issue in this case, and therefore, the reasoning of such courts is persuasive. However, we must independently decide the issue pursuant to Nebraska law.

[5,6] We have stated that arbitration is purely a matter of contract. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002). A party cannot be required to submit a dispute to arbitration unless he or she has agreed

to do so. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). Arbitration of the dispute in this case is required only if the parties have so agreed in the MSA. Therefore, we must determine whether the MSA requires arbitration of the dispute involving whether the State has diligently enforced the qualifying statute, as such dispute relates to calculation of the annual payment and the NPM adjustment.

[7-10] In making our determination, we note certain standards regarding contract construction and interpretation. We have stated that a court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Id*. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id*. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. *Id*. In connection with the arbitrability issue raised in this case, § XI(c) of the MSA provides that the FAA governs arbitration under the MSA, and we note that the FAA requires that any doubts regarding the scope of an arbitration clause be resolved in favor of arbitration. See *Cornhusker Internat. Trucks v. Thomas Built Buses, supra.*

The State believes that the present dispute should be decided in state court and relies heavily on § VII(a) of the MSA which broadly provides for judicial resolution of disputes relating to the MSA. In § VII(a), the parties to the MSA agree that the court in which the settlement was reached, which as to the State of Nebraska refers to the district court for Lancaster County, "shall retain exclusive jurisdiction for the purposes of implementing and enforcing [the MSA] as to such Settling State" and that the state district court "shall be the only court to which disputes under [the MSA] are presented as to such Settling State." The State argues that § VII(a) designates the district court as

the forum for resolution of disputes related to the MSA, including the present dispute.

Contrary to the State's argument, we note that elsewhere in § VII(a), the district court is designated as the forum to which disputes are presented *except* as provided in other specified subsections of the MSA, including § XI(c). We believe that the current dispute is to be arbitrated under § XI(c) and is therefore excepted from judicial resolution under § VII(a).

Section XI(c), as noted above, provides in relevant part as follows:

> Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determination made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators . . . .

By its terms, § XI(c) broadly requires arbitration for "[a]ny dispute . . . arising out of or relating to" the calculations and determinations made by the independent auditor. Under the MSA, the independent auditor is charged with calculating the annual payments, including the NPM adjustment. Calculation of the NPM adjustment necessarily requires determinations regarding whether the settling states had qualifying statutes and whether the settling states diligently enforced such statutes. Thus, the issue of diligent enforcement relates to a calculation performed by the independent auditor which is subject to arbitration under § XI(c).

Contrary to our conclusion, the State asserts that the issue whether a settling state diligently enforced a qualifying statute is not an issue subject to arbitration under § XI(c) because the MSA does not specifically list the determination as to a state's diligent enforcement as a duty of the independent auditor. Unlike the State, we do not read the scope of arbitration under § XI(c) as being limited to a list of designated determinations.

Section XI(c) refers broadly to disputes "arising out of *or relating to*" (emphasis supplied) the calculations and determinations made by the independent auditor. Diligent enforcement,

although not specifically listed in XI(c), is an issue that has a direct impact on the calculation of the NPM adjustment, which in turn has a direct impact on calculation of the annual payment which the tobacco companies make to the States and which payment the auditor is required to determine under the MSA. Reading the MSA as a whole, see *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006), a dispute regarding diligent enforcement is a dispute "relating to" the independent auditor's calculations and therefore a dispute subject to arbitration.

In sum, we determine that a dispute over the issue of diligent enforcement is a dispute "arising out of or relating to" the independent auditor's calculations and determinations and is therefore a dispute that § XI(c) requires to be arbitrated. Because the dispute is subject to arbitration pursuant to § XI(c), it is an exception to the provision in § VII(a) that disputes under the MSA are to be presented to the district court. The district court did not err in ordering arbitration and dismissing the State's action for declaratory judgment.

## CONCLUSION

We conclude that the district court's order compelling arbitration and dismissing the State's action for declaratory judgment was a final order and that this court has jurisdiction to determine this appeal. We further conclude that the district court did not err in determining that the MSA requires arbitration of the dispute over diligent enforcement of the qualifying statute. We therefore affirm the court's order compelling arbitration and dismissing the State's action for declaratory judgment.

AFFIRMED.

# In re Estate of Richard N. Cooper, deceased. Joe M. Richardson, former Successor Personal Representative of the Estate of Richard N. Cooper, deceased, appellant, v. James Mitchell, Successor Personal Representative of the Estate of Richard N. Cooper, et al., appellees.

# In re Estate of Richard N. Cooper, deceased. Joe M. Richardson, former Successor Personal Representative of the Estate of Richard N. Cooper, deceased, et al., appellees, v. Robyn Cooper, former Personal Representative of the Estate of Richard N. Cooper, deceased, appellant.

746 N.W.2d 663

Filed March 28, 2008. Nos. S-06-1400, S-07-109.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Executors and Administrators: Notice.** Neb. Rev. Stat. § 30-2457 (Reissue 1995) permits a special administrator to be appointed after notice when a personal representative cannot or should not act and also permits the appointment of a special administrator without notice when an emergency exists.
4. **Decedents' Estates: Executors and Administrators.** Taken together, Neb. Rev. Stat. §§ 30-2454 and 30-2457 (Reissue 1995) set forth a procedure by which to suspend and remove a personal representative and appoint a special administrator.
5. **Decedents' Estates: Executors and Administrators: Notice.** Under Neb. Rev. Stat. § 30-2454 (Reissue 1995), once the personal representative receives notice of a petition seeking his or her removal, he or she "shall not act," except in limited circumstances. Thus, notice to the personal representative under § 30-2454 effectively suspends the personal representative.
6. ____: ____: ____. Once a personal representative is prohibited from acting under Neb. Rev. Stat. § 30-2454 (Reissue 1995), an interested party may thereafter move under Neb. Rev. Stat. § 30-2457 (Reissue 1995) for the appointment of a special administrator, based on the facts that the personal representative has received notice under § 30-2454 and cannot act and that the appointment of a special administrator would be appropriate to preserve the estate or to secure its proper administration.

7. **Decedents' Estates: Executors and Administrators: Evidence.** In the absence of evidence, no emergency basis under Neb. Rev. Stat. § 30-2457 (Reissue 1995) can be established upon which a county court could base its suspension of a personal representative and the appointment of a temporary special administrator.
8. **Judges: Recusal: Proof.** A trial judge should be recused when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.

Appeals from the County Court for Douglas County: LYN V. WHITE, Judge. Judgment in No. S-06-1400 reversed in part and in part vacated, and cause remanded for further proceedings. Judgment in No. S-07-109 vacated, and cause remanded for further proceedings.

Kristopher J. Covi, Lisa M. Lehan, and J. Terry Macnamara, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant in No. S-06-1400.

Michael D. Kozlik, of Harris Kuhn Law Firm, L.L.P., for appellee W.G. Yates & Sons Construction Company.

L. Steven Grasz and Michael C. Schilken, of Blackwell Sanders, L.L.P., for appellee Robyn Cooper in No. S-06-1400.

L. Steven Grasz, Michael C. Schilken, Trenten P. Bausch, Rebecca B. Gregory, and Lindsay K. Edwards, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellant in No. S-07-109.

T. Randall Wright and Brandon R. Tomjack, of Baird Holm, L.L.P., for appellee Marshall Investment Corporation.

Frederick D. Stehlik and Michael J. Whaley, of Gross & Welch, P.C., for appellees DeSoto County Medical Office and Stevan Himmelstein.

David J. Koukol and Christopher D. Curzon, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee W. Gerald Ezell Estate.

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

MILLER-LERMAN, J.

## NATURE OF CASE

These appeals were brought from separate orders entered in the county court for Douglas County from one underlying estate case involving the estate of Richard N. Cooper. In case No. S-06-1400, sometimes referred to as the "appointment case," appellant Joe M. Richardson appeals from the county court's orders in which it overruled his motion challenging the county court's suspension of Richardson as the successor personal representative and appointment of a temporary special administrator, appointed a second successor personal representative, and denied his motion for sanctions. In case No. S-07-109, sometimes referred to as the "asset case," the issue on appeal is whether the county court erred in determining that a certain brokerage account was an estate asset and therefore subject to the claims of estate creditors. We consolidate these appeals for purposes of opinion and disposition.

In the appointment case, Richardson questions the propriety of the statutory procedure used to remove him under the facts of this case and challenges the ex parte nature of one of the hearings held during the appointment proceedings. In the asset case, it is claimed that the county court's procedure and decision in the appointment case caused the court to improperly prejudge the issue of whether to include the brokerage account as an asset in the estate.

In case No. S-06-1400, we conclude that in the absence of evidence the procedure used to suspend Richardson's authority as the successor personal representative, and to appoint a temporary special administrator was not warranted. Therefore, orders flowing therefrom require reversal and remand of the cause. Accordingly, we vacate the county court's orders removing Richardson as the successor personal representative, appointing a special administrator, appointing a second successor personal representative, and denying Richardson's motion for sanctions. Because the record in the appointment case reflects that the county court made certain factual findings in the absence of evidence concerning those facts, the impartiality of the judge going forward could reasonably be questioned, and we therefore order that the county court judge be recused upon

remand. In view of our disposition of the appointment case, we are required to reverse the county court's order including the brokerage account as an estate asset in case No. S-07-109, and we remand the cause for further proceedings consistent with this opinion.

## FACTS

There is essentially no dispute with regard to the facts relevant to our disposition of these appeals. Decedent Richard N. Cooper died testate on November 3, 2005. He was survived by his wife, Robyn, and several children. Cooper's last will and testament was admitted to probate in the county court on November 17. Robyn initially served as personal representative. She later resigned, and her brother, Richardson, succeeded her as successor personal representative.

On July 13, 2006, Richardson filed a motion seeking a determination as to the estate's ownership interest in a brokerage account held with PrimeVest Financial Services and identified therein as account No. 22373935 (the PrimeVest account). This account is the subject of the asset case. On September 12, Richardson's deposition was taken as part of the estate proceedings.

On September 15, 2006, W.G. Yates & Sons Construction Company (Yates), identifying itself effectively as a claimant of the estate, filed a pleading captioned "Petition for Appointment of Special Administrator in Formal Proceeding in an Emergency," alleging that Richardson was failing to protect and preserve the estate and seeking the appointment of a special administrator. Richardson's appeal in the appointment case challenges the propriety of filing this petition and the proceedings held thereon. The petition did not indicate the statutory authority on which it was based, and the copy of the petition contained in the record does not include a certificate of service demonstrating that Yates served a copy of its petition on any interested parties in the estate case.

On September 19, 2006, 4 days after Yates filed its petition, the county court held a hearing on the petition. The bill of exceptions on appeal contains a transcript from that hearing. The only appearance entered at that hearing is counsel for Yates.

No evidence was offered or received at the hearing. During the hearing, counsel for Yates appears to summarize portions of Richardson's deposition testimony, and elsewhere it appears that counsel for Yates is reading to the court questions asked and answers given during Richardson's deposition. The record further reflects that much of the information provided by Yates' counsel was in response to questioning from the court.

At the conclusion of this hearing, the county court entered its order. In its September 19, 2006, order, the county court made certain factual findings, including finding that "someone" had been removing assets from the estate, that Richardson had "failed and/or refused to protect or preserve" the estate's assets, and that it was "necessary for a Special Administrator to take custody and control of the estate assets for their preservation and protection as [Richardson had] failed to do so." As a result of these and other factual findings, the county court ordered that Richardson be suspended as the successor personal representative. The court further ordered that a temporary special administrator be appointed "to collect and manage the assets of the estate" and that a hearing be held on the permanent removal of Richardson as successor personal representative. Yates' counsel was ordered to provide notice to Richardson of a subsequent hearing regarding his removal as successor personal representative. Yates was awarded attorney fees.

On September 21, 2006, Yates filed an amended petition in which it sought the permanent removal of Richardson as successor personal representative and the appointment of a second successor personal representative. On September 22, Richardson filed a motion to reconsider the court's September 19 order. On October 10, Richardson also filed a motion seeking sanctions against Yates' attorney because of the ex parte nature of the September 19 hearing. The hearing on all of these motions was continued until October 31.

While the removal proceedings giving rise to the appointment case were pending, on September 22, 2006, the county court held an evidentiary hearing in the asset case on Richardson's motion to determine the estate's ownership interest in the PrimeVest account. The record reflects that the temporary special

administrator participated in this hearing. The record also indicates that during the September 19 hearing, it was alleged and the county court found that the PrimeVest account was at least one of the assets Richardson was failing to protect.

On October 31, 2006, the county court held an evidentiary hearing in the appointment case on the various motions relating to Richardson's removal as successor personal representative and the appointment of a second successor personal representative. In an order filed November 27, the county court granted Yates the relief sought in its amended petition by permanently removing Richardson as the successor personal representative and by appointing a second successor personal representative. In the same order, the county court overruled Richardson's motion to reconsider and motion for sanctions. The November 27 order does not contain any factual findings by the court.

In an order filed January 16, 2007, the county court ruled in the asset case that the PrimeVest account was an estate asset and that the funds held in that account were subject to the claims of estate creditors. The county court ordered that any transfers from that account were void and further ordered the second successor personal representative to "trace the assets" that had been transferred from the account.

In case No. S-06-1400, Richardson appeals the county court's orders that overruled his motion to reconsider, removed him as successor personal representative, appointed a second successor personal representative, and denied his motion for sanctions. In case No. S-07-109, the appeal challenges the county court's order determining that the PrimeVest account is an estate asset.

## ASSIGNMENTS OF ERROR

In case No. S-06-1400, Richardson assigns three errors. Richardson claims that the county court erred (1) in denying his motion to reconsider its order appointing a temporary special administrator following an ex parte hearing, (2) in removing Richardson as the successor representative and appointing a "second successor personal representative," and (3) in denying Richardson's motion for sanctions.

In case No. S-07-109, the error assigned generally claims that the county court erred in determining that the PrimeVest account was an estate asset.

## STANDARDS OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007). On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

## ANALYSIS

*Case No. S-06-1400: The County Court's Order Overruling Richardson's Motion for Reconsideration Is Reversed.*

In the appointment case, Richardson claims that the county court erred in overruling his motion to reconsider its previous order suspending his authority as the successor personal representative and appointing a temporary special administrator. Richardson also claims that the county court erred in removing him as the successor personal representative and appointing a second successor personal representative to replace Richardson. Finally, Richardson challenges the county court's order denying his motion for sanctions.

Richardson claims that the emergency procedure utilized by the county court regarding the appointment of the temporary special administrator was not warranted under the probate code and that the county court subsequently erred in suspending him based in part on an ex parte hearing at which no evidence was received but the court nevertheless made factual findings. Richardson also argues that the proceedings during the emergency hearing caused the county court to unfairly prejudge the issues raised during the October 31, 2006, hearing regarding Richardson's permanent removal.

As set forth above, Yates' petition seeking the appointment of a temporary special administrator was apparently not served on either Richardson or any other interested parties in the estate

case. The petition did not cite the statutory authority under which the appointment of a special administrator was sought. However, in its brief on appeal, Yates asserts that its statutory authority for seeking the appointment of a temporary special administrator was Neb. Rev. Stat. § 30-2457 (Reissue 1995). In this regard, Yates asserts that it learned of Richardson's alleged neglect at the deposition of September 12, 2006, and Yates argues to the effect that an emergency hearing without notice pursuant to § 30-2457 was the most opportune statutory remedy by which to promptly suspend Richardson's acts as a personal representative. Contrary to Yates' view of the probate code, we note that the code provides a procedure by which a personal representative can be promptly suspended and a special administrator appointed without resorting to a hearing without notice.

The issue as framed by the parties on appeal is, in part, one of statutory construction. Several sections of the probate code are relevant to our analysis. With regard to the removal of a personal representative, Neb. Rev. Stat. § 30-2454(a) (Reissue 1995) provides, inter alia, as follows:

> A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 30-2450, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate.

[3] With regard to a special administrator, § 30-2457 permits a special administrator to be appointed after notice when a personal representative cannot or should not act and also permits the appointment of a special administrator without notice when an emergency exists. Section 30-2457 provides:

> A special administrator may be appointed:
>
> . . . .
>
> (2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the

> estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Finally, Neb. Rev. Stat. § 30-2450 (Reissue 1995) provides generally for 10 days' notice prior to a removal hearing.

[4-6] Taken together, these statutes set forth a procedure by which to suspend and remove a personal representative and appoint a special administrator. Pursuant to § 30-2454, an interested person may petition the county court for the removal of the personal representative. The statute provides for notice of the petition to be given to the personal representative and others. It is important to note that under § 30-2454, once the personal representative receives such notice, he or she "shall not act," except in limited circumstances. Thus, notice to the personal representative under § 30-2454 effectively suspends the personal representative. Once a personal representative is prohibited from acting under § 30-2454, an interested party may thereafter move under § 30-2457 for the appointment of a special administrator, based on the facts that the personal representative has received notice under § 30-2454 and "cannot . . . act" and that the appointment of a special administrator would be appropriate "to preserve the estate or to secure its proper administration." § 30-2457.

The above-described procedure wherein a personal representative "cannot act," thus requiring a special administrator, was not followed in this case. Instead, Yates chose to commence its proceedings under the last portion of § 30-2457(2), alleging that an emergency existed requiring the appointment of a special administrator, and it persuaded the county court to appoint a special administrator based on argument without evidence and without notice to the personal representative. Given our review of the applicable statutes and record, we conclude that under the procedure utilized in the appointment case, the appointment of a special administrator was not warranted and we reverse the county court's order overruling Richardson's motion for reconsideration and remand the cause as indicated below.

[7] We have often noted that a dialog between the court and counsel is not an evidentiary basis for a ruling. *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004), exemplifies the difficulties that may arise when a trial court does not conduct an evidentiary hearing. In *In re Guardianship & Conservatorship of Trobough*, a conservatorship proceeding, the county court did not hold an evidentiary hearing and no exhibits were offered into evidence. Instead, the trial court "engaged in discussions with the parties without receiving any evidence to support or refute the issues raised in the pleadings." *Id*. at 665, 676 N.W.2d at 368. We determined that without an evidentiary hearing, the county court had no basis upon which to enter its order and that such order was not supported by competent evidence. Similarly, in the present case, in the absence of evidence, no emergency basis under § 30-2457 was established upon which the county court could base its suspension of Richardson and its appointment of a temporary special administrator. We therefore conclude that the county court erred when it overruled Richardson's motion to reconsider its September 19, 2006, order suspending Richardson and appointing a temporary special administrator.

On appeal, Richardson also argues that the nature and resultant findings from the ex parte hearing caused the court to prejudge the issues raised at the October 31, 2006, hearing that resulted in the subsequent order in which the court ultimately removed Richardson as the successor personal representative and appointed a second successor personal representative. As we suggested above, we agree with Richardson that the county court's handling of Yates' petition was problematic.

In addition to the fact that factual findings were made without evidence being taken, we note that the bill of exceptions from the September 19, 2006, hearing indicates that much of the dialog developing the case was initiated by the trial judge. Although we recognize that § 30-2457 permits a hearing without notice, it is nevertheless not advisable for the court to develop the record, as this bears unfavorably on the judge's impartiality. See Neb. Code of Jud. Cond., Canon 3 (rev. 2000) (providing that judge shall perform his or her duties impartially).

[8] It is apparent that the decision to suspend Richardson and appoint a temporary special administrator was based on communications occurring at a nonevidentiary hearing, when there was a "discussion" rather than a formal hearing to enable the trial court to decide the matter then pending before it on the basis of evidence. Looking at the record and the manner in which the September 19, 2006, hearing was conducted, the impartiality of the trial judge could be questioned and the rulings could appear to have prejudicially affected the interested parties' substantial rights. We have previously stated to the effect that a trial judge should be recused when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. See *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004). Under the circumstances, we determine that it is necessary upon remand for the county court judge to recuse herself from further proceedings in the estate case. Given our analysis, we further conclude it is appropriate to vacate that portion of the county court's order permanently removing Richardson as successor personal representative and appointing a second successor personal representative. Finally, we vacate the county court's order denying Richardson's motion for sanctions and remand such motion for consideration by a different judge.

By virtue of the proceedings, Richardson has received notice of Yates' petition to remove him as successor personal representative. Therefore, in accordance with the provisions of § 30-2454, we conclude that following remand, Richardson "shall not act except to account, to correct maladministration or preserve the estate." Pursuant to § 30-2457, Yates may seek to have a hearing before the new county court judge assigned to the estate case regarding the appointment of a special administrator to preserve the estate.

In summary, we determine that the county court erred in suspending Richardson and appointing a temporary special administrator. Accordingly, we reverse the county court's order denying Richardson's motion for reconsideration. We determine that the county court's orders permanently removing Richardson

as the successor personal representative, appointing a second successor personal representative, and denying Richardson's motion for sanctions should be vacated. We also determine that by virtue, inter alia, of the court's factual findings in the absence of evidence, it is necessary for the trial judge to recuse herself to avoid the appearance of partiality. We reverse and vacate, and remand for further proceedings consistent with this opinion.

*Case No. S-07-109: The County Court's Order Determining That the PrimeVest Account Is an Asset of the Estate Is Vacated.*

In the asset case, the issue on appeal is whether the county court erred in determining that the PrimeVest account is an estate asset subject to the claims of creditors. After making this determination, the county court ordered that any transfers from that account were void and it further ordered the second successor personal representative to "trace the assets" from any transfers from the account. As noted above, an argument raised in the asset case is that certain of the proceedings in the appointment case caused the county court to prejudge matters relating to the PrimeVest account. We determine that there is merit to this argument and therefore conclude that it is appropriate to vacate the county court's order in the asset case and remand the cause for further proceedings before a different judge consistent with this opinion.

## CONCLUSION

For the reasons stated above, in case No. S-06-1400, we conclude that the county court erred in suspending Richardson and appointing a temporary special administrator, and we reverse that portion of the county court's order denying Richardson's motion for reconsideration. We determine that under the circumstances, those portions of the county court's orders that permanently removed Richardson as the successor personal representative, appointed a second successor personal representative, and denied Richardson's motion for sanctions should be vacated and the cause remanded for further proceedings consistent with this opinion. We also determine that it is necessary for the trial judge to recuse herself upon remand.

In case No. S-07-109, we vacate the county court's order and remand the cause for further proceedings before a different judge.

JUDGMENT IN NO. S-06-1400 REVERSED IN PART AND IN PART VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT IN NO. S-07-109 VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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LAW OFFICES OF RONALD J. PALAGI, P.C., L.L.O., APPELLEE AND CROSS-APPELLANT, V. STEVEN H. HOWARD, APPELLANT AND CROSS-APPELLEE.

ROSA JURADO, SPECIAL ADMINISTRATOR OF THE ESTATE OF SALVADOR JURADO-MELENDEZ, DECEASED, AND LAW OFFICES OF RONALD J. PALAGI, P.C., L.L.O., APPELLEES, AND STEVEN H. HOWARD, APPELLANT, V. AGRI CO-OP, A NEBRASKA CORPORATION, AND UNION INSURANCE COMPANY, APPELLEES.

747 N.W.2d 1

Filed April 4, 2008. Nos. S-06-384, S-06-664, S-07-757.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Time: Appeal and Error.** If the amendment of a final judgment or decree for the purpose of correcting a clerical error either materially alters rights or obligations determined by the prior judgment or creates a right of appeal where one did not exist before, the time for appeal should be measured from the entry of the amended judgment. If, however, the amendment has neither of these results but, instead, makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree.
3. **Contracts: Public Policy.** The determination of whether a contract violates public policy presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.

6. **Judgments: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a judgment, appellate courts are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
7. **Employer and Employee: Employment Contracts: Wages: Words and Phrases.** A bonus can qualify as wages under the Nebraska Wage Payment and Collection Act if the employer and employee agreed to it in advance.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the District Court for Douglas County: GERALD E. MORAN, Judge. Judgment in No. S-06-384 affirmed. Judgment in No. S-06-664 reversed and vacated in part, and in part affirmed as modified.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Appeal in No. S-07-757 dismissed.

Michael F. Coyle, David J. Stubstad, and Sherman P. Willis, of Fraser Stryker, P.C., L.L.O., for appellant.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellee Law Offices of Ronald J. Palagi.

Thomas F. Hoarty, Jr., for appellee Law Offices of Ronald J. Palagi in Nos. S-06-384, S-06-664.

Jeffrey Jacobsen for appellee Law Offices of Ronald J. Palagi in No. S-07-757.

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

STEPHAN, J.

These consolidated appeals relate to a dispute between The Law Offices of Ronald J. Palagi, P.C., L.L.O. (Law Offices), and attorney Steven H. Howard, a former employee of the firm. The dispute involves entitlement to attorney fees in two cases which were pending at the time Howard left his employment with Law Offices in 2003. The fee in one of those cases, No. S-07-757, is the subject of all three consolidated appeals.

## I. FACTS

Ronald J. Palagi was admitted to practice law in Nebraska in 1975. After practicing with an Omaha firm for a short period, Palagi started Law Offices in Omaha. Howard was admitted to practice law in Nebraska in 1987. In September 1991, he began working at Law Offices as an independent contractor.

In 1993, Howard and Law Offices entered into an "Attorney's Agreement" which "establish[ed] the terms and conditions of their business relationship." Under this agreement, Howard was designated as an employee of Law Offices. Law Offices agreed to pay Howard 15 percent of "any attorney fees received from client files which [Howard] is assigned and which he will resolve." The Attorney's Agreement further provided at paragraph 4:

> The parties agree that [Howard] is offered an amount equal to an additional 5% of any total attorney fees received from the client files assigned and resolved by him for the month. The parties agree that this additional 5% is not consideration for past work, but rather is consideration for any future legal work as set forth in Paragraph 11.

Paragraphs 11 and 12 then provided:

> The parties acknowledge that the clients listed on the client list may exercise their right to choose [Howard] as their attorney in the event [Howard's] association with [Law Offices] is terminated.
>
> . . . If clients of [Law Offices] request that [Howard] represent them, then [Howard] may decide to represent them, but all attorney fees generated on such matters would be paid to [Law Offices], and no attorney fees will be paid to [Howard]. [Howard] acknowledges that the consideration for this commitment is the consideration set forth above, including the additional 5% payment . . . .

The Attorney's Agreement also set forth terms and conditions that would be followed in the event the parties' association terminated, including that Howard was to give 30 days' written notice, that Howard was not to contact any client of Law Offices prior to giving his notice, and that Howard was not to remove any client documents or papers from Law Offices.

The parties acknowledge that in 1997, they orally agreed to a change in the manner in which Howard was to be compensated, but they dispute the terms of the change. According to Palagi, the sole shareholder of Law Offices, Howard told him in the summer of 1997 that he was having financial difficulties and wanted a fixed salary instead of the percentage payments. Palagi stated that in July 1997, they agreed that Howard would receive a salary of $7,000 per month. According to Palagi, the parties agreed that this amount would be divided into two paychecks, one for $4,500 payable on the first of the month and the second for $2,500 payable in the middle of the month. According to Palagi, this pay structure was intended to reflect the provisions regarding "future consideration" contained in paragraphs 4, 11, and 12 of the 1993 Attorney's Agreement. Palagi also indicated the possibility that Howard would be paid discretionary bonuses.

Howard's version of the 1997 agreement is substantially different. He testified that in the summer of 1997, Palagi told him that his current caseload, consisting primarily of workers' compensation and accident cases, would be assigned to another lawyer and that Howard would begin working with Palagi on more substantial cases and would eventually "try some very significant cases." According to Howard, 100 to 120 cases were then transferred from him to another lawyer, and Howard was not paid for any of the work he had done on those cases. Howard testified that Palagi did not specifically mention the Attorney's Agreement, but did tell him that they were "starting over." Howard viewed the change as a favorable professional opportunity. Howard agreed to the $7,000 monthly salary and understood that Palagi would also pay him bonuses based on performance. Howard testified that he chose to split the $7,000 into the two monthly payments because it fit with his bill schedule.

In December 1998, Rosa Jurado, special administrator of the estate of her late husband, Salvador Jurado-Melendez, retained Law Offices to represent her. Jurado-Melendez had been killed in a grain elevator accident which occurred in Buffalo County, Nebraska, in 1997. In 1999, Law Offices filed a wrongful

death action on Jurado's behalf in the district court for Buffalo County, naming Agri Co-op, the owner of the grain elevator, and Union Insurance Company, its workers' compensation carrier, as defendants. Howard prepared the case for trial with the assistance of Palagi and other Law Offices personnel. Law Offices advanced almost $122,000 in litigation expenses.

Between 1997 and 2002, Law Offices paid Howard the agreed-upon salary of $7,000 per month in two monthly payments, and also paid him periodic bonuses. In the summer of 2002, just prior to the scheduled trial of the Jurado case, Howard and Palagi again discussed Howard's compensation. Palagi testified that he offered Howard up to 25 percent of any fee recovered in the Jurado case if Howard would pay, prior to trial, a corresponding percentage of the litigation expenses which had been advanced by Law Offices. Palagi testified that Howard declined this offer.

Howard's account of this conversation is different. He testified that during the first 6 months of 2002, he had generated substantial fees for Law Offices but was still receiving only his $7,000 monthly salary. In July 2002, just before leaving on a planned vacation, he told Palagi that he was frustrated and was thinking of leaving the firm. Howard testified that Palagi immediately wrote him a check for $25,000 and told him to go on vacation and that they would talk more when he returned. Howard testified that they met again when he returned from vacation and at that time, Palagi offered Howard 50 percent of any fee recovered in the Jurado case if Howard paid 50 percent of the costs Law Offices had advanced. Alternatively, Palagi offered 25 percent of the fee recovered in the Jurado case and two other cases the firm was litigating, referred to in the record as the "Barker" and "Christiansen" cases. Howard testified that he accepted this latter offer and agreed to stay at the firm.

Howard tried the Jurado case in the district court for Buffalo County, with the assistance of a paralegal employed by Law Offices. Palagi did not participate in the trial. On September 16, 2002, the jury returned a verdict in the amount of $2,125,000 in favor of Jurado. Agri Co-op appealed and filed a supersedeas bond.

In November 2002, while the Jurado appeal was pending, Law Offices paid Howard a bonus. Palagi testified that the bonus was for the work Howard had done during the year. He denied having any agreement with Howard regarding the fees in the Barker or Christiansen cases at the time of this payment. Howard testified that the bonus he received in November 2002 included 25 percent of the fee in the Barker case, which had been settled during the preceding month. He testified that in December 2002, when Law Offices received the fee in the Christiansen case, he approached Palagi about payment of his 25-percent share, but Palagi responded that Howard had already received a "nice check" in November and did not pay him any additional bonus. This upset Howard.

In late December 2002, Howard visited Jurado at her home in Holdredge, Nebraska. He spoke with her about a settlement offer of $500,000 received during the pendency of the appeal and recommended that she reject it. Near the end of the conversation, Howard mentioned that he was thinking of leaving Law Offices, and Jurado asked him to let her know if he decided to do so.

On February 9, 2003, Howard returned to Jurado's home and informed her that he would probably be leaving Law Offices, but that he would continue to represent her if she wanted him to do so. He informed her that she had the right to choose her lawyer and that she could choose him but was not required to do so. He answered questions asked by Jurado and a family member who was present. Before leaving, Howard gave Jurado a proposed retention agreement, a sample letter to Law Offices terminating its representation, and a blank copy of her fee agreement with Law Offices. After consulting with another attorney, Jurado retained Howard to continue representing her and terminated her relationship with Law Offices by letter dated February 19, 2003. Jurado testified that Howard had been her main contact throughout the course of the litigation and that it was her idea for Howard to continue to represent her. She specifically testified that she would have wanted Howard to remain as her attorney no matter what actions Law Offices took to try to retain her as a client.

A settlement was reached in the Jurado case, and the appeal, *Jurado v. Agri Co-op*,[1] was dismissed by the Nebraska Court of Appeals on June 4, 2004. Pursuant to the settlement agreement, Agri Co-op paid a total of $1,950,000, which was deposited in estate proceedings initiated by Jurado in the county court for Phelps County. As a result of the settlement, Howard filed a satisfaction of judgment on behalf of Jurado.

1. Buffalo County Litigation (Case No. S-07-757)

Both Law Offices and Howard filed notices of attorney lien in *Jurado v. Agri Co-op* and requested that the district court for Buffalo County resolve their competing claims. Howard, Law Offices, and Jurado stipulated that of the total settlement amount, $121,893.93 should be paid to Law Offices to reimburse it for the litigation expenses it had advanced. They further stipulated that $780,000 represented a fair and reasonable amount of the total attorney fee to be paid by Jurado. The parties stipulated that this amount should be held in a separate interest-bearing account by the clerk of the county court for Phelps County in the Jurado-Melendez estate proceeding, for the benefit of Law Offices and Howard only.

In its initial ruling on the competing attorney liens, the district court noted that there was pending litigation between Law Offices and Howard in Douglas County regarding their respective rights under an employment agreement and that both parties had agreed that resolution of the lien issue was not intended to resolve that dispute. As to the competing attorney liens, the court determined that an offer to settle for $500,000 was pending at the time Jurado terminated her relationship with Law Offices and retained Howard. Reasoning that the contingent fee agreement between Law Offices and Jurado entitled Law Offices to one-third of any settlement agreement pending at the time of termination, the court awarded Law Offices $166,667 of the $780,000 and awarded Howard the remaining $613,333.

Law Offices appealed, and in a memorandum opinion filed June 21, 2006, we reversed, and remanded. Noting that the disputed funds were held by the probate court and were not

[1] *Jurado v. Agri Co-op*, 12 Neb. App. xxvi (No. A-02-1207, June 4, 2004).

"in the hands of the adverse party" within the meaning of the attorney lien statute,[2] we characterized the action as an equitable proceeding to determine the amount of fees to which Law Offices and Howard were entitled for services to the Jurado-Melendez estate, based upon the principle of quantum meruit. We also noted the "unique circumstances" presented by the parties' separate litigation of their contractual claims against each other and determined that for purposes of resolving the appeal, we would treat the case as if there had been no employment relationship between Palagi and Howard, i.e., "as if the Estate had simply discharged its attorney and retained a different attorney who had no prior relationship with previous counsel or the case." We concluded that the district court should have allocated the total amount of the fee to the parties based upon the reasonable value of their services before and after Jurado discharged Law Offices and retained Howard. We therefore reversed the judgment of the district court and remanded the cause "for an allocation of attorney fees based on a determination of the reasonable value of the services performed by [Law Offices] up to February 19, 2003, and Howard thereafter."

Following our remand, the district court conducted an evidentiary hearing and determined that Law Offices was entitled to $746,250 plus interest and that Howard was entitled to $33,750 plus interest. In an order entered on April 13, 2007, which included these findings, the court directed "the Clerk of the District Court for Buffalo County" to forward the sum of $746,250 plus 95.68 percent of accrued interest to Law Offices and to forward the sum of $33,750 plus 4.32 percent of accrued interest to Howard. On its own motion, the court entered an amended order on April 19 in which it directed that the same payments be made by "the Clerk of the County Court for Phelps County, Nebraska." On April 25, Howard filed a motion to alter or amend the judgment, which the court denied. Howard then filed the appeal docketed as case No. S-07-757, which we moved to our docket on our own motion.

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[2] Neb. Rev. Stat. § 7-108 (Reissue 1997).

### 2. Douglas County Litigation (Cases Nos. S-06-384 and S-06-664)

Law Offices filed an action against Howard in the district court for Douglas County, alleging a breach of the 1993 Attorney's Agreement and tortious interference with a business relationship. In its operative seventh amended complaint, Law Offices alleged that certain oral modifications of the Attorney's Agreement occurred in 1997. Based on an alleged breach of the Attorney's Agreement as modified and other theories of recovery, Law Offices sought the full $780,000 fee in the Jurado case, as well as other relief. In his answer, Howard denied liability and alleged counterclaims in which he sought 25 percent of the fees in the Jurado and Christiansen cases received by Law Offices, and additional relief pursuant to the Nebraska Wage Payment and Collection Act (NWPCA).[3] In a pretrial ruling, the district court determined that the Attorney's Agreement was an enforceable contract.

The case was tried to a jury, which returned a verdict awarding Law Offices $585,000 of the $780,000 fee in the Jurado case and awarding Howard the remaining $195,000. The jury also awarded Howard $16,625, an amount equal to 25 percent of the fee in the Christiansen case. Both parties filed motions for new trial, and Howard filed a motion to alter or amend the judgment. Howard also filed a motion for costs and attorney fees pursuant to the NWPCA. The district court denied both parties' motions for new trial and Howard's motion to alter or amend the judgment. The court sustained Howard's NWPCA motion for costs and attorney fees on his claim for a portion of the fee in the Christiansen case, awarding him $4,156.25 in attorney fees plus taxable costs, but it denied his NWPCA motion as to the fee in the Jurado case, reasoning that because Law Offices had never been in possession of the fee, it could not have withheld payment from Howard. Howard perfected an appeal, and Law Offices cross-appealed. We moved the case to our docket on our own motion, and it is now before us as case No. S-06-664.

Before the trial of the case resulting in case No. S-06-664, Law Offices filed a second action in the district court for Douglas

[3] Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998).

County against Howard, alleging a breach of the Attorney's Agreement. Howard filed a motion to dismiss, alleging that the complaint "sought to enforce provisions of the same" employment contract at issue in the pending case. The district court granted the motion to dismiss, reasoning that the previously filed and then pending action "involves the same parties and the same issues." Law Offices appealed from the order of dismissal, and on our own motion we moved the appeal to our docket, where it appears as case No. S-06-384.

## II. CASE NO. S-07-757

After the appeal from the district court for Buffalo County was docketed, Law Offices filed a motion to dismiss for lack of jurisdiction, arguing that the appeal was not timely perfected. We overruled the motion and directed the parties to brief the jurisdictional issue, which they have done.

### 1. Assignments of Error

Howard assigns, restated and consolidated, that the district court erred in (1) using different standards to divide the attorney fees, (2) admitting evidence allegedly showing Law Office's costs in litigating the Jurado case, and (3) relying on the inadmissible evidence in distributing the fees.

### 2. Standard of Review

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] Because the jurisdictional issue presented here does not involve a factual dispute, we resolve it as a matter of law.[5]

### 3. Analysis

The jurisdictional issue turns on whether Howard's April 25, 2007, motion to alter or amend the judgment was timely and therefore effective to terminate the time for appeal until it was

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[4] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[5] See, *Williams v. Baird, supra* note 4; *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

ruled upon. "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment."[6] When so filed, a motion to alter or amend the judgment terminates the "running of the time for filing a notice of appeal" until the entry of an order ruling on the motion.[7] Law Offices contends that because Howard's motion was not filed within 10 days of the district court's order of April 13, 2007, it did not terminate the 30-day time to appeal. It contends that the 30-day time to appeal thus expired before the notice of appeal was filed on July 11, 2007. Howard argues that because his motion to alter or amend the judgment was filed within 10 days of the district court's April 19 order modifying the April 13 order, it was timely and terminated the running of appeal time until the motion was overruled on June 13, 2007.

[2] To resolve this issue, we must determine the nature and effect of the April 19, 2007, order which was entered on the court's own motion. In a similar context, we adopted the following rule:

> If the amendment of a final judgment or decree for the purpose of correcting a "clerical error" either materially alters rights or obligations determined by the prior judgment or creates a right of appeal where one did not exist before, the time for appeal should be measured from the entry of the amended judgment. If, however, the amendment has neither of these results, but instead makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree.[8]

We conclude that the same reasoning should apply to the filing of motions which terminate the running of time for appeal.

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[6] Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006).

[7] Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[8] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 114, 459 N.W.2d 519, 523 (1990), quoting *Mullinax and Mullinax*, 292 Or. 416, 639 P.2d 628 (1982).

Thus, if the April 19 order materially altered rights or obligations existing under the April 13 order, or created a right of appeal where one did not exist before, the filing of the motion to alter or amend on April 25 was timely. But if the April 19 order had no adverse effect on the rights or obligations of the parties under the April 13 order or the parties' right to appeal, the filing of the motion to alter or amend was not timely and did not terminate the running of the time for appeal.

The April 19, 2007, order amended the April 13 order in two respects. First, it deleted "Clerk of the District Court for Buffalo County" and substituted "Clerk of the County Court for Phelps County" as the person directed to disburse the designated portions of the $780,000 fee to Howard and Law Offices. Second, it added the name "Steven Howard" after the word "appellee" in the sentence directing disbursal of that portion of the fee which the court determined should be paid to Howard. Neither of these changes had any adverse effect on the rights or obligations of the parties under the April 13 order, nor did either change create a right to appeal where none had existed. The parties knew and indeed stipulated that the disputed fee was being held in the probate proceedings pending in the county court for Phelps County. While the terms "appellant" and "appellee" were perhaps confusing in the context of the April 13 order, insertion of Howard's name after the word "appellee" resolved any possible confusion. The changes were clearly and simply an exercise of the district court's "'inherent authority to amend its records so as to make them conform to the facts.'"[9] Thus, the April 19 order did not affect the time in which to file a motion to alter and amend the April 13 judgment determining the portion of the disputed fee which each party was to receive. Because Howard's motion was untimely, it did not terminate the running of the time to appeal the April 13 order, and that time had expired before he filed his notice of appeal.

For these reasons, we conclude that we have no appellate jurisdiction, and we dismiss the appeal docketed as case No. S-07-757.

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[9] *Id.* at 113, 459 N.W.2d at 522-23, quoting *Gunia v. Morton*, 175 Neb. 53, 120 N.W.2d 371 (1963).

## III. CASE NO. S-06-664

This appeal is from the first action filed by Law Offices against Howard in the district court for Douglas County, which was concluded by a jury trial and judgment entered on the verdict. The case once included multiple claims involving several clients represented by Law Offices and Howard prior to February 2003. By the time of trial in April 2006, the issues had been narrowed to two: (1) the competing claims of Law Offices and Howard to the $780,000 fee in the Jurado case and (2) Howard's claim to $16,625, which was 25 percent of the fee paid to Law Offices in the Christiansen case. The sum of the fees in dispute was $796,625, and the jury was instructed that it must award this amount "to either one party or, in some percentage totaling 100 percent, to both parties in this case." As noted, the jury awarded Law Offices $585,000 of the fee in the Jurado case. It awarded Howard the remaining $195,000 of the fee in the Jurado case and $16,625 of the fee in the Christiansen case.

We note that the fee in the Jurado case at issue in this case, No. S-06-664, is the same fee at issue in the Buffalo County case which resulted in case No. S-07-757, previously discussed herein. At the time of trial of this case, the fee was not in the possession of either party but was held in an interest-bearing account by the county court for Phelps County pursuant to the parties' stipulation. Having concluded that we lack jurisdiction to review the judgment of the Buffalo County action, we now address the issues presented by the appeal and cross-appeal in the Douglas County case.

### 1. Assignments of Error

Howard assigns 18 errors, which form three basic issues: (1) whether the Attorney's Agreement was a valid, enforceable contract, and if so, whether there was trial error prejudicial to Howard; (2) whether Howard was entitled to recover costs and attorney fees under the NWPCA with respect to the fee in the Jurado case; and (3) whether the district court erred in denying Howard's motion for new trial.

Law Offices assigns on cross-appeal, restated and consolidated, that the district court erred in (1) allowing the jury to

consider Howard's counterclaims for 25 percent of the fees in the Christiansen and Jurado cases and (2) directing a verdict for Howard on Law Offices' claim that he breached a fiduciary duty.

### 2. Standard of Review

[3,4] The determination of whether a contract violates public policy presents a question of law.[10] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[11]

[5] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[12]

### 3. Analysis

#### (a) Enforceability of "Attorney's Agreement"

Law Offices' claim to the entire fee in the Jurado case is based upon the provision of the 1993 Attorney's Agreement which states that if Howard is retained by a Law Offices' client after he leaves the firm's employment, all fees generated by such representation are payable to Law Offices and no portion of such fees are payable to Howard. In a pretrial ruling, the district court determined that the agreement was an enforceable contract which had been breached by Howard, but that there was a genuine issue of material fact as to damages. In instructing the jury, the district court stated that Law Offices alleged that Howard had breached the contract by "claiming entitlement to legal fees in the Jurado[-Melendez] Estate case." Howard alleges on appeal that the Attorney's Agreement was not enforceable with respect to his representation of Jurado after

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[10] *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

[11] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

[12] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002).

leaving the employment of Law Offices because the agreement constituted a restrictive covenant which is overly broad and injurious to the public. Law Offices counters that the restriction in the Attorney's Agreement is reasonable and resulted from a conscious business decision by Howard to accept greater compensation during his employment in exchange for giving up any entitlement to a fee if he represented a client of the firm after leaving its employment.

As its title indicates, the contractual agreement at issue here is between attorneys who are subject to the professional ethics rules promulgated by this court. By establishing a "framework for the ethical practice of law," such rules establish a state's public policy with respect to the professional conduct of lawyers.[13] On the date of the agreement and during the parties' representation of Jurado, the Code of Professional Responsibility, Canon 2, provided in relevant part:

> DR 2-108 Agreements Restricting the Practice of a Lawyer.
>
> (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
>
> (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

Since September 2005, Nebraska lawyers have been subject to the Nebraska Rules of Professional Conduct, which similarly provide:

> Rule 5.6 RESTRICTIONS ON RIGHT TO PRACTICE
>
> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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[13] Neb. Ct. R. of Prof. Cond., preamble, ¶ 16 (rev. 2005); *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 607 A.2d 142 (1992).

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.[14]

Based upon similar ethics rules in effect throughout the country, "[c]ourts do not enforce any agreement involving the employment of lawyers that appears to have restrictive and thus anticompetitive tendencies."[15] This is so whether the restriction on competition is direct or indirect.[16] The prohibition against restrictive covenants in agreements between lawyers is generally reasoned to be necessary to ensure the freedom of clients to select counsel of their choice.[17] Courts and commentators note a distinction between the business principles which govern commercial enterprises and the ethical principles that govern the practice of law and find that because "'"clients are not merchandise"'" and "'"[l]awyers are not tradesmen,"'" restrictive covenants may not "'"barter in clients."'"[18] Because the client's freedom of choice is the paramount interest the ethics rules attempt to serve, courts reason that any disincentive to competition is as detrimental to the public interest as an outright prohibition on competition.[19] Thus, cases almost uniformly hold that financial disincentive provisions in attorney agreements are unenforceable as against public policy.[20]

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[14] Neb. Ct. R. of Prof. Cond. 5.6 (rev. 2005).

[15] 15 Grace McLane Giesel, Corbin on Contracts § 80.22 at 166 (Joseph M. Perillo ed., rev. ed. 2003). See, also, 6 Samuel Williston, A Treatise on the Law of Contracts § 13:7 (Richard A. Lord ed., 4th ed. 1995) (citing cases).

[16] See, e.g., *Jacob v. Norris, McLaughlin & Marcus, supra* note 13.

[17] *Id.*

[18] *Jacob v. Norris, McLaughlin & Marcus, supra* note 13, 128 N.J. at 131, 607 A.2d at 146, quoting ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 300 (1961).

[19] See, *Jacob v. Norris, McLaughlin & Marcus, supra* note 13; *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528 (Tenn. 1991); *Anderson v. Aspelmeier, Fisch, Power*, 461 N.W.2d 598 (Iowa 1990); *Cohen v Lord, Day & Lord*, 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989); *Hagen v. O'Connell, Goyak & Ball*, 68 Or. App. 700, 683 P.2d 563 (1984).

[20] *Id.*

We agree with this reasoning and find it applicable to this case. While the restrictive language in paragraph 12 of the Attorney's Agreement does not directly restrict a departing lawyer from practicing in competition with the firm, it provides a strong financial disincentive for that lawyer to perform services for a former client, and accordingly, it restricts the client's right to retain the lawyer. We conclude that the restriction is contrary to public policy and unenforceable. Accordingly, we reverse and vacate the judgment in favor of Law Offices and against Howard.

(b) Counterclaims

[6] In its cross-appeal, Law Offices contends that the district court erred in submitting Howard's counterclaims to the jury, arguing that there was insufficient evidence to support Howard's claimed entitlement to 25 percent of the fees in the Jurado and Christiansen cases. When reviewing the sufficiency of the evidence to sustain a judgment, we are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.[21] Howard testified that in the summer of 2002, he and Palagi, on behalf of Law Offices, reached a specific oral agreement that Howard would receive 25 percent of the fee in three cases, including Jurado and Christiansen, and that based upon this agreement, Howard decided to stay with the firm at that time. While this testimony was disputed by Palagi, we conclude that it was sufficient to warrant submission of Howard's counterclaims based upon breach of an oral agreement.

In a related argument, Law Offices contends that because Howard received a discretionary bonus in the year in which the fee in the Christiansen case was received by Law Offices, which bonus exceeded the amount he claimed was due to him from the Christiansen case, he was not entitled to an additional share of that fee. The record reflects that Howard received a bonus in November 2002 and that Law Offices received the fee in the Christiansen case in December of that year. Howard

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[21] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

specifically testified that he did not receive the promised 25 percent of that fee. The jury resolved the disputed factual issue in Howard's favor, and we will not disturb its findings under our deferential standard of review.

We do note one error with respect to the amount awarded to Howard on his counterclaim with respect to the fee in the Jurado case. The $195,000 award represents 25 percent of the total fee of $780,000 being held by the clerk of the Phelps County Court at the time of trial. But, as subsequently determined by the district court for Buffalo County, Law Offices was entitled to $746,250 of the fee in the Jurado case and Howard was entitled to the remainder. Thus, the award of 25 percent of the entire fee to Howard would result, at least to some degree, in an impermissible double recovery.[22] Accordingly, we modify the judgment in favor of Howard on the fee in the Jurado case by reducing it from $195,000 to $186,562.50, which represents 25 percent of that fee awarded to Law Offices by the district court for Buffalo County.

(c) Nebraska Wage Payment and Collection Act

Howard argues that the district court erred in failing to find that the jury's award of 25 percent of the fee in the Jurado case was an award of "wages" under the NWPCA and thus erred in failing to award him costs and attorney fees on the claim.[23] Howard further argues that the district court erred in not ordering Law Offices to pay an additional amount to the common schools fund pursuant to the NWPCA.[24] Law Offices argues that we lack jurisdiction to resolve these issues because of a deficiency in Howard's notice of appeal. We conclude that we have jurisdiction to address the NWPCA issues presented in this appeal.

Under the NWPCA, "[a]n employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such

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[22] See *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[23] See § 48-1231.

[24] See § 48-1232.

unpaid wages in the proper court."[25] If the employee has an attorney, the employee "shall be" entitled to recover "an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages."[26]

[7] The district court refused to award attorney fees on the amount the jury awarded Howard as his share of the fee in the Jurado case, reasoning that this amount did not qualify as "wages" under the NWPCA. Under the NWPCA, "[w]ages shall mean compensation for labor or services rendered by an employee . . . when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."[27] A bonus can qualify as wages if the employer and employee agreed to it in advance.[28]

Howard argues on appeal that the jury award of the fee in the Jurado case meets the definition of wages under the statute because it was a bonus agreed to by the parties for which all conditions were met. He contends that it is unreasonable not to treat his claim to 25 percent of that fee as a "bonus" in the same manner as his claim to 25 percent of the fee in the Christiansen case. He further argues that the fact that the money at issue was held by the Phelps County Court is irrelevant because Palagi denied the existence of the 2002 oral agreement, and that thus, even if Law Offices had received the fee in the Jurado case, it would not have paid Howard a 25-percent share.

The oral agreement between Howard and Law Offices with respect to division of the fee in the Jurado case, as described by Howard, had not ripened into a claim for wages at the time of trial. Howard's own testimony indicates that he was not paid his share of the fee in the Barker case until the fee was actually received by Law Offices. His testimony also clearly indicates that he did not expect to receive a share of the fee in the Christiansen case until it was received by Law Offices.

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[25] § 48-1231.

[26] *Id.*

[27] § 48-1229(4).

[28] See *Knutson v. Snyder Industries, Inc.*, 231 Neb. 374, 436 N.W.2d 496 (1989).

In characterizing his successful NWPCA claim on that fee, Howard's brief states that Law Offices received the fee in December 2004 and "failed to pay [him] 25% of the fee *within thirty (30) days of said date*."[29] As we view the record, Howard had no viable claim to a portion of the fee in the Jurado case until it was received by Law Offices, which has not yet occurred because both parties agreed that it would be held in the Phelps County Court pending resolution of their litigation. The district court did not err in denying Howard's NWPCA claims with respect to the fee in the Jurado case.

Because Howard did receive an award of attorney fees and costs as to his share of the fee in the Christiansen case, we address his argument that the court should have ordered Law Offices to pay an additional amount to the common schools fund. The NWPCA provides that if an employee secures judgment on a wage collection claim, the court may order the employer to pay an amount equal to one or two times the amount of the judgment to the common schools fund.[30] It is within the court's discretion whether to order such a payment.[31] Whether or not the parties had an agreement whereby Howard would receive a percentage of the fee in the Christiansen case was disputed at trial. Although the jury resolved this issue in Howard's favor, we conclude that the district court did not abuse its discretion in declining to order Law Offices to pay an amount to the common schools fund under § 48-1232.

(d) Breach of Fiduciary Duty

In its cross-appeal, Law Offices argues that the district court erred in directing a verdict against Law Offices on its claim that Howard breached a fiduciary duty by communicating with Jurado regarding his decision to leave the firm while still employed by Law Offices. In sustaining Howard's motion, the district court noted that there was no evidence that Howard's conduct was the proximate cause of any damage to Law

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[29] Brief for appellant in case No. S-06-664 at 31 (emphasis supplied).

[30] § 48-1232.

[31] *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000).

Offices. As noted, Jurado testified that she would have retained Howard to conclude her case regardless of when she learned that he was leaving Law Offices, and regardless of any efforts by Law Offices to discourage her from doing so.

Relying on a Utah case[32] and this court's inherent authority to regulate lawyers and the practice of law, Law Offices argues that Howard's communication with Jurado in his own behalf while still an employee of Law Offices warrants "two possible remedies: disgorgement of any amounts awarded to Howard from the Jurado case, or reimbursement to the firm of the $247,852.00 that is specifically related to the provisions of the [Attorney's] Agreement relating to post-termination legal fees."[33] In the Utah case, an associate attorney had secretly represented clients and retained fees while employed by a law firm, using the firm's resources to do so. Finding that this conduct breached a fiduciary duty owed to the firm, the court ordered him to disgorge all fees collected from the undisclosed clients while still employed by the firm. The court denied the firm's request for total forfeiture of all compensation paid to the associate during the period when the breach occurred, concluding that the circumstances did not require "such a harsh remedy."[34]

We do not read this case to support Law Offices' apparent contention that causation is not an element of a claim based upon an alleged breach of a fiduciary duty. Indeed, a subsequent decision by a U.S. District Court applied Utah law and specifically discussed evidence of causation in denying summary judgment on a breach of fiduciary duty claim.[35] We note that Howard has not retained fees from his representation of Jurado, and he will receive only those portions of the total fee specifically awarded to him in this case and the action in the district court for Buffalo County. We conclude on the basis of this record that the district court did not err in granting

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[32] *Prince, Yeates & Geldzahler v. Young*, 94 P.3d 179 (Utah 2004).

[33] Brief for appellee on cross-appeal in case No. S-06-664 at 10.

[34] *Prince, Yeates & Geldzahler v. Young, supra* note 32, 94 P.3d at 185.

[35] *Farm Bureau Life Ins. v. American Nat. Ins. Co.*, 505 F. Supp. 2d 1178 (D. Utah 2007), citing *Prince, Yeates & Geldzahler v. Young, supra* note 32.

Howard's motion for directed verdict with respect to Law Offices' claim of breach of fiduciary duty.

(e) Remaining Assignments of Error

[8] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[36] In light of our determinations that Law Offices is not entitled to recover on its breach of contract and breach of fiduciary claims and that Howard is to retain his judgment on the counterclaims, as modified, it is unnecessary for us to reach the remaining assignments of error.

## IV. CASE NO. S-06-384

This is an appeal by Law Offices from the dismissal of the second action which it filed against Howard in the district court for Douglas County. It sought to enforce the provision of the Attorney's Agreement which required Howard to assign fees received from former clients of the firm if he performed services for such clients, at their request, after he left the firm. The district court sustained Howard's motion to dismiss, reasoning that the case involved the same parties and the same issues presented in the previously filed action. Law Offices does not dispute this, and concedes in its brief that "it could well be argued that Law Offices has not been prejudiced by the court's dismissal."[37] But it argues that the dismissal with prejudice "**might** be construed as limiting Law Offices' remedies down the road."[38]

Without speculating as to the nature of such remedies or the length of the road, we conclude that the district court did not err in dismissing this action. In general, the law does not favor piecemeal litigation of disputes.[39] In this action, Law Offices sought to enforce the same contractual restrictions on Howard's

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[36] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[37] Brief for appellee on cross-appeal in case No. S-06-664 at 13.

[38] *Id.*

[39] See, e.g., *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004); *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

right to retain fees after leaving the firm that were at issue in the previously filed action which was tried to conclusion. We have found those restrictions to be contrary to public policy and unenforceable in our disposition of case No. S-06-664. We affirm the order of dismissal in this case.

## V. CONCLUSION

For the reasons discussed, the appeal in case No. S-07-757 is dismissed for lack of appellate jurisdiction. Upon issuance of our mandate, the final order of the district court will require the clerk of the Phelps County Court to disburse the $780,000 fee in the Jurado case which has been held in an interest-bearing account pursuant to the stipulation of the parties. Of this amount, Law Offices will receive $746,250 plus 95.68 percent of the accrued interest, and Howard will receive $33,750 plus 4.32 percent of the accrued interest.

In case No. S-06-664, we reverse and vacate the judgment in favor of Law Offices, based upon our determination that the contractual restrictions which it sought to place upon Howard's practice of law after leaving the firm are contrary to public policy and unenforceable. As to Howard's counterclaim seeking 25 percent of the fee in the Jurado case paid to Law Offices, we reduce the amount from $195,000 to $186,562.50 in order to prevent a double recovery and affirm as modified. As to Howard's counterclaim seeking 25 percent of the fee in the Christiansen case paid to Law Offices, we affirm the judgment of $16,625 and the award of $4,156.25 in costs and attorney fees under the NWPCA.

Finally, in case No. S-06-384, we affirm the judgment of dismissal entered by the district court.

JUDGMENT IN NO. S-06-384 AFFIRMED.
JUDGMENT IN NO. S-06-664 REVERSED AND VACATED IN PART, AND IN PART AFFIRMED AS MODIFIED.
APPEAL IN NO. S-07-757 DISMISSED.

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Brent R. Wadman, respondent.

746 N.W.2d 681

Filed April 4, 2008. No. S-06-1213.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4 ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. Neb. Ct. R. of Discipline 4 (rev. 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 or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
6. ____. Each case justifying the discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
7. ____. 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.
8. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
9. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating and mitigating factors.
10. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

PER CURIAM.

## INTRODUCTION

On October 31, 2006, formal charges were filed by the office of the Counsel for Discipline, relator, against Brent R. Wadman, respondent. "Additional Formal Charges" were filed subsequently thereto. The collective formal charges effectively set forth two counts that included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule) and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment for professional services), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer disputed certain of the allegations.

A referee was appointed, and on April 26, 2007, a referee's hearing was held. A total of 21 exhibits were received into evidence, and respondent testified. The referee filed a report on June 1. With respect to the formal charges, the referee found that respondent's conduct had violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 7-101(A)(2). The referee did not make any findings regarding the allegation that respondent's conduct had violated his oath of office as an attorney. With regard to the discipline to be imposed, the referee recommended that respondent be publicly reprimanded.

Neither relator nor respondent filed exceptions to the referee's report. On June 11, 2007, relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2005). The motion was not opposed. On July 18, we granted the motion for judgment on the pleadings in part, ordering that the facts found by the referee were "accepted as facts established in the case," and we found that respondent had violated the code provisions as alleged in the formal charges. We ordered that the case should proceed to briefing and oral argument limited to the issue of the appropriate discipline. We now impose discipline as indicated below.

## STATEMENT OF FACTS

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska on April 23, 2001. Respondent was engaged in the private practice of law in Nebraska from 2001 until early 2005. In early 2005, he closed his private practice and began working as in-house counsel to a Nebraska business, where he was still employed at the time of the referee's hearing.

With regard to the allegations contained in the formal charges, the referee found that respondent had been retained to represent Eloise Johnson in a personal injury case. Respondent filed suit on behalf of Johnson in the county court for Douglas County. Thereafter, respondent did not respond to a motion for summary judgment filed by the defendant, and he did not attend the summary judgment hearing at which the county court entered summary judgment in favor of the defendant and dismissed Johnson's personal injury action. Respondent testified to the effect that he had moved offices and that he did not receive notice of a change in the date for the summary judgment hearing until after the hearing had been held and the motion had been granted. Respondent admitted that although he advised Johnson that the defendant had filed a motion for summary judgment, he did not tell her that the motion had been sustained or that her case had been dismissed.

With regard to the allegations contained in the "Additional Formal Charges," the referee found that respondent had been retained to represent Thomas Smith-Perkins in a personal injury case. Although respondent did engage in some initial investigatory work on behalf of Smith-Perkins, respondent did not take any other action with regard to Smith-Perkins' alleged personal injury claim. Although the "Additional Formal Charges" allege that Smith-Perkins' personal injury claim was now time barred, the referee's report does not contain a finding with respect to that allegation.

The referee's report summarized respondent's testimony at the hearing wherein respondent effectively stated that he did not feel competent to handle personal injury cases and that it

was for that reason that he closed his private practice in 2005 and began working as in-house counsel to a business. The referee found that at the time of the referee hearing, there had been "no further allegations of wrong doing [sic] since [respondent] left private practice."

Although it was not specifically identified by the referee as an aggravating factor, the referee found that respondent had been the subject of two prior disciplinary proceedings generally involving the neglect of three separate clients' matters while he was engaged in private practice. The prior proceedings had resulted in respondent's receiving private reprimands on May 17, 2005, and on April 12, 2006. The referee also found certain facts that can be characterized as mitigating factors, including respondent's cooperation with relator during the disciplinary proceedings, respondent's admission of many of the allegations contained within the formal charges and "Additional Formal Charges," and respondent's acknowledging responsibility for his actions.

Based upon the evidence offered during the hearing, the referee found by clear and convincing evidence that respondent's actions constituted a violation of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 7-102(A)(2). With respect to the discipline that ought to be imposed, the referee recommended that respondent be publicly reprimanded.

As noted above, no objections were filed to the referee's report. On June 11, 2007, relator filed a motion for judgment on the pleadings. On July 18, this court granted the motion in part, adopting the referee's findings and setting for briefing and oral argument the issue of the appropriate discipline.

## ASSIGNMENT OF ERROR

The only issue before the court is the appropriate discipline to be entered against respondent.

## STANDARDS OF REVEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Pinard-Cronin*, 274 Neb. 851, 743 N.W.2d 649 (2008). To sustain a charge in

a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id.*

## ANALYSIS

*Findings.*

We note that all of respondent's conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility.

[3] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Pinard-Cronin, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

As previously noted, there were no exceptions filed to the referee's report in this case, and in an earlier order, this court adopted the findings of the referee. Given this record, we find clear and convincing evidence that respondent's conduct, set forth above, violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 7-101(A)(2). We also conclude that by virtue of respondent's conduct, respondent has violated his oath of office as an attorney. See § 7-104.

*Factors Affecting Discipline to Be Imposed.*

[4,5] We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007). 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 or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See, also, rule 10(N).

[6,7] With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying

the 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. Petersen*, 272 Neb. 975, 982, 725 N.W.2d 845, 851 (2007). To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Dortch, supra*.

[8,9] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id*. We have noted that the determination of an appropriate penalty to be imposed on an attorney also requires consideration of any aggravating and mitigating factors. *Id*.

*Discipline to Be Imposed.*

[10] The evidence in this case establishes that respondent has neglected two clients' legal matters, and this court is seriously concerned with respondent's repeated neglect of matters entrusted to him. See *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 902, 660 N.W.2d 502, 512 (2003) (discussing attorney's prior private reprimands and stating that "[w]e have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions"). In this connection, we take into consideration and find troubling the facts that in addition to the present proceedings, respondent has twice been previously privately reprimanded for his conduct with respect to three clients' matters and that he effectively misrepresented to Johnson the status of her case. As mitigating factors, we note that respondent cooperated with relator during the disciplinary proceedings, admitted many of the allegations contained within the formal charges and "Additional Formal Charges," and acknowledged responsibility for his actions. The evidence also establishes that respondent is no longer engaged in the private practice of law.

Upon due consideration of the record, the court finds that respondent should be and hereby is suspended from the practice of law for a period of 6 months, effective immediately. Respondent shall 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. At the end of the 6-month suspension period, respondent may apply to be reinstated to the practice of law, provided that respondent has demonstrated his compliance with rule 16, and further provided that relator has not notified this court that respondent has violated any disciplinary rule during his suspension.

## CONCLUSION

We find by clear and convincing evidence that respondent violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 7-101(A)(2), and his oath of office as an attorney. It is the judgment of this court that respondent be suspended from the practice of law for a period of 6 months. Respondent shall comply with rule 16, 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), rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001), within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

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# STATE OF NEBRASKA, APPELLEE, V. DANIEL T. RODRIGUEZ-TORRES, APPELLANT.

746 N.W.2d 686

Filed April 4, 2008. No. S-06-1351.

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. **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. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
5. ____: ____. 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.

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

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, Susan J. Gustafson for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Daniel T. Rodriguez-Torres appeals from the district court's denial of his motion to vacate judgment and allow for withdrawal of his guilty pleas. The main question presented by this appeal is whether Rodriguez-Torres is entitled to withdraw his guilty pleas for two separate convictions after having already served his sentences, because, he claims, he was not advised that his convictions could result in deportation. The other question presented by this appeal is whether Rodriguez-Torres received effective assistance of counsel.

## BACKGROUND

Following a plea of guilty, Rodriguez-Torres was convicted in January 1997 of possession of a controlled substance, a Class IV felony. Rodriguez-Torres was sentenced to 2 years' supervised probation. Rodriguez-Torres was subsequently charged with possession of a controlled substance and violation of probation. He pled guilty to violation of probation and was sentenced to 1 year's imprisonment. Rodriguez-Torres did not perfect a direct appeal of either conviction.

In July 2006, Rodriguez-Torres filed a motion to vacate judgment and allow for withdrawal of guilty pleas. He alleged that as a result of his guilty pleas in 1997 and 1999, he became deportable by the Bureau of Citizenship and Immigration Services. Rodriguez-Torres alleged that he was not advised of the effect his guilty pleas would have on his immigration status and was, therefore, unable to enter a knowing, voluntary, and intelligent plea. Rodriguez-Torres further alleges that his attorney's failure to advise him of the immigration consequences of his guilty pleas constitutes ineffective assistance of counsel.

At the hearing before the district court on the motion, counsel for Rodriguez-Torres advised the court that the action was not one for postconviction relief. Instead, counsel characterized the action as "an action more in terms of equity and justice." The motion was denied by the district court, which found that there existed no good or sufficient reasons why Rodriguez-Torres should be allowed to withdraw his pleas. Rodriguez-Torres appealed the district court's decision, and we moved this appeal to our docket.

## ASSIGNMENTS OF ERROR

Rodriguez-Torres assigns that the district court erred by (1) finding that no good or sufficient reasons existed to allow Rodriguez-Torres to withdraw his pleas of guilty or vacate the judgments, (2) not finding that Rodriguez-Torres' immigration consequences were the direct result of his guilty pleas and finding that he need not have been advised of such consequences, and (3) concluding that Rodriguez-Torres did not receive ineffective assistance of counsel.

## 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.[1]

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an

[1] *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

independent conclusion irrespective of the determination made by the court below.[2]

## ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3]

Rodriguez-Torres' motion to vacate judgment and allow for withdrawal of guilty pleas is premised on Neb. Rev. Stat. § 29-1819.02 (Cum. Supp. 2006). Section 29-1819.02, which was adopted in 2002, provides:

> (1) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.
>
> . . . .
>
> (3) With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required by subsection (1) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

The State asserts that although § 29-1819.02 gives the trial court some discretion to allow a defendant to withdraw a guilty plea, the statute does not provide a separate procedure

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[2] *State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005).

[3] *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

to accomplish that after the defendant's conviction has become final. The State further asserts that absent a statutorily authorized procedure allowing for the present action, the district court was without jurisdiction to address the merits of Rodriguez-Torres' motion. We agree.

[4,5] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[4] 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.[5]

In § 29-1819.02, the Legislature gives a court discretion to vacate a judgment or withdraw a plea where a court has failed to provide the advisement required for pleas made on or after July 20, 2002. It does not, however, convey upon a court jurisdiction to do so where a party has already completed his or her sentence. Nor has the Legislature in any other statute allowed for a specific procedure whereby a person who has been convicted of a crime and has already served his or her sentence may later bring a motion to withdraw his or her plea and vacate the judgment.

We have concluded on a number of occasions that where a criminal procedure is not authorized by statute, it is unavailable in a criminal proceeding.[6] For example, in *State v. Louthan*,[7] a defendant charged with second-offense driving under the influence (DUI) filed a petition seeking a determination that a prior conviction for first-offense DUI was invalid for purposes of enhancement. We held that a prior conviction used for enhancement purposes may not be collaterally attacked in a separate proceeding. We stated, "The Legislature has not enacted a procedure for asserting second-tier challenges to prior plea-based

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[4] *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[5] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

[6] See, *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). See, also, *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

[7] *State v. Louthan, supra* note 6.

DUI convictions, and thus, unless such a procedure is constitutionally mandated, it 'is unauthorized and, therefore, unavailable under Nebraska criminal procedure.' "[8]

We reached a similar conclusion in *State v. El-Tabech*,[9] wherein a prisoner brought a motion under the Nebraska Postconviction Act to compel state-funded DNA testing. We concluded that such a motion was prohibited under the postconviction statute under the circumstances of that case and that there were no available common-law civil procedures. We declined, under the factual circumstances of that case, where no constitutional issue presented itself, to fashion a procedure where none existed. We determined that in the absence of a legislatively mandated procedure, there was currently no recourse procedure available to the prisoner.

Here, Rodriguez-Torres failed to directly appeal his convictions or seek postconviction relief. Years after having served his sentence, Rodriguez-Torres now seeks to have his pleas withdrawn and convictions vacated. However, no legislatively authorized procedure exists which allows him to do so. Absent such a legislative procedure, there is no present recourse for Rodriguez-Torres to withdraw his pleas and vacate the judgments years after having completed his sentences. We, therefore, determine that the district court did not have jurisdiction to address Rodriguez-Torres' motion.

## CONCLUSION

For the reasons discussed above, we remand this action to the district court with directions to dismiss Rodriguez-Torres' motion to vacate judgment and allow for withdrawal of guilty pleas.

REMANDED WITH DIRECTIONS.

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[8] *Id.* at 186, 595 N.W.2d at 925.

[9] *State v. El-Tabech, supra* note 6.

# Donelle Giboo, appellant, v. Certified Transmission Rebuilders, appellee.

746 N.W.2d 362

Filed April 4, 2008. No. S-07-139.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside the judgment of the three-judge panel of the Nebraska Workers' Compensation Court, an appellate court reviews the findings of the single judge who conducted the original hearing.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. ____: ____. Regarding questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation.** Under Nebraska law, the amount an employer must pay a disabled employee in workers' compensation is based on that employee's earning capacity.
5. ____. The factors used to assess a disabled employee's earning capacity include (1) eligibility to procure employment generally, (2) ability to hold a job obtained, (3) capacity to perform the tasks of the work, and (4) ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fit.
6. ____. The first step in identifying a labor market is to identify the hub from which the spokes of the reasonable geographic area radiate, whether it is from the place the injury occurred, the place the claimant resided at the time the injury occurred, or the place the claimant resides at the time of the workers' compensation hearing.
7. ____. When an employee injured in one community relocates to a new community, the new community will serve as the hub community from which to assess the claimant's earning capacity, provided that the change of community was done in good faith and not for improper motives.
8. **Workers' Compensation: Proof.** The claimant carries the burden to establish that the move was made in good faith and not for the purpose of exaggerating the extent of his or her difficulty finding suitable employment.
9. ____: ____. If the claimant cannot show a legitimate motive behind his or her postinjury relocation, the community where the claimant resided at the time the injury occurred will serve as the hub community.
10. **Workers' Compensation.** Once the hub community has been identified, a "labor market" includes not only that particular community, but also any communities within a reasonable geographic area around it.
11. ____. Communities surrounding the claimant's hub community should be considered part of the claimant's labor market, but only to the extent that it would be reasonable for the claimant to seek work in that location.
12. ____. Whether it is reasonable for a claimant to seek work in a particular community is determined by looking to the totality of the circumstances, with regard

for such factors as (1) availability of transportation, (2) duration of the commute, (3) length of the workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, and (5) economic feasibility of a person in the claimant's position working in that location. Regard might also be given to the more generalized inquiry of whether others who live in the claimant's hub community regularly seek employment in the prospective area.

13. **Workers' Compensation: Expert Witnesses.** Court-appointed vocational rehabilitation experts will help courts identify vocational rehabilitation plans and apply the statutory factors used to assess disabled employees' earning capacities.
14. **Expert Witnesses: Presumptions: Proof.** The opinion of the court-appointed expert is imbued with a rebuttable presumption of validity, and a party who disagrees with that opinion has the burden to show that it is inaccurate.
15. ____: ____: ____. The rebuttable presumption in favor of the court-appointed expert's opinion can be rebutted by a showing that his or her assessment was predicated on principles that are contrary to law.
16. ____: ____: ____. A party can show that the opinion of the court-appointed expert is inaccurate by offering proof that the nonexistence of a fact presumed by the court-appointed expert is more probable than is its existence.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Timothy E. Clarke and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Heavican, C.J.

## I. INTRODUCTION

Donelle Giboo filed this action against Certified Transmission Rebuilders (CTR) of Omaha, Nebraska, seeking medical expenses and future compensation for injuries she suffered when she slipped on a set of stairs while working for CTR. At trial, the Nebraska Workers' Compensation Court adopted the assessment of the court-appointed vocational expert despite conflicting testimony by Giboo's own expert. On appeal, a divided panel of the Nebraska Workers' Compensation Court affirmed. Giboo now appeals to this court. We reverse and remand for reasons set forth below.

## II. BACKGROUND

On July 25, 2002, Giboo, a CTR employee, slipped and fell while descending a flight of stairs at CTR's Omaha location. Giboo was 7 months pregnant at the time. The fall aggravated a preexisting injury to Giboo's spine and ultimately required several surgeries to repair. On September 9, Giboo filed a petition in the Nebraska Workers' Compensation Court to obtain medical expenses as well as future compensation to offset diminished earning capacity. After a trial, the compensation court entered an award on May 21, in which CTR was ordered to pay medical expenses Giboo had incurred to that date. Moreover, based on the finding that Giboo was "temporarily totally disabled," the court ordered CTR to pay Giboo $267.62 per week in compensation.

On December 7, 2004, Giboo's physician, Dr. Randall Woodward, advised Giboo that she could return to work, but only if she observed several restrictions on her range of motion and the amount of weight she could lift or carry. Moreover, Woodward limited Giboo to a 6-hour workday, though he believed that she would eventually be able to work a full 8-hour workday. CTR accommodated these restrictions and continued to employ Giboo.

Giboo and CTR agreed that David Utley, a vocational rehabilitation expert, would serve as the vocational rehabilitation counselor assigned to the case. In a report dated July 18, 2005, Utley determined that Giboo had sustained a 25-percent loss of access to jobs in the Omaha and Council Bluffs, Iowa (Omaha/Council Bluffs), labor market. Utley concluded that for someone of Giboo's training and experience, this resulted in a 30-percent reduction in earning capacity in the Omaha/Council Bluffs labor market.

However, on September 28, 2005, Dr. James Devney, a colleague of Woodward, determined that Giboo should be permanently limited to no more than 6 hours of work per day. Additionally, Devney determined that Giboo had long since reached her "[m]aximum medical improvement" and that her condition would not improve from that point forward. CTR terminated Giboo's employment shortly thereafter.

In response to the new 6-hour-workday limitation, Utley issued an amended evaluation of Giboo's earning capacity

on October 3, 2005. Notably, Utley did not modify his prior conclusion that Giboo's disability reduced her access to jobs in Omaha/Council Bluffs by 25 percent. Utley did, however, increase his assessment of Giboo's loss of earning capacity from 30 to 35 percent.

On August 23, 2005, CTR filed a petition in the Nebraska Workers' Compensation Court to modify Giboo's prior award. Giboo and CTR agreed on most points, but disagreed on the extent of Giboo's lost earning capacity in light of her disabilities. At this second trial, Giboo presented evidence that she had since moved from the Omaha area to Dunlap, Iowa, a small, rural community of approximately 600 residents some 50 miles east of Omaha. Giboo testified that she made the move to live with the father of her child, since he owned a home in Dunlap. Giboo also presented testimony from Paulette Freeman, another vocational rehabilitation expert. Freeman testified that in her opinion, Utley had underestimated Giboo's loss of access to employment.

The court issued its order on February 10, 2006. In its order, the trial court discounted Freeman's testimony for reasons that we develop more fully below. The court then concluded that the statutory presumption in favor of Utley's assessment, as the assessment of the court-appointed vocational expert, had not been overcome. Therefore, the court adopted Utley's assessment and concluded that Giboo suffered from a 35-percent loss of earning capacity. Accordingly, the court adjusted Giboo's compensation to $93.67 per week for 139$^{3}/_{7}$ weeks.

Giboo petitioned for review by a three-judge panel of the Nebraska Workers' Compensation Court on February 23, 2006. On January 17, 2007, the three-judge panel affirmed the lower court's award by a vote of 2 to 1. Giboo now appeals the panel's decision affirming the trial court's award.

## III. ASSIGNMENTS OF ERROR

Giboo assigns, restated, consolidated, and renumbered, that the trial court erred (1) in determining the relevant labor market from which to assess her earning capacity, (2) in upholding the statutory presumption in favor of Utley's appraisal of Giboo's earning capacity, and (3) in failing to issue a "reasoned

decision" as required by the procedural rules governing the Nebraska Workers' Compensation Court.

## IV. STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside the judgment of the three-judge panel of the Nebraska Workers' Compensation Court, an appellate court reviews the findings of the single judge who conducted the original hearing.[1]

[2,3] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.[2] Regarding questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[3]

## V. ANALYSIS

### 1. Relevant Labor Market

[4,5] The predominant issue on appeal in this case is whether the trial court erred in selecting the relevant labor market from which to assess Giboo's earning capacity. Under Nebraska law, the amount an employer must pay a disabled employee in workers' compensation is based on that employee's earning capacity.[4] The factors used to assess a disabled employee's earning capacity include (1) eligibility to procure employment generally, (2) ability to hold a job obtained, (3) capacity to perform the tasks of the work, and (4) ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fit.[5]

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[1] See *Wilson v. Larkin & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

[2] See *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999).

[3] See *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

[4] Neb. Rev. Stat. § 48-121 (Reissue 2004); *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

[5] See *Davis, supra* note 4.

The factor assessing the ability to procure employment "in general" depends in part on the number and type of jobs available in a given market. Therefore, this factor might change depending on the location in question. For example, a major metropolitan area will have more jobs of a wider variety than a rural community.

Giboo lived and worked in the Omaha area at the time she was injured. However, after giving birth to her son in September 2002, Giboo began spending the majority of her time in Dunlap, where her child and the child's father reside. Giboo formally moved to Dunlap in September 2005. This case requires that we confront the question of what market to use to measure earning capacity when an employee, after suffering an injury while living and working in one community, relocates to a new community with fewer employment opportunities.

In its order, the trial court indicated this question had already been resolved by this court's prior opinion in *Harmon v. Irby Constr. Co.*[6] The trial court read *Harmon* as standing for the proposition that "the labor market in which the claimant was injured is the labor market in which the claimant's loss of earning capacity should be measured." This reading stretches *Harmon* too far.

In *Harmon*, an employee was injured while working for a company in Superior, Nebraska. The Nebraska Workers' Compensation Court found that Superior was the employee's exclusive labor market from which to assess his earning capacity. The employer appealed, claiming that the employee should be required to move to a larger labor market with more employment opportunities. This court disagreed and held that an employee "cannot be required to move to find employment."[7] But the conclusion that an employee cannot be forced to relocate in order to increase his or her earning capacity does not resolve the issue of where to measure earning capacity when an employee voluntarily relocates.

To resolve that question, it may be helpful to think of this issue as encompassing two separate inquiries. The first inquiry

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[6] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999).

[7] *Id.* at 428, 604 N.W.2d at 820.

should ask which community—Dunlap, Omaha/Council Bluffs, or both—should serve as the "hub" area from which to assess Giboo's earning capacity. The second inquiry should address the other geographic areas that may be considered along with the hub community.

(a) "Hub" Community

[6] Courts and commentators uniformly agree that a "labor market" does not refer to a single community, but encompasses employment opportunities within a reasonable geographic area.[8] It would seem, therefore, that the first step in identifying a labor market is to identify "the hub from which the spokes of a 'reasonable geographic area' radiate, whether it [is] from the place the injury occurred, the place the claimant resided at the time the injury occurred, or the place the claimant resides at the time of [the workers' compensation] hearing."[9]

In addressing the concept of the hub community as it relates to this case, we proceed in two parts. Drawing upon the parties' arguments, the first subpart surveys the approaches used by courts in other jurisdictions. In the second subpart, we identify the approach we think is preferable and apply it to the facts before us.

*(i) Survey of Approaches Used in Other Jurisdictions*

Without using the "hub" terminology, CTR essentially argues that *both* Omaha/Council Bluffs and Dunlap should serve as hub communities. CTR's position is that as a market with substantially fewer employment opportunities, using Dunlap as the hub community will lead to an exaggerated decrease in Giboo's earning capacity and thus a sharper increase in the amount of compensation CTR must pay. Instead, CTR urges us to adopt a rule under which the market where the injury occurred and any new market to which the claimant relocates are *both* regarded as hub communities. By keeping the injury market in the equation, CTR believes that such a rule would reduce the incentive

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[8] See, e.g., *Kelly Services v. Industrial Com'n*, 210 Ariz. 16, 106 P.3d 1031 (Ariz. App. 2005).

[9] *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994).

for employees to "unilaterally manipulate" their earning capacity by moving to "poor or nonexistent labor markets in order to make themselves totally disabled, where they otherwise would not have been."[10]

CTR's proposition is based on the approach taken by the Idaho Supreme Court. In most situations, the Idaho Supreme Court regards "the market in which a claimant resides at the time of the hearing as the axis from which the scope of a 'reasonable geographic area' is defined."[11] However, when an employee voluntarily relocates to a community with fewer employment opportunities, both the community where the injury occurred *and* the community to which the employee relocates are considered hub communities.[12] Like CTR, the Idaho Supreme Court reasoned that a claimant should not be permitted to manipulate his or her disability status, and thus the amount of compensation the employer must pay, simply "by changing his place of residence."[13]

Giboo argues that Dunlap alone is the hub community from which to base an assessment of her earning capacity. In support of this proposition, Giboo points out that there is no evidence that her move to Dunlap was based on improper motives, such as the desire to avoid work. Instead, Giboo argues the record supports the contention that her move was done for completely legitimate purposes.

In making such arguments, Giboo invokes a line of decisions from other jurisdictions which hold that the community to which a claimant relocates after an injury will serve as the relevant labor community, provided that the move was made for legitimate reasons.[14] However, even those courts disagree on what qualifies as a "legitimate" motive.

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[10] Brief for appellee at 19.

[11] *Davaz, supra* note 9, 125 Idaho at 338, 870 P.2d at 1297.

[12] See *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977), cited with approval, *Davaz, supra* note 9. Cf. *Paramo v. Industrial Com'n of Arizona*, 186 Ariz. 75, 918 P.2d 1093 (Ariz. App. 1996).

[13] *Lyons, supra* note 12, 98 Idaho at 407 n.3, 565 P.2d at 1364 n.3.

[14] See, e.g., *Reede v. State, Dept. of Transp.*, 620 N.W.2d 372 (S.D. 2000).

The First and Fourth Circuits have held that in most cases, only "economic" motives provide a sufficient justification for a claimant's decision to relocate to a new community after a vocational injury. In *See v. Washington Metropolitan Area Transit Authority*,[15] Elwood See relocated to Franklin, West Virginia, after he suffered a disability while living and working in Washington, D.C. The employer argued that using Franklin instead of Washington, D.C., as the labor market would mean employers' compensation obligations could be unilaterally manipulated by "'the claimant's personal choice to relocate to an area with fewer available jobs.'"[16]

In response, the Fourth Circuit held that "[t]he presence of a legitimate purpose influencing a post-injury relocation is a significant factor warranting consideration in the determination of the relevant labor market."[17] Regarding the definition of "legitimate," it is significant that the Fourth Circuit based its decision on the fact that "[t]here [was] substantial evidence supporting the *economic reasons* for See's move to West Virginia and the legitimacy of those reasons."[18] The court gave a clue as to its definition of "economic" when it held that a "move predicated on a legitimate intent to reduce an injured claimant's cost of living" would suffice.[19]

The First Circuit relied on *See* in *Wood v. U.S. Dept. of Labor*,[20] wherein Michael Wood relocated to Shortsville, New York, after being injured while working at a shipyard in Bath, Maine. Wood testified that his decision to move back to New York was prompted in part by a need to provide care to his ailing mother. The First Circuit acknowledged that "[c]are for an aged parent is to be commended," but nonetheless felt that the

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[15] *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375 (4th Cir. 1994).

[16] *Id.* at 382.

[17] *Id.*

[18] *Id.* at 383 (emphasis supplied).

[19] *Id.* at 382.

[20] *Wood v. U.S. Dept. of Labor*, 112 F.3d 592 (1st Cir. 1997).

federal workers' compensation laws demanded an "economic" motive behind a claimant's relocation.[21]

In contrast to the First and Fourth Circuits, a number of state courts have indicated that a claimant's new community will serve as the relevant labor market so long as the claimant moved there in good faith. For example, in *Kurrell v. National Con Rod, Inc.*,[22] an employee injured while working in Minneapolis, Minnesota, subsequently relocated to Walnut Grove, Minnesota, a small town some 150 miles away. The claimant moved to Walnut Grove to be with her family. Although the Minnesota Supreme Court acknowledged that the claimant's "motivations in moving to Walnut Grove may be viewed as 'merely personal,'" Walnut Grove was nonetheless the relevant labor market because the move there "was not part of a plan to retire from the labor market."[23]

In *USAir, Inc. v. W.C.A.B. (Keene)*,[24] a claimant injured while working in Pittsburgh, Pennsylvania, relocated to Destrehan, Louisiana, after his wife was offered an additional $27,000 per year to take a job there. The employer argued that Pittsburgh should be the labor market for purposes of the earning capacity assessment because the "choice to move was a personal one, not prompted by any economic or other necessity."[25] The court disagreed and held that Destrehan would serve as the relevant community because "'the claimant . . . resettled [there] under circumstances which do not indicate a lack of good faith in the move itself.'"[26]

Similarly, in *Reede v. State, Dept. of Transp.*,[27] a claimant injured while working in the Black Hills area in South Dakota relocated to Forsyth, Montana, a location with fewer employment opportunities. The claimant explained that she moved to

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[21] *Id.* at 597.

[22] *Kurrell v. National Con Rod, Inc.*, 322 N.W.2d 199 (Minn. 1982).

[23] *Id.* at 202.

[24] *USAir, Inc. v. W.C.A.B. (Keene)*, 706 A.2d 888 (Pa. Commw. 1998).

[25] *Id.* at 889.

[26] *Id.* at 890.

[27] *Reede, supra* note 14.

Montana out of "financial necessity" and because she "has a good support network in that community."[28] The South Dakota Supreme Court held that a claimant's new residence will serve as the relevant labor market if the "claimant . . . demonstrates that a change of community was done in good faith, and not for improper motives."[29] The court ultimately upheld the use of Forsyth as the labor market, based on the state department of labor's finding that the move to Forsyth was made for legitimate reasons.[30]

Finally, we note that the Florida Court of Appeals has suggested that the area to which "a claimant relocates after the injury" is the community from which to assess earning capacity, provided "there is no evidence that claimant's relocation following his injury was motivated by a desire to avoid work."[31]

*(ii) Identifying Hub Community in Present Case*

Having surveyed the various approaches other jurisdictions use to identify the hub community, we must now identify which approach we believe is preferable. There is no doubt that the Idaho Supreme Court's approach offers a good deal of protection to employers. That court's approach would reduce the incentive for claimants to distort the extent of their disability by relocating to an area with fewer job opportunities. Moreover, by factoring the original community into the earning capacity average, this approach would mitigate the impact of any attempt to manipulate earning capacity through relocation.

Nevertheless, we decline to adopt this approach because of the potential for unjust results. As CTR notes in its brief, the distance between the hub communities—old and new—is completely irrelevant under the Idaho Supreme Court's approach. As such, if a claimant was injured while working in Omaha and then relocates to Scottsbluff, Nebraska, his or her earning capacity would be based on the availability of employment

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[28] *Id.* at 374.

[29] *Id.* at 376.

[30] *Reede, supra* note 14.

[31] *Genelus v. Boran, Craig, Schreck Const. Co.*, 438 So. 2d 964, 966 (Fla. App. 1983).

opportunities in and around both cities. But we believe that adjusting a claimant's earning capacity based on employment opportunities that are not realistically available to the claimant would contravene the policy behind the Nebraska Workers' Compensation Act.

The primary purpose of that act is "restoration of the injured employee to gainful employment."[32] To that end, the act prescribes a number of steps that courts must take to accurately assess an employee's *actual* earning capacity. It would be odd, therefore, for us to adopt a rule which openly allows courts to distort the picture by factoring in employment opportunities that are clearly not practical.

Additionally, the Idaho Supreme Court's approach would force claimants to choose between legitimate opportunities to improve their personal or financial situations and their rights to receive much-needed compensation. As the cases surveyed above demonstrate, claimants may have any number of perfectly legitimate reasons for relocating to a new community after suffering an injury in their old community. A claimant may need to move to provide care for an aging or infirm family member or to maintain a cohesive family unit. Moreover, individuals with physical disabilities often find it necessary "to move back to communities where family members can lend support."[33] As the Minnesota Supreme Court noted in *Kurrell*, "[i]t would be a harsh and rigid rule that allowed an employee to better her personal situation only at the expense of her statutory right to rehabilitation benefits."[34]

It seems, therefore, that the better rule is one which regards the employee's new community as the hub community provided that the move was made for legitimate reasons. Such a rule would avoid the policy pitfalls identified above and, by scrutinizing the legitimacy of the reasons behind the move, would screen out claimants whose moves are based on illegitimate purposes.

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[32] Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 2006).

[33] *Wood, supra* note 20, 112 F.3d at 596.

[34] *Kurrell, supra* note 22, 322 N.W.2d at 202.

However, in adopting this approach, we do not believe it is necessary for the claimant to justify his or her relocation with a purely economic motive. We note that the Fourth Circuit indicated in *See*[35] that a lower cost of living in the new community would qualify as an economic motive. But given that smaller communities—that is, communities with fewer employment opportunities—will frequently have a lower cost of living than larger communities, it is difficult to envision a situation in which a claimant's move to a small community could not be justified on an economic basis. In this way, the federal circuit's approach appears to offer more in theory than in practice.

Moreover, insisting on an economic justification would essentially punish those claimants who relocated for legitimate reasons that may not be "economic" in the strictest sense. For example, one can easily envision a single mother who, after suffering a work-related physical disability, must relocate to a community where family can assist with childcare. In such a hypothetical, the more significant factor is not the prospect of free childcare from family members—a potentially economic justification—but, rather, the nature and quality of care that family would provide relative to complete strangers.

[7-9] Accordingly, we hold that when an employee injured in one community relocates to a new community, the new community will serve as the hub community from which to assess the claimant's earning capacity, provided that the "change of community was done in good faith, and not for improper motives."[36] Like the South Dakota Supreme Court, we believe the claimant carries the burden to establish that the move was made in good faith and not for the purpose of exaggerating the extent of his or her difficulty in finding suitable employment.[37] If the claimant cannot show a legitimate motive behind his or her postinjury relocation, the community where the claimant resided at the time the injury occurred will serve as the hub community.

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[35] *See, supra* note 15.

[36] See *Reede, supra* note 14, 620 N.W.2d at 376.

[37] See *id.*

There is significant evidence in the record to support the belief that Giboo's move was made in good faith and therefore that Dunlap should be the hub community from which to base an assessment of Giboo's earning capacity. Giboo testified at trial that her move to Dunlap was motivated solely by the desire to live with her son who was born in September 2002, shortly after Giboo's injury. Although she maintained her permanent residence in Plattsmouth, Nebraska, Giboo testified that she was in Dunlap "95 percent" of the time. Giboo formally established her residence in Dunlap in September 2005. When asked why it took so long to officially change her residence to Dunlap, Giboo explained that parole limitations prevented her from establishing a residence outside Nebraska until September 2005.

These facts suggest that Giboo's move to Dunlap was made in good faith and was not motivated by a desire to manipulate the extent of her disability. We acknowledge that the trial court's order lacks a conclusive finding in this regard. Nevertheless, we note that the trial court never discredited Giboo's testimony. Moreover, we note that CTR appeared to concede that Giboo's move was made in good faith when, in its brief before this court, it stated: "Further, [CTR] is not claiming that there is evidence that support[s] a conclusion that the move was made in a deliberate attempt to manipulate [Giboo's] labor market."[38] This comment is tantamount to a concession that Giboo's move was made for legitimate reasons in line with the rule we adopt today. It is therefore unnecessary to remand for the trial court to conduct findings on the motives behind Giboo's move. Accordingly, we conclude that Dunlap alone should serve as the hub community from which to assess Giboo's earning capacity.

(b) Impact of Employment Opportunities Around Hub Community

Having concluded that Dunlap is the hub community from which to assess Giboo's earning capacity, we must now address

[38] Brief for appellee at 20.

what other communities around Dunlap should factor into the calculation of Giboo's earning capacity.

[10] Once the hub community has been identified, authorities agree that a "labor market" includes not only that particular community, but also any communities within a reasonable geographic area around it. This concept is made explicit in a few state statutes[39] and is also a concept familiar to workers' compensation experts.[40]

At trial, Freeman, Giboo's vocational expert, testified that Dunlap should be the primary community from which to conduct an assessment of Giboo's earning capacity. Other areas—including Omaha/Council Bluffs—may also factor into the calculation so long as it would be practical for Giboo to accept employment there. Freeman's testimony in this regard parallels the conclusions reached by courts from other jurisdictions.

In *Kelly Services v. Industrial Com'n*,[41] the Arizona Court of Appeals addressed whether an employee who lived and worked in Yucca, Arizona, should be required to seek work in neighboring towns with greater employment opportunities. In particular, the employer argued that the claimant should be required to seek employment in either Kingman, Arizona, or Lake Havasu City, Arizona, towns 24 and 34 miles from Yucca, respectively. The court declined to adopt a bright-line rule either excluding or including those communities in the claimant's labor market. Instead, the court adopted a circumstantial reasonableness test under which areas in the vicinity of one's hub community would also be taken into consideration so long as "a reasonable person in the claimant's situation would probably seek employment there."[42] The court further noted that "[i]n making such a determination, a totality of the circumstances approach,

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[39] Idaho Code Ann. § 72-430 (2006), *construed in Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989); S.D. Codified Laws § 62-4-52(1) (2004).

[40] 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 84.01(4) (2007).

[41] *Kelly Services, supra* note 8.

[42] *Id.* at 20, 106 P.3d at 1035.

in which all relevant factors are considered, should be used."[43] While not an exhaustive list, the court then explained that

> relevant considerations in determining whether a potential job lies within a person's geographical labor market area would typically include [(1)] availability of transportation, [(2)] duration of commute, and [(3)] length of workday. . . . It would also include [(4)] the ability of the person to make the commute based on his physical condition.[44]

The Pennsylvania Supreme Court uses the same approach as the Arizona Court of Appeals, but also places some weight on whether the particular geographic area outside the hub community is an "'area where others [from] the same community would accept employment.'"[45]

These standards essentially mirror the testimony of Freeman, who also emphasized that Giboo's 6-hour-workday limitation and potential inability to make a long commute should be considered when evaluating the relevance of areas around Dunlap. Freeman also emphasized one additional factor which the Arizona Court of Appeals and Pennsylvania Supreme Court did not specifically touch upon: the amount of wages the claimant could expect to earn in the prospective community. As Freeman testified, it would be impractical for an individual to make a 2-hour roundtrip each day to Omaha/Council Bluffs for jobs which pay only $6 per hour.

[11,12] We agree with the above and therefore hold that communities surrounding the claimant's hub community should be considered part of the claimant's labor market, but only to the extent that it would be reasonable for the claimant to seek work in that location. This reasonableness determination should be based on the totality of the circumstances, with regard for such factors as (1) availability of transportation, (2) duration of the commute, (3) length of the workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, and (5) economic feasibility

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[43] *Id.*

[44] *Id.* (citations omitted). See, also, *Litzinger v. W.C.A.B. (Builders Transp.)*, 731 A.2d 258 (Pa. Commw. 1999).

[45] *Dilkus v. W.C.A.B.*, 543 Pa. 392, 399, 671 A.2d 1135, 1139 (1996).

of a person in the claimant's position working in that location. Regard might also be given to the more generalized inquiry of whether others who live in the claimant's hub community regularly seek employment in the prospective area.

[13-15] Nebraska law contemplates that court-appointed vocational rehabilitation experts will help courts identify vocational rehabilitation plans and apply the statutory factors used to assess disabled employees' earning capacities.[46] The above factors should be used by courts—and the court-appointed vocational experts guiding them—when selecting the relevant areas to use in setting a claimant's vocational rehabilitation plan and loss of earning capacity. Of course, the opinion of the court-appointed expert is given a rebuttable presumption of validity[47] and a party who disagrees with that opinion has the burden to show that it is inaccurate.[48] Obviously, the rebuttable presumption in favor of the court-appointed expert's opinion can be rebutted by a showing that his or her assessment was predicated on principles that are contrary to law. So, for example, a claimant would have the burden to show that in conducting his or her assessment, the court-appointed expert incorrectly considered an area around the hub community where employment opportunities are not reasonably available to the claimant. Similarly, an employer would have the burden to show that in conducting his or her assessment, the court-appointed expert incorrectly omitted an area near the hub community where employment opportunities *are* reasonably available to the claimant.

Based on the preceding discussion, it is possible that Omaha/Council Bluffs may be taken into account in assessing Giboo's earning capacity. However, any consideration of Omaha/Council Bluffs would be based on its proximity to Dunlap—approximately 50 miles—*not* by virtue of the fact that Omaha/Council Bluffs was the community where Giboo lived and worked at the time of her vocational injury.

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[46] See § 48-162.01(3).

[47] See *id.*

[48] See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

2. Statutory Presumption in Favor of Utley's Assessment

Giboo also challenges the trial court's decision to adopt the assessment of Utley, the court-appointed vocational expert. Giboo believes Utley erroneously concluded that Giboo suffered a mere 35-percent reduction in her earning capacity as a result of her injuries. Accordingly, Giboo believes the court erred in adopting Utley's assessment.

[16] As noted above, Nebraska law provides that trained vocational experts will help workers' compensation courts handle compensation claims by disabled employees.[49] While the opinion of the court-appointed expert is given a rebuttable presumption of validity,[50] a party who disagrees with the expert's conclusions may overcome this presumption by showing that those conclusions are inaccurate.[51] Again, one way of showing the inaccuracy of a court-appointed expert's opinion is to demonstrate that the opinion is based on assumptions which run contrary to law. A party can also show that the opinion of the court-appointed expert is inaccurate by offering proof that the nonexistence of a fact presumed by the court-appointed expert is more probable than is its existence.[52] As the Nebraska Court of Appeals has observed, a party might carry his or her burden by, among other things, presenting the testimony of his or her own vocational expert.[53]

(a) Improper Focus on Labor Market

Giboo claims that Utley failed to give due consideration to Dunlap—and overly emphasized Omaha/Council Bluffs—in conducting his assessment of Giboo's earning capacity. At trial and during oral argument before this court, counsel for CTR insisted that Utley considered both the Omaha/Council

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[49] See § 48-162.01(3).

[50] See *id.*

[51] *Dawes, supra* note 48.

[52] *Id.*

[53] See, *Romero v. IBP, inc.*, 9 Neb. App. 927, 623 N.W.2d 332 (2001); *Stansbury v. HEP, Inc.*, 3 Neb. App. 712, 530 N.W.2d 284 (1995), *reversed on other grounds* 248 Neb. 706, 539 N.W.2d 28. See, also, *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

Bluffs *and* Dunlap communities in conducting his assessment of Giboo's earning capacity. However, this suggestion runs counter to Utley's reports admitted into evidence.

In his report dated July 18, 2005, Utley states, "After developing . . . Giboo's vocational profile and eliminating occupations that would not be compatible with these restrictions, her loss of access to suitable jobs *in the Omaha/Council Bluffs labor market* was determined to be approximately 25%." (Emphasis supplied.) Later in that same report, Utley noted that wage surveys for jobs suited to Giboo pay "in the range of $268.00 per week to $530.00 per week *in the Omaha/Council Bluffs labor market.*" (Emphasis supplied.) Utley's report concludes in the following manner: "This opinion is expressed with a reasonable degree of vocational certainty and *is based upon . . . Giboo's . . . access to jobs in the Omaha/Council Bluffs labor market area.*" (Emphasis supplied.)

Dunlap was not referenced in the body of the report. Utley only referenced Dunlap at the very beginning of his report where he listed Giboo's current residence as "Dunlap, IA." Utley's second report, issued after Giboo was limited to a 6-hour workday, is identical to the first report in these respects.

These statements certainly support the belief that Utley considered only Omaha/Council Bluffs in conducting his assessment of Giboo's earning capacity. At a minimum, the repetitive use of "Omaha/Council Bluffs" as the labor market indicates that Utley regarded Omaha/Council Bluffs as the primary community rather than Dunlap. It appears Utley's approach to the labor market issue conflicts with our holding that Dunlap is the hub community. Utley should have used Dunlap as the hub community and only considered Omaha/Council Bluffs if doing so would be reasonable under the circumstantial factors set forth earlier. Because Utley apparently did not do either of these things, his assessment is predicated on principles which are contrary to law.

(b) Failure to Adjust Giboo's Loss of Access

Giboo also challenges the accuracy of Utley's ultimate assessment of the extent of Giboo's diminished earning capacity. In his report dated July 18, 2005, Utley concluded that Giboo had

suffered a 25-percent loss of access to jobs and a 30-percent reduction in earning capacity overall. After Giboo's physician limited her to a 6-hour workday, Utley amended his earning capacity assessment from a 30-percent reduction to a 35-percent reduction. However, his loss of access estimate remained at 25 percent.

Utley's failure to adjust his assessment of Giboo's loss of access despite her 6-hour-workday limitation suggests that Utley did not believe that such a limitation would reduce her access to jobs. But it simply cannot be true that a worker who is permanently limited to a maximum of 6 hours of work per day will have the same access to jobs as a worker with no such limitation. In fact, this very case demonstrates that fact. The record shows that CTR went out of its way to accommodate Giboo's numerous movement and weight-bearing limitations after her accident and even reassigned her to different positions of employment in order to keep her on staff. However, when Giboo was permanently limited to a 6-hour workday by her physicians, even CTR could not bring itself to accommodate this limitation and Giboo's employment was terminated. Therefore, Utley's assumption that a 6-hour-workday limitation would not affect Giboo's access to jobs is not accurate. As a result, the numerical conclusions which depended upon that assumption must also be inaccurate under the principles we outlined above.

That Utley changed his assessment of Giboo's earning capacity from a 30-percent reduction to a 35-percent reduction does not save his assessment. All other things being equal, a person who can work no more than 6 hours per day will obviously earn less than an individual with no such limitation. Utley's conclusion that Giboo's 6-hour-workday limitation resulted in an additional 5-percent reduction in her overall earning capacity merely reflects this basic fact. But such a limitation would also reduce a person's earning capacity by virtue of the fact that it reduces the number of jobs available to that individual.

Freeman, Giboo's own vocational expert, testified in support of those points. While she did not prepare an earning capacity report of her own, Freeman indicated that such a report was not necessary for her to determine that Utley's assessment

was erroneous. The trial court discounted Freeman's testimony based on the court's erroneous belief that Freeman did not think employment opportunities in Omaha/Council Bluffs were relevant. This conclusion is clearly erroneous.

During cross-examination by counsel for CTR, Freeman was asked whether she thought it was appropriate to consider both Dunlap and Omaha/Council Bluffs in the earning capacity analysis. Freeman gave a qualified answer in which she stated that consideration of employment opportunities in Omaha/Council Bluffs would depend on whether it was practical for Giboo to take the particular job. Freeman referenced such considerations as the amount of wages and length of commute.

Shortly thereafter, Freeman was asked the same question by counsel for CTR. This time, Freeman seemed to indicate that employment opportunities in Omaha/Council Bluffs should *not* be considered at all. However, Freeman immediately retracted the statement and stated that she did not understand counsel's question. Counsel promised to pose the question again, but did not. Nevertheless, on no less than five subsequent occasions, Freeman testified that although jobs in Omaha/Council Bluffs might be relevant, it would depend on several circumstantial factors. On at least one of these occasions, Freeman's answer came in response to a question from the bench. In light of Freeman's repetitive statements, the court clearly erred in concluding that Freeman did not think jobs in Omaha/Council Bluffs were relevant. As such, the court erred in discounting the importance of Freeman's testimony. Rather than present an inaccurate view of the relevant issues, Freeman's prescient testimony actually mirrored the two-part approach we adopt today.

In sum, it is clear that Utley's assessments of Giboo's earning capacity contain several errors. The assessments not only depend on an incorrect understanding of the labor market issue, they also present calculations that depend on demonstrably false assumptions. As a result, the trial court erred by relying on Utley's assessments over Freeman's contrary testimony.

### 3. Rule 11 Claim

In her final assignment of error, Giboo argues that the trial court violated Workers' Comp. Ct. R. of Proc. 11(A) (2006)

by failing to issue a "reasoned decision." At the time, rule 11 provided:

> **A. Reasoned Decisions.** All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

Rule 11 provides that lower court decisions must facilitate appellate review. Although the trial court's order was somewhat ambiguous at times, it nonetheless provided the basis for meaningful appellate review. The trial court made conclusions of law regarding the labor market issue. It also concluded that Giboo suffered a 35-percent reduction in her earning capacity due to her disability and cited Utley's report as the basis for that conclusion. The court considered and rejected the testimony by Freeman. This assignment of error is without merit.

## VI. CONCLUSION

We conclude that Dunlap should serve as the hub community from which to assess Giboo's earning capacity. This conclusion is premised upon evidence in the record which tends to show that Giboo had a good-faith basis to move from Omaha to Dunlap, as well as CTR's concession that no contrary evidence exists regarding Giboo's motive. However, we nonetheless find it necessary to reverse the order of the compensation court review panel with directions to remand the cause to the trial court to determine the exact value of Giboo's earning capacity in light of her disability and new place of residence.

Because Utley did not regard Dunlap as the hub community and failed to adjust Giboo's loss of access figure, his opinion is not entitled to any presumption of correctness on remand. Rather, the trial court's assessment of Giboo's earning capacity should be based on all the evidence in the record, as well as additional evidence offered by the parties and evidence presented by Freeman. Finally, the trial court is to rely on the

totality of the circumstances when considering whether any communities around Dunlap should factor into the assessment of Giboo's earning capacity.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
DANNY L. SING, APPELLANT.

746 N.W.2d 690

Filed April 4, 2008. No. S-07-345.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support 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.
2. **Homicide: Intent: Words and Phrases.** A person kills with premeditated malice if, before the act causing the death occurs, the person has formed the intent or determined to kill the victim without legal justification.
3. **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.
4. **Trial: Pleadings: Proof: Appeal and Error.** In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in which the questions were asked.
5. **Criminal Law: Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, Mikki C. Jerabek, and Scott C. Sladek for appellant.

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

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

WRIGHT, J.

## NATURE OF CASE

Danny L. Sing was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon, following the death of Edi Torres. Sing was sentenced to life in prison, a consecutive term of 5 to 10 years in prison for use of a weapon, and a concurrent term of 5 to 10 years for possession of a deadly weapon. He appeals.

## SCOPE OF REVIEW

[1] In reviewing a claim that the evidence was insufficient to support 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. See *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

## FACTS

Sing lived on South 9th Street in Omaha, Nebraska. A common driveway ran between Sing's house and the house next door, in which Loc Nguyen and Johanna Nguyen resided. The Nguyens had moved in several weeks prior to September 30, 2005, and in that time, police had been called to the Nguyens' house for a noise complaint and a complaint about a dog. The police had also towed a vehicle from the backyard of the Nguyens' house.

Torres was a friend of Loc's and often came to the Nguyens' house to lift weights. On September 30, 2005, Loc and Torres made plans to meet around midnight. When Loc and Johanna arrived home, Torres was waiting on the enclosed front porch. Because Loc had sprained his hand and could not lift weights, he and Torres decided to buy some beer. Loc, Johanna, and Torres were on the porch when Sing came over at about 1 a.m.

Sing drank two or three beers in 15 to 30 minutes. He repeatedly talked about a stolen vehicle that had been parked behind the Nguyens' house. Loc asked Sing if he had called the police about the vehicle, and Sing said he was not a "snitch."

Because Loc's wrist was wrapped, Sing repeatedly asked Loc what was wrong with his wrist. Loc finally responded that he was about to sprain his other wrist if Sing did not stop asking about it. Loc, Johanna, and Torres all laughed at this, but Sing did not. At Loc's suggestion, Sing left, and Loc secured the door to the porch.

A few minutes later, Loc saw Sing run up the steps to the porch. Torres was seated on a chair, Johanna was sitting on the weight bench, and Loc was standing against the house near Johanna. Sing tried to open the door, but it was locked. He had a small pistol in his left hand and a shotgun in his right hand. Sing asked Loc if he had "anything to say now" and asked Loc and Torres if they were "tough now." Sing pointed the pistol at Loc and Torres, and the muzzle of the pistol was touching the glass in the door.

Torres told Sing not to point the gun at him or anyone else. Sing then pointed the pistol at Loc's face and fired, but Loc dodged and the shot missed him. Torres told Loc to take Johanna inside the house, and Loc walked behind Johanna to protect her. Before Johanna got into the house, she heard a gunshot that was louder than the first. As Loc reached the doorway, he looked at Torres to tell him to come into the house. At that moment, a gun was fired and Loc saw Sing with both hands on the shotgun, which was pointed at Torres. Torres was knocked backward, and his chair flew against the wall. Loc saw Sing run away.

Inside the house, Johanna called the 911 emergency dispatch service. Loc went into the kitchen, grabbed two knives, and went to the back door because he thought Sing might try to return through that door. Loc then returned to the front porch and saw Torres struggling to move. When medical personnel arrived, Loc told them to hurry because Torres was badly injured. Loc saw Sing on his porch, looking out. When the police arrived, Loc directed them to Sing's house. Torres died later that day from a gunshot wound to the head. The shot had been roughly parallel to the top of Torres' head.

Police officers ordered Sing to come out of his house, and he was taken into custody. Police found a shotgun shell on the ground near the garage of Sing's house and a shotgun in a

wooded area behind Sing's house. The shotgun was test fired and found to be operational.

Sing told the officer who transported him to police headquarters that he had gone next door to confront Loc and Johanna about a car which had been "dumped" in his backyard and that they laughed at him. He said that Loc and Torres told him they were going to "storm troop his residence, kill him, [and] rape his wife." Loc and Johanna denied that anyone made any threats to Sing and denied that there had been foul language spoken that night or raised voices.

During a police interview the morning of October 1, 2005, Sing stated that he had gone to tell the Nguyens that they lived in a quiet neighborhood and that it was not "cool" to bring the police around. Sing claimed Loc stated that if they found out Sing had called the police about the stolen car, they would come to his house, rape his wife or girlfriend, and kill him while he was sleeping. Sing gave several explanations for the events of the night of September 30, 2005: (1) He got his guns from his house and went next door because he wanted to scare the Nguyens and Torres; (2) the shooting was an accident; (3) he stumbled, and the shotgun went off; and (4) he blacked out and had no memory of that segment of time.

Sing told police that he did not have to work on September 30, 2005, and that he began drinking about 11 a.m. He claimed that he consumed approximately 34 beers between 11 a.m. and 5 p.m. and napped until about 8 p.m. When his girlfriend arrived home, they went to a neighborhood bar. He claimed to have consumed six or seven beers there, as well as seven shots of liqueur. Sing then went home and drank "a couple" of beers before going to the Nguyens' house.

Sing was charged in an amended information with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. A jury returned verdicts of guilty on all three charges.

Sing was sentenced to life in prison for first degree murder and 5 to 10 years' imprisonment for use of a weapon to commit a felony, to be served consecutively to the life sentence. He was sentenced to 5 to 10 years' imprisonment for possession of a deadly weapon by a felon, to be served concurrently to the

sentence for the weapons conviction. He was given credit for time served of 522 days against the sentence imposed for first degree murder.

## ASSIGNMENTS OF ERROR

Sing's assignments of error can be summarized to allege that the evidence was insufficient to support the conviction for first degree murder and that the district court erred in sustaining the State's motion in limine regarding the victim's alleged gang affiliation.

## ANALYSIS

### Sufficiency of Evidence

Sing asserts that the evidence was insufficient to support the conviction for first degree murder. He argues that the State failed to prove that he killed Torres purposely and with deliberate and premeditated malice. Neb. Rev. Stat. § 28-303(1) (Cum. Supp. 2006) provides that the killing must be committed "purposely and with deliberate and premeditated malice." Sing claims that the evidence never established such intent and that the record supports a finding that the death was the result of an accident. He alleges that he had consumed an excessive amount of alcohol, he was verbally threatened by Loc and Torres, and the shotgun discharged when he stumbled in his drunken state.

The jury was given a step instruction stating that Sing could be found guilty of first degree murder, second degree murder, or manslaughter, or found not guilty. It was also given an instruction defining intoxication as a defense. Although Sing argues that the facts support a manslaughter charge, we note that the jury was given this option, but did not make that factual finding.

Concerning the elements of first degree murder, we have held that deliberate means "not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act." *State v. Robinson*, 272 Neb. 582, 627, 724 N.W.2d 35, 73 (2006). Premeditated means the actor has formed a design to commit an act before it is done. See *State v. Robinson, supra*.

[2,3] A person kills with premeditated malice if, before the act causing the death occurs, the person has formed the intent or determined to kill the victim without legal justification. See *id*. There is no particular length of time required for premeditation, as long as the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. See *id*. It is for the jury to decide whether the defendant acted with premeditation. See *id.* 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. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

Loc testified that Sing returned to the porch with two guns and asked Loc if he had "anything to say now." Sing pointed a pistol directly at Loc and fired, but he missed. As Loc attempted to go into the house with Johanna, a shot was fired and he saw Sing with both hands on the shotgun. Torres was knocked back against the wall, and Sing ran away. This evidence is sufficient to demonstrate beyond a reasonable doubt that Sing intended to kill Torres. Sing formulated the design to commit the act by going to his house and returning to the Nguyens' house with two guns. It may be reasonably inferred from Sing's actions and the circumstances surrounding the incident that he had the intent to kill Torres purposely and with deliberate and premeditated malice.

Sing argues that "the homicide was the result of an accident and [was] not committed purposely with deliberate and premeditated malice." Brief for appellant at 11. Sing contends that he had two weapons, was standing in front of the porch, discharged the pistol into the doorjamb, stumbled, and then accidentally discharged the shotgun. His defense was that the shooting was an accident.

The record does not support this argument. The witnesses testified that Sing did not appear to stumble or fall as he came up the steps with the guns. None of the police officers who had contact with Sing observed any instability due to intoxication. The autopsy revealed that Torres died from a gunshot

that was approximately parallel to the top of his head. Loc saw Sing point the shotgun at Torres. The shotgun was tested and found to be operational. It fired as it was designed, with no defects. It had a trigger guard that would keep the trigger from being depressed if the gun was dropped. The guard was not found to be defective. There was no evidence that the shotgun was accidentally discharged or that Sing stumbled due to his intoxication.

Sing also argues that neither Loc nor Johanna witnessed Sing discharge the shotgun. The record does not support this claim. Loc and Johanna testified that they saw Sing point the pistol and shoot in Loc's direction. Immediately after hearing a second shot, Loc saw Sing with both hands on the shotgun, which was pointed at Torres.

In reviewing a claim that the evidence was insufficient to support 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. See *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007). The evidence admitted at Sing's trial was sufficient to support the murder conviction. Sing's assignment of error has no merit.

## Motion in Limine

Sing claims the district court erred in sustaining the State's motion in limine concerning Torres' alleged affiliation with a street gang. Prior to trial, the State argued that Sing's opinion concerning an alleged affiliation between Torres and a gang was speculation and was not relevant. Sing claimed that it was relevant to his state of mind and to explain why he feared Torres and Loc. Sing also claimed that gang members had attended gatherings at the Nguyens' house.

When the motion in limine was made, defense counsel indicated that Sing would testify at trial. The district court reserved final ruling on the receipt of gang evidence in relation to Sing's state of mind. The court directed that witnesses were not to be

asked whether they were members of a gang and that Torres was not to be identified as a gang member.

Following the testimony of four police officers at trial, the issue of gang affiliation was raised again. Sing sought to present evidence that he returned to the Nguyens' residence with two guns because he believed Torres was a member of a gang based on a tattoo of the number 13 on Torres' ear. Sing intended to solicit testimony from a police officer that would support Sing's contention that he was afraid of Torres. The district court ruled that witnesses could not testify whether Sing was fearful that Torres was a member of a gang. The court stated that it would allow the witnesses to testify about subjects previously mentioned during the trial, including a stolen car, threats made to Sing, and a tattoo of the number 13. The court stated it would not allow questions regarding the alleged gang affiliation of persons who visited the Nguyens' house.

Sing did not testify at trial. The evidence of his motive and intent was presented through the testimony of a police officer who had interviewed Sing. There was no evidentiary ruling by the district court that would have excluded testimony by Sing concerning his knowledge of whether Torres had any gang affiliation. Nor was there any testimony concerning how such affiliation may have affected Sing's state of mind.

Neb. Rev. Stat. § 27-103 (Reissue 1995) provides:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

See, also, *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

[4] In order to preserve any error before this court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in which the questions were asked. *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803

(1990). See, also, *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004). There was no offer of proof made concerning any testimony related to alleged gang affiliation. There are only two references in the trial transcript that might be construed to relate to gang affiliation. One of the police officers stated that Sing described one of the individuals next door as a Hispanic male, 20 years old, with the number 13 tattooed on his right ear. The physician who completed the autopsy stated that Torres had a tattoo of the number 13 on his left ear. Sing made no offer of proof as to any witness who would have testified that Torres was a gang member or that any gang members had visited the Nguyens' home. No one testified and no offer of proof was made to suggest that Sing returned to the Nguyens' home with guns because he felt threatened by Loc or Torres due to their affiliation with a gang.

Sing argues that testimony about the gang affiliation of Torres and Loc was relevant to Sing's state of mind, specifically his fear of Torres and Loc, who Sing claimed had threatened him earlier. Sing claims that he was prejudiced because he was not allowed to present an essential aspect of his defense.

This argument has no merit. Sing did not testify. The defense presented only two witnesses: a bartender who testified as to the amount of alcohol Sing consumed the evening of the shooting and a police officer who interviewed Johanna. Apparently, the officer's testimony was intended to impeach Johanna's testimony concerning Sing's level of intoxication.

Sing did not make an offer of proof concerning testimony about gang affiliation, which testimony he claims should have been admitted. Because he did not make a record, there is nothing to support his claim that the district court wrongly sustained the motion in limine.

## Sentences

The district court sentenced Sing to life in prison for first degree murder; to a term of 5 to 10 years in prison for use of a weapon to commit a felony, to be served consecutively to the life sentence; and to a term of 5 to 10 years in prison for the possession of a deadly weapon by a felon, to be served concurrently to the sentence for the weapons conviction. Sing was

given credit for time served (522 days) against the sentence imposed on the first degree murder conviction. We find plain error in the allocation of credit for time served.

When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001), citing *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[5] A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled. *State v. Ildefonso, supra*. Sing is entitled to receive credit for 522 days served, but the credit should be applied against the sentence for use of a weapon rather than against the sentence for first degree murder. We therefore modify Sing's sentences by ordering that the credit for time served be applied against the sentence for use of a weapon to commit a felony.

## CONCLUSION

The evidence was sufficient to support the conviction for first degree murder, and the district court did not err in sustaining the State's motion in limine concerning evidence of gang affiliation. Thus, Sing's convictions are affirmed.

The sentencing order incorrectly granted Sing credit for time served against the life sentence. We modify the sentence to apply credit for time served to the sentence for use of a weapon to commit a felony. The sentences are, in all other respects, affirmed.

AFFIRMED AS MODIFIED.

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Mark D. Kratina, respondent.

746 N.W.2d 378

Filed April 4, 2008. No. S-07-578.

Original action. Judgment of suspension.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

## INTRODUCTION

On May 25, 2007, formal charges were filed by the office of the Counsel for Discipline, relator, against Mark D. Kratina, respondent. The formal charges included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); and Canon 5, DR 5-103(B) (improperly advancing or guaranteeing financial assistance to client), as well as the following provisions of Neb. Ct. R. of Prof. Cond. (rev. 2005): rules 1.8(e) (providing financial assistance to client), 8.4(a) (violating disciplinary rule), and 8.4(d) (engaging in conduct prejudicial to administration of justice). The formal charges also alleged that respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer in effect disputed certain of the allegations.

A referee was appointed who heard evidence. The referee filed a report on December 28, 2007. With respect to the formal charges, the referee concluded that respondent's conduct had violated DR 1-102(A)(1) and (5), DR 5-103(B), rule 1.8(e) and rule 8.4(a) and (d), and his oath as an attorney. The referee recommended that respondent be suspended from the practice of law for 60 days.

On January 7, 2008, respondent filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon. Also on January 7, relator filed its response to respondent's motion, in which relator

indicated it did not object to the motion. We grant respondent's motion, and we impose discipline as indicated below.

## FACTS

The referee's hearing was held on October 30, 2007. Respondent testified during the hearing. A total of seven exhibits were admitted into evidence.

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska in 1976. He has practiced in Douglas County, Nebraska.

With regard to the allegations in the formal charges, the referee found that respondent represented Patricia Hill in a personal injury case arising out of a trip-and-fall accident in June 2004. As a result of her injury, Hill sustained a significant knee injury, and she became unemployed. She remained unemployed for the entire time period relevant to the present disciplinary proceeding.

The referee found that during the pendency of Hill's personal injury case, respondent made certain payments to or on behalf of Hill, including sums to pay for transportation and vehicle expenses, health insurance premiums, and rent. With regard to the transportation and vehicle expenses, the referee specifically found that respondent advanced sums to Hill to pay cabfare so that Hill could attend doctor's appointments to receive medical treatment related to her injury, to pay certain fines so that Hill could have her driver's license reinstated, to pay Hill's motor vehicle registration and licensing, to pay for repairs to Hill's vehicle, to pay for Hill's loan payment on her car, and to pay to redeem Hill's car from repossession. The referee found that the total amount respondent advanced to Hill exceeded $11,000.

In December 2006, Kratina was able to successfully settle Hill's personal injury case for the total amount of $125,000. Pursuant to his fee agreement with Hill, Kratina received as his fee one-third of the settlement proceeds, and he was also reimbursed for all costs and expenses he had paid to or on behalf of Hill during the pendency of the case.

In his report, the referee noted as mitigating factors respondent's cooperation during the disciplinary proceeding and the

fact that respondent was not motivated by self-interest or personal gain in making the advancements to Hill. The referee also noted that Hill suffered no direct harm or loss as a result of respondent's actions. The referee noted as aggravating factors two prior reprimands respondent had received: On March 28, 1994, respondent received a private reprimand for the mishandling of certain funds. On January 5, 2001, respondent received a public reprimand as a result of an imbalance in his trust account; however, as part of that public reprimand it was stipulated that "'no misappropriations had been shown and the discrepancy in the account occurred due to mere negligence.'"

Based upon the evidence offered during the hearing, the referee found that certain of respondent's actions constituted a violation of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (5) and DR 5-103(B). The referee also found that certain of respondent's actions constituted a violation of rule 1.8(e) and rule 8.4(a) and (d) of the Nebraska Rules of Professional Conduct. Finally, the referee found that respondent's actions constituted a violation of respondent's oath of office as an attorney. With respect to the discipline to be imposed, the referee recommended that respondent be suspended from the practice of law for 60 days.

No exceptions were filed to the referee's report. On January 7, 2008, respondent filed a motion for judgment on the pleadings, in which respondent moved this court to enter judgment in conformity with the referee's report and recommendation. On January 7, relator filed a response to the motion, stating that "Relator does not object to Respondent's [motion] that the Court enter judgment based upon the Referee's report and recommended sanction."

## ANALYSIS

We note that certain of respondent's conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility. We also note that certain of respondent's conduct at issue in this case occurred on or after September 1, 2005, and is therefore governed by the Nebraska Rules of

Professional Conduct. We are guided by the principles previously announced in our prior decisions under the Code of Professional Responsibility. See *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), respondent filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007).

Respondent is charged with advancing sums to his client for such things as transportation and vehicle expenses, insurance premiums, and rent. We note that the disciplinary rules were mandatory before September 1, 2005, that a lawyer "shall not advance or guarantee financial assistance to the client" in connection with contemplated or pending litigation. DR 5-103(B). The disciplinary rules remained mandatory on and after September 1, 2005, that a lawyer "shall not provide financial assistance to a client in connection with pending or contemplated litigation." Rule 1.8(e). Both rules provide exceptions for the advancement of litigation expenses, such as court costs. However, we conclude that neither rule permits an attorney to make advances to his or her client to pay for the transportation and vehicle-related expenses, health insurance premiums, and rent payments that were advanced in the instant case. Compare, *Attorney Griev. Comm'n v. Eisenstein*, 333 Md. 464, 635 A.2d 1327 (1994) (stating that rule 1.8(e) contains exceptions for court costs and litigation expense but not for humanitarian acts); *Rubenstein v. Statewide Grievance*

*Committee*, No. CV020516965S, 2003 WL 21499265 (Conn. Super. June 10, 2003) (unpublished opinion) (discussing rule 1.8(e) and stating that lawyer must not advance money for rent even under threat of eviction).

Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted. Specifically, based upon the foregoing evidence, we conclude that by virtue of respondent's conduct occurring before September 1, 2005, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (5) and DR 5-103(B). We also conclude that by virtue of respondent's conduct occurring on or after September 1, 2005, respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: rule 1.8(e) and rule 8.4(a) and (d). Finally, we conclude that by virtue of respondent's conduct, respondent has violated his oath of office as an attorney, § 7-104.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Dortch, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id*. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. *Id*.

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration of the record, the court finds that respondent should be and hereby is suspended from the practice of law for a period of 60 days, effective immediately. Respondent shall 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. At the end of the 60-day suspension period, respondent may apply to be reinstated to the practice of law, provided that respondent has demonstrated his compliance with rule 16, and further provided that relator has not notified this court that respondent has violated any disciplinary rule during his suspension.

## CONCLUSION

We find by clear and convincing evidence that respondent violated DR 1-102(A)(1) and (5), DR 5-103(B), rule 1.8(e) and rule 8.4(a) and (d), and his oath as an attorney. It is the judgment of this court that respondent be suspended from the practice of law for a period of 60 days. Respondent shall comply with disciplinary rule 16, 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), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

# Maria Cruz-Morales, appellee, v. Swift Beef Company, appellant.

746 N.W.2d 698

Filed April 4, 2008. No. S-07-812.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
4. **Workers' Compensation: Default Judgments.** Under Neb. Rev. Stat. § 48-162.03(1) (Reissue 2004), the Workers' Compensation Court has authority to rule on motions for default judgment.
5. **Workers' Compensation: Courts.** The Workers' Compensation Court may not establish procedural rules that are more restrictive or onerous than those of the trial courts in this state.
6. ____: ____. When deciding whether a Workers' Compensation Court rule is more restrictive or onerous than the procedural rules of the state trial courts, a court should consider whether the rule restricts the procedural safeguards offered in the state's trial courts.
7. **Workers' Compensation: Default Judgments: Notice.** Under Workers' Comp. Ct. R. of Proc. 3 (2006), a party in default for failure to answer or appear is entitled to notice of a default judgment motion.

Appeal from the Workers' Compensation Court. Reversed and remanded.

Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Lee S. Loudon and Ami M. Huff, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

CONNOLLY, J.

Following an injury at work, Maria Cruz-Morales filed an action against her employer, Swift Beef Company (Swift Beef). Swift Beef failed to answer, and Cruz-Morales moved for a default judgment. After a trial judge of the Nebraska Workers' Compensation Court entered a default judgment and award, Swift Beef moved to vacate the default judgment. Swift Beef argued that the Workers' Compensation Court lacked statutory authority to enter default judgments and, in the alternative, that Swift Beef did not receive proper notice of the default judgment motion or hearing. The trial judge overruled Swift Beef's motion, and Swift Beef appealed to the Workers' Compensation Court's review panel. The review panel affirmed the default judgment and award.

This appeal presents the question whether the Workers' Compensation Court has statutory authority to enter default judgments and, if so, whether Swift Beef was entitled to notice of the default judgment motion and hearing. We reverse, and remand. We conclude that the compensation court has authority to enter a default judgment when a party fails to answer or appear. But the defaulting party must be given notice of the motion for default judgment under Workers' Comp. Ct. R. of Proc. 3 (2006).

## BACKGROUND

In September 2006, Cruz-Morales filed a petition against Swift Beef in the Workers' Compensation Court. The petition alleged that she injured her back in a slip-and-fall accident while working for Swift Beef in September 2005. In November 2006, Cruz-Morales moved for default judgment because Swift Beef had not filed an answer. Attached to the motion was an affidavit stating the Workers' Compensation Court had issued summons to Swift Beef and its registered agent. The affidavit also stated that the court had received signed returned receipts from Swift Beef and the agent.

The trial judge held a hearing on Cruz-Morales' motion for default judgment. Swift Beef did not appear. Cruz-Morales testified. She offered, and the trial judge received, 13 exhibits. These exhibits included medical records and a list of weekly

earnings. In addition, the record reflects a loss of earning capacity analysis by David Utley, a court-appointed vocational rehabilitation counselor, and a loss of earning capacity rebuttal report by Gayle Hope, Cruz-Morales' expert. Utley opined that Cruz-Morales sustained a loss of earning capacity of about 15 percent. Hope concluded that Cruz-Morales had sustained a 69-percent loss of earning capacity.

On December 8, 2006, Swift Beef moved to stay entry of the order on Cruz-Morales' default judgment motion. The motion to stay alleged that Swift Beef did not attend the default judgment hearing because it had not received notice of the motion or the hearing. According to Swift Beef's motion to stay, Swift Beef learned of the default judgment motion on December 8. The motion to stay requested that the trial judge stay entry of an order to allow Swift Beef the opportunity to assess and defend its interests in the matter.

That same day, however, the trial judge entered a default judgment and award against Swift Beef. The judge decided Cruz-Morales was entitled to, among other things, future medical care and vocational rehabilitation. She also determined that Utley's opinion as to Cruz-Morales' loss of earning capacity had been rebutted by Hope. The judge adopted Hope's opinion that Cruz-Morales had suffered a 69-percent loss of earning capacity.

Following entry of the court's order, Swift Beef moved for an order (1) correcting a patent error in the default judgment and award under Neb. Rev. Stat. § 48-180 (Reissue 2004) or, in the alternative, (2) vacating the default judgment order. As the basis for both motions, Swift Beef argued that the compensation court lacked statutory authority to enter a default judgment upon a party's failure to file an answer. Swift Beef also argued in the alternative that the default judgment was improper because Swift Beef was not properly served with notice of the default judgment motion or hearing. In support of the second argument, Swift Beef explained that Cruz-Morales' motion and notice of hearing was served on the following: Swift Beef Company, P.O. Box 540010, Omaha, NE 68154-0010. Swift Beef presented evidence showing this address was the mailing address for Sedgwick Claims

Management Services (Sedgwick). Sedgwick was the third-party administrator for Swift Beef's workers' compensation claims through July 31, 2006. Sedgwick, however, was no longer Swift Beef's third-party administrator when Cruz-Morales sent the notice of the default judgment motion to that address. Swift Beef also presented evidence that the proper post office box for Swift Beef claims, when Sedgwick was still Swift Beef's third-party administrator, was P.O. Box 540040. And P.O. Box 540010 was the address for claims involving ConAgra Beef Company, not Swift Beef. Although Swift Beef claimed it did not receive proper notice of the default judgment motion, the parties agreed that Swift Beef was properly served with the petition.

In a December 15, 2006, order, the trial judge overruled Swift Beef's motions. The judge concluded that "Rule 5 of the Nebraska Rules of Pleading calls into question [Swift Beef's] entitlement to notice of default when it has failed to answer." The judge further determined there was no patent and obvious error in her order granting default judgment, so Swift Beef's motion under § 48-180 was improper. Finally, the judge determined she had authority to consider and rule on motions for default judgment. The judge reasoned that Neb. Rev. Stat. § 48-162.03 (Reissue 2004) grants the compensation court general authority to hear and decide motions. But the judge concluded the compensation court did not have statutory authority to stay or vacate a default judgment.

Swift Beef appealed both the December 8 and 15, 2006, orders to the court's review panel. Swift Beef argued that the trial judge erred in granting the default judgment and in denying Swift Beef's motions to stay, to correct a patent error under § 48-180, and to vacate. To support these alleged errors, Swift Beef argued that the judge lacked authority to enter default judgments and that, in the alternative, Swift Beef was not provided proper notice of the default judgment motion. Swift Beef also claimed that the judge erred in finding Utley's opinion had been rebutted and in awarding Cruz-Morales a 69-percent loss of earning power. Finally, Swift Beef argued the judge erred in awarding Cruz-Morales payment of medical bills, future medical treatment, and vocational rehabilitation.

The review panel consolidated and reduced the errors Swift Beef had alleged to three: The trial judge erred in (1) entering a default judgment against Swift Beef, (2) denying Swift Beef's various motions to negate the default judgment, and (3) awarding benefits to Cruz-Morales. The review panel first determined that the trial judge had authority to enter the default judgment under § 48-162.03. The review panel also decided that the trial judge was correct in concluding she lacked authority to rule on a motion to vacate. The review panel rejected Swift Beef's argument that it was entitled to notice of the default judgment motion and hearing. Finally, the review panel concluded that the trial judge did not err in awarding a 69-percent loss of earning capacity, in awarding vocational rehabilitation benefits, or in awarding future medical benefits. The review panel affirmed the trial judge's orders.

## ASSIGNMENTS OF ERROR

Swift Beef assigns, restated and consolidated, that the review panel erred in (1) deciding that the Workers' Compensation Court has authority to enter a default judgment, (2) deciding the trial judge did not have authority to vacate a default judgment, (3) deciding Swift Beef was not entitled to notice of the default judgment motion and hearing, and (4) affirming the trial judge's award of a 69-percent loss of earning capacity, vocational rehabilitation benefits, and future medical care.

## STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[2]

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[1] See *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

[2] *Id.*

## ANALYSIS

### The Workers' Compensation Court Has Authority to Enter Default Judgments

[3] As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.[3] Swift Beef contends that there is no provision in the Nebraska Workers' Compensation Act granting the compensation court authority to enter a default judgment. Swift Beef argues that the "Workers' Compensation Act does not speak to default judgments anywhere."[4] Cruz-Morales contends that § 48-162.03 gives the court the authority to grant default judgments.

Section 48-162.03(1) provides in relevant part:

> The Nebraska Workers' Compensation Court or any judge thereof may rule upon any motion addressed to the court by any party to a suit or proceeding, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial or motions for reconsideration.

[4] From the plain language of § 48-162.03(1), the Workers' Compensation Court has authority to rule on motions for default judgment. The statute gives the court authority to rule upon "*any* motion"[5] except motions for new trial or motions for reconsideration. A motion for default judgment is not a motion for new trial or a motion for reconsideration.

In deciding the compensation court had authority to enter default judgments, the review panel did not rely on the "any motion" language in § 48-162.03(1). Instead, the panel concluded that Cruz-Morales' motion for default judgment was a motion for judgment on the pleadings. But Swift Beef argues, and Cruz-Morales agrees in her brief, that the motion for default judgment was not a motion for judgment on the pleadings. Swift Beef further argues that even if the motion for default judgment is equivalent to a motion for summary judgment, it

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[3] *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[4] Brief for appellant at 12.

[5] § 48-162.03(1) (emphasis supplied).

would not have been proper for the court to grant summary judgment because genuine issues of fact remained. We need not reach the issue of whether a motion for default judgment is a motion for judgment on the pleadings or a motion for summary judgment. The court's authority under § 48-162.03(1) is not limited to such motions. Instead, the statute's language grants the court broad authority to rule on any motion except motions for new trial and motions for reconsideration. Therefore, we conclude that the Workers' Compensation Court has statutory authority to enter default judgments.

### Swift Beef Was Entitled to Notice of the Motion for Default Judgment and Hearing

Having decided that the Workers' Compensation Court does have authority to enter default judgments, we next determine whether the review panel erred in affirming the trial judge's entry of default judgment. Swift Beef argues that the entry of default judgment was improper because Swift Beef did not receive notice of the default judgment motion. Although Cruz-Morales served notice of the motion and hearing, the notice was sent to the wrong address. Swift Beef does not argue that it did not receive notice of the original petition, just that it did not receive notice of the default judgment motion.

Swift Beef argued before the review panel that rule 3 of the Nebraska Workers' Compensation Court Rules of Procedure required notice of the default judgment motion. Rule 3(B) provides: "Every pleading subsequent to the petition, every written motion, every document relating to discovery or disclosure, and every written notice, appearance, designation of record on appeal, and similar document shall be served upon each of the parties by the initiating party." At the time of the default judgment and award, rule 3(B)(3) further provided: "Notice of hearing shall be mailed or personally delivered to opposing counsel or party, if unrepresented, three full days prior to hearing."

The review panel determined that rule 3 must yield to Neb. Ct. R. of Pldg. in Civ. Actions 5 (rev. 2003). The first sentence of rule 5(a) is similar to rule 3. It states:

> Except as otherwise provided in these rules or by statute, every order required by its terms to be served, every

> pleading subsequent to the original complaint . . . every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

But rule 5(a) has an additional sentence that applies when a party is in default for failure to appear: "No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of a summons." This additional clause in rule 5(a) establishes that a party in default for failure to appear is not entitled to notice when the plaintiff moves for default judgment. Our common law similarly provides that a party who is served with summons and a copy of the complaint and fails to answer or make an appearance is not entitled to further notice of a hearing.[6] Rule 3 does not mention parties in default. The review panel recognized the conflict between rule 5 of the Nebraska Rules of Pleading in Civil Actions and the Workers' Compensation Court rule 3. The review panel explained, "[Rule 3] mandates the need to serve the defaulting party with notice of the request for the entry of a default judgment while [rule 5] does not."

In deciding rule 5 applied instead of rule 3, the review panel first reasoned that rule 5 applies to all civil actions except when "a conflict arise[s] with statutes otherwise applicable to a given matter." The review panel was apparently referring to Neb. Ct. R. of Pldg. in Civil Actions 1 (rev. 2004). That rule provides, "These Rules govern pleading in civil actions . . . to the extent not inconsistent with statutes governing such matters." The review panel "[found] no specific statute that would support a credible argument that the procedural rule of the Nebraska Workers' Compensation Court ought to supersede or supplant Rule 5 as adopted by the Nebraska Supreme Court." We disagree. Neb. Rev. Stat. § 48-168 (Cum. Supp. 2006) provides:

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[6] See *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

> The Nebraska Workers' Compensation Court shall not be bound . . . by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.

Under Neb. Rev. Stat. § 48-163 (Cum. Supp. 2006), the compensation court "may adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act." Contrary to the review panel's conclusion, §§ 48-163 and 48-168 show that the Nebraska Workers' Compensation Court Rules of Procedure, including rule 3, can supersede or supplant the Nebraska Rules of Pleading in Civil Actions, including rule 5.

[5] In rejecting rule 3, the review panel also relied on *Phillips v. Monroe Auto Equip. Co.*[7] There, we held that the compensation court does not have authority to establish procedural rules that are more restrictive than rules applicable to the state trial courts. In *Phillips*, we concluded that the compensation court acted without or in excess of its powers when it excluded expert witness testimony under a Nebraska Workers' Compensation Court rule. We recognized that § 48-163 gives the compensation court authority to "'adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act.'"[8] We explained that the purpose of § 48-163 is to "allow the compensation court to 'make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the sprit of the Nebraska Workers' Compensation Act.'"[9] We held, however, that the "procedural, evidentiary, and discovery rules established by the

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[7] *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997).

[8] *Id.* at 590, 558 N.W.2d at 803.

[9] *Id.* at 595, 558 N.W.2d at 806.

compensation court may not be more restrictive or onerous than those of the trial courts in this state."[10]

Under *Phillips*, rule 3 would be valid and would apply here, entitling Swift Beef to notice of the default judgment motion and hearing, unless rule 3 is "more restrictive or onerous" than rule 5 or our common law. The review panel opined that "Rule 3 places a burden upon a moving party that is more restrictive or onerous than those that govern the movant in the trial courts in Nebraska." The panel reasoned that rule 3 required the moving party to give notice of a hearing on a motion for default judgment although a similar movant in state trial court would not be required to give such notice. Of course, Swift Beef views restrictiveness from a different perspective. Swift Beef contends that rule 5 is the more restrictive rule because it restricts the situations in which a party is entitled to notice.

In deciding which of these perspectives is more appropriate, we consider the rationale underlying our holding in *Phillips*. The trial court in *Phillips* had excluded expert testimony under Workers' Comp. Ct. R. of Proc. 4(D) (1994). When *Phillips* was decided, that rule provided that an expert witness would not be allowed to testify if a written report from the expert witness had not been timely disclosed. On appeal, we explained that the sanction in rule 4 did not provide adequate procedural safeguards equal to those used in the state trial courts. We stated that the state civil courts would not use a sanction prohibiting a party from introducing otherwise admissible evidence unless all parties had received notice of the possible sanction and were given an opportunity to be heard. But rule 4 did not require a similar procedure before the compensation court could impose the sanction.

[6] In *Phillips*, we held that "at a minimum, the parties litigating before a compensation court are permitted to introduce evidence which is procedurally and substantively admissible in the trial courts of this state."[11] We also concluded that "substantive sanctions regarding discovery and other pretrial procedural matters in the compensation court should be subject

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[10] *Id.* at 596, 558 N.W.2d at 806.

[11] *Id.*

to at least the same procedural safeguards as comparable sanctions for alleged discovery and pretrial procedural violations in Nebraska's civil courts."[12] Although *Phillips* specifically involved discovery rules and the admissibility of evidence, the underlying rationale of our holding is plain: At a minimum, the Workers' Compensation Court's rules should provide the procedural protections that apply in the trial courts of this state. Therefore, when deciding whether a Workers' Compensation Court rule is "more restrictive or onerous," we will consider whether the rule restricts the procedural safeguards offered in the state's trial courts.

[7] Rule 5 and our common law address when a party is entitled to notice. And under these rules, a party in default for failure to answer is not entitled to notice of a motion for default judgment. Rule 3 does not restrict the procedural safeguards offered under rule 5 and our common law. Instead, rule 3 expands the protections in those rules and requires that even a defaulting party should receive notice. Therefore, rule 3 is not more restrictive or onerous than the rules of this state's trial courts, and rule 3 is the applicable rule in this case.

Applying rule 3, Swift Beef was entitled to notice of Cruz-Morales' motion for default judgment. Because Swift Beef did not receive notice of the motion and hearing, we must reverse, and remand. We do not reach Swift Beef's remaining assignments of error because an appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[13]

## CONCLUSION

We conclude that under § 48-162.03(1), the Workers' Compensation Court has authority to enter default judgments, but the defaulting party must receive notice of the motion for default judgment under Workers' Compensation Court rule 3. Swift Beef did not receive notice of Cruz-Morales' motion because she sent notice to the wrong address. Therefore, the compensation court "acted without or in excess of its powers"

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[12] *Id.* at 597, 558 N.W.2d at 807.

[13] See *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

when entering and affirming the default judgment.[14] We reverse the review panel's judgment and remand the cause to that court for further remand to the trial judge for proceedings consistent with this opinion with directions to vacate the default judgment and award.

REVERSED AND REMANDED.

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[14] See, Neb. Rev. Stat. § 48-185 (Reissue 2004); *Phillips, supra* note 7.

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JEFFREY JAY REED, APPELLEE, V.
CHRISTINE JENNIFER REED, APPELLANT.

747 N.W.2d 18
Filed April 11, 2008. No. S-06-757.

1. **Conveyances: Fraud: Equity: Appeal and Error.** An appeal of a district court's determination that a transfer of an asset was not in violation of the Uniform Fraudulent Transfer Act is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court.
3. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Conveyances: Fraud: Proof.** A person seeking to set aside a transfer under the Uniform Fraudulent Transfer Act must first prove that he or she is a "creditor" under the act and that the party against whom relief is sought is a "debtor."
5. **Conveyances: Fraud.** The Uniform Fraudulent Transfer Act requires some nexus between the claim upon which an individual's creditor status depends and the purpose for which that individual seeks to set aside a fraudulent transfer.
6. **Divorce: Property Division: Equity: Fraud.** A spouse's right to an equitable distribution of the marital estate is not a "right to payment" under the Uniform Fraudulent Transfer Act.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

John W. Ballew, Jr., and Karisa D. Johnson, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for appellant.

Mark Porto and John A. Wolf, of Shamberg, Wolf, McDermott & Depue, for appellee.

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

HEAVICAN, C.J.

## INTRODUCTION

Jeffrey Jay Reed petitioned for divorce from Christine Jennifer Reed. Shortly before filing for divorce, Jeffrey's interests in two business ventures—C.J. Reed Enterprises, Inc., and R.S. Wheel, L.L.C.—were transferred to third parties. At trial, the district court for Hall County was asked to determine whether those transfers violated Nebraska's Uniform Fraudulent Transfer Act (UFTA).[1] The district court concluded that the transfers were not fraudulent and then dissolved the parties' remaining assets. Christine now appeals, challenging the district court's conclusion that the predivorce transfers of Jeffrey's business interests did not violate the UFTA. We affirm the district court's judgment for the reasons set forth below.

## BACKGROUND

The only issues on appeal concern Jeffrey's interests in two businesses—C.J. Reed Enterprises and R.S. Wheel. Accordingly, we include in our background discussion only the underlying facts that directly relate to those two business interests.

### C.J. REED ENTERPRISES

In 1997, approximately 1 year after they were married, Christine and Jeffrey formed C.J. Reed Enterprises. They formed the business to purchase and operate a jewelry store. Christine and Jeffrey obtained financing for the store from Norwest Bank. Jeffrey's parents, James and Precious Reed, agreed to act as sureties on the loan from Norwest Bank. On July 11, 1997, Christine, Jeffrey, James, and Precious executed an agreement setting forth each party's rights and obligations stemming from James and Precious' roles as sureties. At the

[1] Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 2004).

time, Christine and Jeffrey each owned half of the 10,000 total shares of C.J. Reed Enterprises stock. The agreement specified that James and Precious could take title to all of the corporation's stock if Christine or Jeffrey ever failed to discharge her or his obligations as owners of C.J. Reed Enterprises to the satisfaction of James and Precious. Among other things, the agreement required Christine and Jeffrey to avoid "default" in making "payment to trade creditors or any other creditors."

In 2000, James and Precious paid Christine and Jeffrey's debt to Norwest Bank and thereby became the sole financiers of Christine and Jeffrey's business. The total principal on Christine and Jeffrey's loan was $576,595.92, and interest was calculated at $188,163, assuming the loan was paid within 10 years. It is not clear how much Christine and Jeffrey paid toward the loan before May 2001. However, between May 2001 and the time of the divorce proceeding, they paid a mere $3,000 toward the principal and $40,000 toward the interest. Christine and Jeffrey both concede that this constituted a "default" within the meaning of their July 1997 agreement with James and Precious.

Nevertheless, James and Precious did not execute their right to take title of C.J. Reed Enterprises stock until Jeffrey advised James in early June 2004 of his intent to divorce Christine. On June 11, 2004, approximately 2 weeks before Jeffrey filed for divorce, James and Precious notified their attorney that they wanted to exercise their option to take title of C.J. Reed Enterprises. On June 15, James and Precious sent Christine and Jeffrey separate letters informing them that James and Precious were transferring all 10,000 shares of C.J. Reed Enterprises stock into their names. Jeffrey filed for divorce on June 24.

### R.S. Wheel

In January 2004, Jeffrey formed R.S. Wheel with Dr. Steven Schneider in order to purchase two parcels of land on South Locust Street in Grand Island, Nebraska. At the time of purchase, the land was situated across the street from a plot where Wal-Mart was planning to open a store. R.S. Wheel purchased this land for $380,000. The hope was that the land could be resold for much more due to its proximity to emerging local businesses. R.S. Wheel received financing from Home Federal

Savings and Loan, and as of January 12, 2006, R.S. Wheel owed $383,842.70 on the loan and interest.

On June 18, 2004, 6 days before he filed for divorce, Jeffrey transferred his interest in R.S. Wheel to Schneider. In return, on June 21, Jeffrey received a check for $15,000. Schneider testified that prior to this transfer, he and Jeffrey discussed Jeffrey's plans to divorce Christine. On June 22, Jeffrey deposited the check in an account held in his name only. Some of the funds were spent on various debts.

In reviewing these facts, the district court specifically found that the transfers were for legitimate reasons and not fraudulent conveyances under the UFTA. Accordingly, the district court did not consider either business interest when it made an equitable distribution of the marital estate between Christine and Jeffrey. Christine now challenges that determination on appeal.

## ASSIGNMENTS OF ERROR

Christine assigns, restated, consolidated, and renumbered, that the district court erred by failing to find that the transfers of Jeffrey's interests in (1) C.J. Reed Enterprises and (2) R.S. Wheel were fraudulent transfers in violation of the UFTA and therefore subject to an equitable division among the parties as property within the marital estate.

## STANDARD OF REVIEW

[1-3] An appeal of a district court's determination that a transfer of an asset was not in violation of the UFTA is equitable in nature.[2] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court.[3] Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to

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[2] *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004) (citing *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999)).

[3] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006); *Parker, supra* note 2.

the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[4]

## ANALYSIS

As the Nebraska Court of Appeals aptly summarized, the UFTA allows a creditor to reach an asset that a debtor has transferred if the transfer bears certain indicia of fraud.[5] In other words, under the UFTA, "'transfers of property designed to place a debtor's assets beyond the reach of the debtor's creditors are void as to the creditors.'"[6]

[4] It is elementary, therefore, that a person seeking to set aside a transfer under the UFTA must first prove that he or she is a "creditor" under the UFTA and that the party against whom relief is sought is a "debtor." The UFTA defines a "creditor" as "a person who has a claim"[7] and a "debtor" as "a person who is liable on a claim."[8] A "claim" is defined as "a *right to payment*, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[9]

Christine believes she is a creditor of Jeffrey because he owes her payments for child and spousal support. Those support obligations vest Christine with a right to payments for which Jeffrey is liable. It appears, therefore, that Jeffrey is a debtor of Christine under the UFTA with respect to his support obligations.[10] Jeffrey concedes as much, but questions whether that permits Christine to invoke the UFTA in this case.

As Jeffrey points out, Christine is not asking that predivorce transfers of Jeffrey's business interests be set aside in order to satisfy Jeffrey's support obligations. Rather, Christine uses her status as a "creditor" for support purposes as the basis

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[4] *Strunk, supra* note 3; *Parker*, *supra* note 2.

[5] *Trew v. Trew*, 5 Neb. App. 255, 558 N.W.2d 314 (1996), *reversed on other grounds* 252 Neb. 555, 567 N.W.2d 284 (1997).

[6] *National Loan Investors, L.P. v. Givens*, 952 P.2d 1067, 1069 (Utah 1998).

[7] § 36-702(4).

[8] § 36-702(6).

[9] § 36-702(3) (emphasis supplied).

[10] See *Parker, supra* note 2.

for her request that the transferred assets be put back into the marital estate. The question, then, is whether the UFTA permits Christine to use her status as a creditor for one particular claim to seek relief for an unrelated purpose.

[5] As set forth in the UFTA, "[i]n an action for relief against a transfer . . . under the [UFTA], a creditor . . . may obtain . . . avoidance of the transfer" only "to the extent necessary to satisfy the creditor's claim."[11] We read this language as requiring some nexus between the claim upon which an individual's creditor status depends and the purpose for which that individual seeks to set aside a fraudulent transfer. In other words, Christine's status as a creditor for purposes of child and spousal support might entitle her to set aside a fraudulent transfer by Jeffrey if necessary to secure her rights to those support payments. (Of course, Christine does claim that the allegedly fraudulent transfers would interfere with Jeffrey's ability to meet his child or spousal support obligations.) But under § 36-708(a)(1), Christine's right to support payments does not automatically render her a creditor for purposes of the interest she is asserting in this case—the right to an equitable share of the marital estate. Christine's ability to qualify as a creditor for that purpose must therefore arise independently.

For Christine to qualify as a creditor for purposes of the equitable division of the marital estate, her right to an equitable division must be a "claim" within the meaning of the UFTA. Again, the UFTA defines a "claim" as a "right to payment."[12] Therefore, properly framed, the question is whether a spouse's right to an equitable division of the marital estate qualifies as a "right to payment" for which the other spouse is liable.

We have not addressed that question before, and as far as we can see, neither have appellate courts in any other jurisdiction. In *Caldwell v. Caldwell*,[13] the Wisconsin Supreme Court concluded—without elaborating on its rationale—that a wife qualified as a "creditor" in light of her right to an equitable division

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[11] § 36-708(a)(1).

[12] § 36-702(3).

[13] *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958).

of the marital estate. Although *Caldwell* was not decided under the UFTA, the Wisconsin act at issue was very similar to modern versions of the UFTA.

There is, however, considerable force to the other side of the argument. As a general matter, "payment" is defined as the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation."[14] But it would be quite a stretch to say, for example, that a husband performs an obligation to his wife during the divorce court's equitable division of the marital estate. In making this argument in his brief, Jeffrey points out that, "[a]s opposed to traditional 'payment' obligations, neither spouse 'owes' the other spouse anything in a property division. Rather, the court determines how to divide *the property which already belongs to them*."[15]

[6] We agree and hold that a spouse's right to an equitable distribution of the marital estate is not a "right to payment" under the UFTA. Accordingly, the UFTA does not apply in cases where, as here, an individual believes that his or her former spouse fraudulently transferred assets before the divorce to prevent those assets from being equitably distributed as part of the marital estate. Instead, such a claim is perhaps more properly litigated as a claim for dissipation of marital assets.[16] Obviously, this conclusion renders it unnecessary for us to determine whether the predivorce transfers of Jeffrey's business interests were fraudulent in violation of the UFTA. And because Christine did not assign errors or present arguments related to any other theories of recovery, we affirm the district court's judgment.

## CONCLUSION

Christine argues that the predivorce transfers of Jeffrey's business interests should be set aside as fraudulent transfers under

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[14] Black's Law Dictionary 1165 (8th ed. 2004).

[15] Brief for appellee at 8 (emphasis supplied).

[16] See, e.g., *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001); *Herron v. Johnson*, 714 A.2d 783 (D.C. 1998); *Jeffcoat v. Jeffcoat*, 102 Md. App. 301, 649 A.2d 1137 (1994).

the UFTA and thereby equitably distributed as part of the marital estate. Christine's argument is based on the belief that she is a creditor of Jeffrey for child and spousal support purposes. We hold, however, that the UFTA requires some nexus between the claim for which a party is asserting creditor status and the type of relief sought. We also hold that a former spouse's right to an equitable division of the marital estate is not a "right to payment" under the UFTA, and thus a former spouse does not qualify as a "creditor" under the UFTA by virtue of his or her right to an equitable share of the marital estate.

As a result, the UFTA does not apply to Christine's claims that the predivorce transfers of Jeffrey's business interests should be set aside as fraudulent. We therefore affirm the district court's refusal to include Jeffrey's interests in C.J. Reed Enterprises and R.S. Wheel in the marital estate.

AFFIRMED.

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## BERENS AND TATE, P.C., APPELLEE, V. IRON MOUNTAIN INFORMATION MANAGEMENT, INC., APPELLANT.

747 N.W.2d 383

Filed April 11, 2008. No. S-07-193.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
2. **Contracts: Damages: Penalties and Forfeitures.** Generally, the question whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.
3. **Contracts: Breach of Contract: Stipulations.** Parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.
4. **Contracts: Breach of Contract: Stipulations: Damages.** A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated either is a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

5. ____: ____: ____: ____. Contracting parties have a right to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances.
6. **Contracts: Breach of Contract: Damages: Penalties and Forfeitures.** The distinction between liquidated damages and penalty provisions applies only when the contractual provision at issue is an attempt by the parties to provide for the measure of recovery in the event of nonperformance or breach of the contract.
7. ____: ____: ____: ____. The focus on liquidated damages versus penalty only arises when the contractual provision seeks to determine, in advance, the measure of damages resulting from a parties' breach or nonperformance of the contract.
8. ____: ____: ____: ____. A provision for payment of a specified sum as compensation for services already contemplated by the contract, as opposed to compensation for injury resulting from a breach of the contract, is neither a liquidated damages clause nor a penalty provision.
9. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed.

David J. Lanphier, of Broom, Johnson, Clarkson & Lanphier, for appellant.

Nora M. Kane, of Stinson, Morrison & Hecker, L.L.P., for appellee.

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

GERRARD, J.

Berens and Tate, P.C., has stored its business records and other files with Iron Mountain Information Management, Inc. (Iron Mountain), since 1997. Pursuant to the agreement between these parties, in order for Berens and Tate to permanently remove its records from Iron Mountain, Berens and Tate must pay a "Permanent Withdrawal" fee in addition to a retrieval fee. The question presented in this case is whether the "Permanent Withdrawal" fee is an unenforceable penalty provision. We conclude that it is not and reverse the judgment of the district court.

## FACTS

In 1989, Berens and Tate, a Nebraska law firm, entered into a "Storage and Service Agreement" with Bekins Records Management Center, wherein Bekins Records Management Center agreed to provide storage services for Berens and Tate's files and other business records. In 1997, Iron Mountain purchased Bekins Records Management Center and continued providing storage services to Berens and Tate.

In 1998, Berens-Tate Consulting Group, Inc., entered into a "Records Management and Service Agreement" with Iron Mountain. The parties agree that whatever the relationship between Berens-Tate Consulting Group and Berens and Tate law firm, the law firm is bound to the contract, and for purposes of this appeal, we will refer simply to "Berens and Tate."

The contract at issue in this case is automatically renewed each year, unless written notice of nonrenewal is given within 30 days of the contract's expiration date. Each year, Iron Mountain has sent Berens and Tate a renewal notice entitled "Schedule A." Each "Schedule A" sets forth, among other things, the effective date of the contract and a schedule of fees to be charged for Iron Mountain's services for that year.

As relevant to this appeal, "Schedule A" includes fees for "Retrievals or Refiles," "Delivery," and "Permanent Withdrawal." The "Schedule A" provides that the fee for "Retrievals or Refiles" is for "[t]he temporary retrieval of deposits from, or return to, storage." A customer is charged a retrieval fee when a customer asks to have a record temporarily removed and is charged a refile fee when the record is returned. The "Permanent Withdrawal" fee is for "[t]he preparation, documentation, and permanent withdrawal of deposits." Pursuant to "Schedule A," when a customer permanently removes a record, the customer is charged the "Permanent Withdrawal" fee and is also charged the fee for "retrieval."

"Schedule A" also contains a section entitled "Storage pricing," which addresses a minimum monthly storage fee that must be paid by each customer. If a customer permanently removes its records prior to the expiration date of its contract with Iron Mountain, the customer is still obligated to pay the

minimum monthly storage fee for the months remaining on the contract.

On August 12, 2004, Berens and Tate notified Iron Mountain that it wanted to remove all of its records from Iron Mountain and transfer those records to another storage company. Iron Mountain informed Berens and Tate that pursuant to the operative "Schedule A," Berens and Tate would be obligated to pay the "Permanent Withdrawal" fee of $3.70 per cubic foot and a retrieval fee of $2.10 per cubic foot. According to Berens and Tate, the total charge to permanently remove its records would have been approximately $10,000.

Berens and Tate filed a complaint seeking a declaratory judgment that "the permanent removal fee provision in Iron Mountain's contract [is] null and void and illegal in the State of Nebraska." In its complaint, Berens and Tate alleged that the permanent removal fee is "an unlawful and unenforceable liquidated damages provision," that it "constitutes a penalty," and that it is "a charge separate and beyond the fee that is assessed for actual retrieval of the files, and is essentially a fiction . . . with no service, benefit or other consideration performed for or bestowed upon the owner of the records."

At the time of trial, Berens and Tate's files were still being stored by Iron Mountain. The record further reflects that other than payment of the "Permanent Withdrawal" fee, Berens and Tate has complied with, and is current on, all of the other fees required under "Schedule A."

In its case in chief, Berens and Tate called David Harding, general manager for Iron Mountain, to testify. Harding was questioned at length regarding the fees charged by Iron Mountain—in particular, Iron Mountain's justification for charging a permanent withdrawal fee in addition to a retrieval fee when records are permanently removed. Harding testified, summarized, that the permanent withdrawal fee is necessary in order to compensate for the additional labor and services that are provided when large amounts of records are permanently removed.

Harding further testified that the permanent withdrawal fee is needed because when records are permanently removed, the shelf space that was "reserved" for that customer's records

remains empty, resulting in a loss of revenue for the remainder of the contract. However, Harding later acknowledged that a customer is obligated to pay the monthly storage fee for the entire contract, regardless of whether the customer's records have been permanently removed prior to the end of the contractual term.

The district court, citing *Growney v. C M H Real Estate Co.*,[1] determined that the "Permanent Withdrawal" fee cannot be considered an enforceable liquidated damages clause. The court explained that "[p]aying twice for the same service is not a reasonable estimate of damages and is not reasonably proportionate to the damages which have actually been caused by the breach . . . ." The court found that the permanent removal fee provision was unenforceable and entered judgment accordingly. Iron Mountain appealed.

## ASSIGNMENTS OF ERROR

Iron Mountain assigns, restated, consolidated, and renumbered, that the district court erred in (1) finding that the "Permanent Withdrawal" fee in the contract was unenforceable and (2) imposing upon Iron Mountain an incorrect burden of proof.

## STANDARD OF REVIEW

[1] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[2]

[2] Generally, the question whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.[3]

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[1] *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

[2] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[3] *Abel Constr. Co. v. School Dist. of Seward*, 188 Neb. 166, 195 N.W.2d 744 (1972).

## ANALYSIS

The question presented in this appeal is whether the "Permanent Withdrawal" fee in "Schedule A" of the contract between Iron Mountain and Berens and Tate is an enforceable contractual provision. Iron Mountain contends that it is, while Berens and Tate claims it is not. Specifically, Berens and Tate argues that the "Permanent Withdrawal" fee is not a reasonable liquidated damages clause, but is rather an unenforceable penalty provision. Accordingly, Berens and Tate claims that the principles governing the distinction between liquidated damages and penalty provisions govern the disposition of this case.

[3-5] In addressing liquidated damages and penalty provisions, we have explained that "'parties to a contract may override the application of the judicial remedy *for breach of a contract* by stipulating, in advance, to the sum to be paid *in the event of a breach*.'"[4] We have held that

> "'[t]he question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: a stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be *caused by a breach* or is reasonably proportionate to the damages which have actually been *caused by the breach*.'"[5]

We have "'consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid *in*

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[4] *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 24, 645 N.W.2d 519, 527 (2002) (emphasis supplied), quoting *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992).

[5] *Kozlik v. Emelco, Inc., supra* note 4, 240 Neb. at 536-37, 483 N.W.2d at 121 (emphasis supplied) (emphasis omitted), quoting *Growney v. C M H Real Estate Co., supra* note 1. See, also, *Stanford Motor Co. v. Westman*, 151 Neb. 850, 39 N.W.2d 841 (1949).

*the event of a breach of contract*, provided the stipulated sum is reasonable in light of the circumstances.' "[6]

[6-8] Given these principles, it is clear that the distinction between liquidated damages and penalty provisions applies only when the contractual provision at issue is an attempt by the parties to provide for the measure of recovery in the event of nonperformance or breach of the contract. Stated differently, the focus on liquidated damages versus penalty only arises when the contractual provision seeks to determine, in advance, the measure of damages resulting from a parties' breach or nonperformance of the contract. It therefore follows that a provision for payment of a specified sum as compensation for services already contemplated by the contract, as opposed to compensation for injury resulting from a breach of the contract, is neither a liquidated damages clause nor a penalty provision.

It is well established that a contractual provision that requires payment based on something other than a breach of the contract is neither a liquidated damages clause nor a penalty provision.[7] For example, the U.S. Supreme Court in *Kirby v. United States*[8] was called upon to determine, among other things, whether a particular provision in a lease agreement constituted a penalty. The Court concluded that it was "neither a penalty nor liquidated damages," because the fee at issue "was not to be paid for any breach of contract, but as compensation"[9] under the contract. Likewise, the Texas Court of Appeals, in *B.F. Saul Real Estate Inv. Trust v. McGovern*,[10] explained that "[t]he

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[6] *Reichert v. Rubloff Hammond, L.L.C., supra* note 4, 264 Neb. at 24, 645 N.W.2d at 527 (emphasis supplied), quoting *Kozlik v. Emelco, Inc., supra* note 4.

[7] See, *Kirby v. United States*, 260 U.S. 423, 43 S. Ct. 144, 67 L. Ed. 329 (1922); *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635 (5th Cir. 1991); *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 59 P.3d 1003 (2002); *Preyer v. Parker*, 257 N.C. 440, 125 S.E.2d 916 (1962); *B.F. Saul Real Estate Inv. Trust v. McGovern*, 683 S.W.2d 531 (Tex. App. 1984).

[8] *Kirby v. United States, supra* note 7.

[9] *Id.*, 260 U.S. at 427.

[10] *B.F. Saul Real Estate Inv. Trust v. McGovern, supra* note 7, 683 S.W.2d at 534.

whole subject of penalty versus liquidated damages only arises when the parties to a contract have attempted to provide for a remedial right upon breach of a contract."

Applying these principles to the present case, it is clear that the "Permanent Withdrawal" provision in the contract between Iron Mountain and Berens and Tate is neither a liquidated damages clause nor a penalty provision. The "Permanent Withdrawal" fee is not a prediction of damages for a possible future breach of the contract by Berens and Tate. Rather, it was the parties' agreed-upon compensation for services to be performed—specifically, the permanent removal of records.

According to the contract, permanently removing records does not, in and of itself, result in a breach. Indeed, under the terms of the contract, Berens and Tate is free to permanently remove one, or all, of its records, without being in breach of the contract, so long as Berens and Tate pays the contracted fee. And the contract expressly provides that in order for the permanent removal of the records to be performed by Iron Mountain, payment for such services must be made. In other words, the "Permanent Withdrawal" fee is charged for services to be rendered by Iron Mountain and not for damages resulting from any breach of contract by Berens and Tate. Therefore, the "Permanent Withdrawal" fee is neither a liquidated damages clause nor a penalty provision. The question whether the fee is a reasonable estimate of damages caused by a breach is irrelevant, and the district court erred in engaging in such an analysis.

Other than its contention that the "Permanent Withdrawal" fee is an illegal penalty provision, Berens and Tate provides no other argument as to why the provision is unenforceable. The record reflects that both Berens and Tate and Iron Mountain are experienced in business. And we have been reluctant to modify contracts between parties with business experience, as opposed to contracts between consumers and skilled corporate parties.[11] Having found that the "Permanent Withdrawal" fee

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[11] See, *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *Reichert v. Rubloff Hammond, L.L.C., supra* note 4; *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989).

is not a liquidated damages clause nor a penalty provision, we also find no basis to conclude that the "Permanent Withdrawal" provision is otherwise unenforceable.

[9] Without question, the "Permanent Withdrawal" fee is a relatively high price for a comparatively inexpensive service to be performed by Iron Mountain. Nevertheless, except in limited circumstances not present here, business operators are free to establish the prices they want for their services, and the law will generally enforce an agreement to pay such a price. While Berens and Tate may, in retrospect, be dissatisfied with the bargained-for provision it entered into, we will not rewrite the contract to provide terms contrary to those which are expressed.[12] Nor is it the province of a court to rewrite a contract to reflect the court's view of a fair bargain.[13] Berens and Tate must be held to the plain language of the agreement it entered into, and the district court erred in finding otherwise.

Our conclusion that the "Permanent Withdrawal" fee is an enforceable contractual provision is dispositive of this appeal. Therefore, we do not address Iron Mountain's remaining assignment of error.

## CONCLUSION

The district court erred in finding that the "Permanent Withdrawal" fee was unenforceable. We conclude that the "Permanent Withdrawal" fee is neither a liquidated damages clause nor an illegal penalty provision. Rather, the provision is an enforceable contractual term that sets forth the payment required for services to be performed under the contract. The judgment of the district court is reversed.

REVERSED.

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[12] See, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992).

[13] *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

# State of Nebraska, appellee, v. Michael T. Jackson, appellant.

747 N.W.2d 418

Filed April 18, 2008. No. S-06-1041.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** An appellate court reviews ineffective assistance of counsel claims under the two-prong inquiry mandated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
4. ____: ____. In applying the two-prong test for ineffective assistance of counsel claims, an appellate court reviews the lower court's factual findings for clear error.
5. ____: ____. Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that an appellate court resolves independently of the lower court's decision.
6. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
7. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
8. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.
10. **Constitutional Law: Right to Counsel: Conflict of Interest.** A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel.
11. **Effectiveness of Counsel: Conflict of Interest: Proof.** In cases of a conflict which adversely affects a lawyer's performance, there is no need to show that the conflict resulted in actual prejudice to the defendant, showing an actual conflict existed is sufficient.
12. **Attorney and Client: Conflict of Interest: Words and Phrases.** The term "actual conflict" encompasses any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another.
13. **Effectiveness of Counsel: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area—and

(2) this deficient performance actually prejudiced the defendant in making his or her defense.

14. ____: ____. The prejudice prong of the ineffective assistance of counsel test requires that the defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.
15. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
16. **Effectiveness of Counsel: Appeal and Error.** An appellate court can assess the two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, in either order.
17. ____: ____. Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
18. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
19. **Trial: Effectiveness of Counsel: Appeal and Error.** If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring such a claim. An appellate court must then consider whether the appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
20. **Trial: Effectiveness of Counsel: Presumptions.** In assessing trial counsel's performance under the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), there is a strong presumption that trial counsel acted reasonably.
21. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
22. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing an ineffective assistance of counsel claim, an appellate court will not second-guess reasonable strategic decisions made by counsel.
23. **Evidence: Prosecuting Attorneys.** Prosecutors have a duty to present material exculpatory evidence even if defense counsel never requests the evidence.
24. **Trial: Evidence.** Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.
25. ____: ____. A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
26. **Due Process: Evidence: Prosecuting Attorneys.** In the context of prosecutorial withholding of evidence, Nebraska law defines materiality more broadly than due process requirements and applies that term to evidence which strongly indicates it would play an important role in preparing a defense.
27. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.

28. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
29. ____: ____. Relevancy requires only that the degree of probativeness be something more than nothing.
30. **Postconviction: Appeal and Error.** The Nebraska Postconviction Act looks unfavorably on any attempts to rehash issues at the postconviction stage which were—or could have been—raised and disposed of at trial or on direct appeal.
31. **Postconviction: Evidence.** Prisoners cannot seek discovery at the postconviction stage if the requested evidence could have been obtained at trial.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Paula B. Hutchinson for appellant.

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

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

CONNOLLY, J.

A jury convicted Michael T. Jackson of first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. On direct appeal, we affirmed Jackson's convictions.[1] In Jackson's postconviction petition, he alleges (1) ineffective assistance of trial counsel, (2) ineffective assistance of counsel on appeal, and (3) prosecutorial misconduct. The district court overruled Jackson's petition. Jackson appeals. We conclude that none of his numerous assignments of error have merit.

## I. BACKGROUND

### 1. THE CRIME

The facts of Jackson's underlying offense are set out in his direct appeal.[2] We briefly recount the facts necessary to provide context for Jackson's claims.

On February 4, 1996, Jackson met with Dionne Brewer and Jason Thornton to buy cocaine. They planned to travel from

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[1] See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

[2] *Id.*

Omaha to Minneapolis to make the buy. Brewer and Thornton wanted to fly, but Jackson wanted to drive because he was concerned about flying with $11,500 in cash. Brewer and Thornton agreed to drive and picked Jackson up in Thornton's vehicle, but Jackson suggested that they make the trip in a car that he had rented.

Jackson then gave Thornton, the driver, instructions to drive to where the rental car was parked. Jackson, who purported to be under the influence of marijuana, repeatedly led the trio astray. Brewer grew impatient and urged Jackson to stop wasting time. Jackson then directed Thornton to the location where he said he had parked the rental car. When they arrived at the location, Thornton stopped near a car Jackson identified as the rental car. As Thornton opened the driver's-side door to get out, gunshots rang out and Brewer saw Jackson shooting at Thornton from behind.

Brewer leapt out of the vehicle and began running down the street. Jackson got out of the vehicle and shot Brewer. As she lay in the street, Jackson shot her several times in the head and torso. Ella R. Iler, a woman who lived on the street where the shootings occurred, heard the initial gunfire. She rushed to her kitchen window and observed Jackson shoot Brewer.

Brewer managed to survive by playing dead. When officers arrived, Brewer informed them that she did not know Jackson's last name, but that his first name was Mike and that she knew where he lived. Some officers went to the location Brewer provided, while others went to the home of Jackson's former girlfriend, Demeteria Gardner, now known as Demeteria Miller (Miller). Miller gave officers consent to search her vehicle, which was parked in front of Jackson's home. (Jackson had borrowed Miller's vehicle earlier that day.) In the vehicle, police found a duffelbag containing clothes matching the description of the clothing worn by the killer. The clothing also contained red stains. A test at the University of Nebraska Medical Center would later reveal that the stains came from Thornton's blood. Officers then obtained a warrant and entered Jackson's home, where they found Jackson. Police seized several items in the house, including two .38-caliber bullets, a gun case, and a knit cap matching the description of a cap worn by the shooter.

### 2. Pretrial Motions and the Trial

Michael J. Poepsel represented Jackson at trial. Before trial, Poepsel moved in limine to suppress (1) physical evidence that officers recovered from Jackson's home and Miller's car, (2) statements that Jackson made to police, and (3) DNA evidence. The court overruled the motion regarding the physical and DNA evidence. The prosecution, however, agreed not to introduce Jackson's statements at trial.

Several doctors and technicians affiliated with the University of Nebraska Medical Center testified that the bloodstains on the clothing found in the vehicle came from Thornton.

At one point, Poepsel objected to the admission of autopsy photographs of Thornton's body. The court overruled the objection. Poepsel also renewed his objection to the items of physical evidence when the State offered them at trial. After the prosecution rested, Poepsel moved to dismiss because the State had failed to prove premeditation. The court overruled the motion. Poepsel then rested without presenting any evidence. The jury found Jackson guilty on all counts.

### 3. Direct Appeal

On appeal, James C. Hart, Jr., represented Jackson. Hart did not argue ineffective assistance of trial counsel in his direct appeal. Instead, Hart argued that the district court erred in (1) admitting the items of physical evidence seized from Jackson's residence, (2) admitting DNA evidence regarding the substance on Jackson's clothing, (3) admitting the gruesome photographs of Thornton's body, (4) overruling Jackson's motion to dismiss for lack of evidence on premeditation, and (5) overruling Jackson's motion for a new trial because of jury contamination. We rejected these claims and upheld Jackson's convictions.[3]

### 4. Postconviction Motions

Following his unsuccessful appeal, Jackson filed a postconviction motion. In his motion, Jackson alleged: (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate

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[3] *Jackson, supra* note 1.

counsel, and (3) prosecutorial misconduct because the prosecution failed to provide potentially exculpatory evidence.

At the postconviction hearing, the State adduced testimony from Poepsel and Hart. Jackson adduced testimony from his mother; Miller; and Cindy Lee Welch-Brown, the mother of Jackson's nieces and nephews.

Poepsel testified that he met with Jackson regularly to discuss trial strategy. During these meetings, Jackson allegedly changed his story frequently. According to Poepsel, Jackson initially stated that he did not murder Thornton, then stated that he killed Thornton in self-defense, and then admitted to murdering Thornton. Poepsel testified that because Jackson admitted he killed Thornton and because of the DNA evidence, they changed strategy. Poepsel testified that he and Jackson would focus the defense on ensuring a conviction of a lesser offense. Hart testified that while preparing an appeal in Jackson's case, he found nothing in the record that indicated a viable ineffective assistance of counsel claim.

The district court denied Jackson's motion. On appeal, this court remanded with instructions that the district court enter a formal order with factual findings.[4] In response, the district court entered an order in which it made numerous factual findings and conclusions of law. Notably, the court credited Poepsel's and Hart's testimony over the testimony of Jackson, Jackson's mother, and Welch-Brown.

## II. ASSIGNMENTS OF ERROR

### 1. Assignments Regarding Trial Counsel

Jackson assigns on appeal, restated, that the court erred in failing to find that Jackson received ineffective assistance of trial counsel. Regarding this assignment, Jackson argues that trial counsel failed to (1) present Miller's testimony, (2) present Welch-Brown's testimony, (3) refute and undermine Iler's testimony, (4) undermine the State's use of the bullets and gun case found in Jackson's home, (5) obtain and present evidence of the gunshot residue analysis, (6) depose a University of Nebraska Medical Center medical technologist and undermine

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[4] *State v. Jackson*, 264 Neb. xxiv (No. S-02-366, Oct. 9, 2002).

her testimony at trial, (7) consider and present testimony by a forensic pathologist, (8) effectively rebut Brewer's testimony, (9) present evidence that fingerprints found at the crime scene did not match Jackson's prints, (10) develop a clear trial strategy, and (11) subject the State's case to meaningful adversarial testing.

### 2. Assignments Regarding Appellate Counsel

Additionally, Jackson assigns that the court erred in failing to find that Jackson received ineffective assistance of counsel on direct appeal. He claims Hart was ineffective because of (1) an alleged conflict of interest stemming from Hart's personal relationship with Poepsel, Jackson's trial counsel, and (2) Hart's failure to argue on direct appeal that Poepsel was ineffective in the particulars listed above.

### 3. Assignment Regarding the Prosecution

Jackson assigns that he was deprived a fair trial because the State failed to disclose potentially exculpatory evidence.

### 4. Assignments Regarding Discovery Motions

Jackson assigns that the court erred when it denied the following discovery requests: (1) evidence found in a search of a drug kingpin's jail cell, (2) Brewer's drug abuse history, and (3) gunshot residue testing, either by a court-appointed expert or at Jackson's own expense.

## III. STANDARD OF REVIEW

[1-5] A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous.[5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[6] We review ineffective assistance of counsel claims under the two-prong inquiry mandated by *Strickland v. Washington*.[7] Under this inquiry,

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[5] *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007).

[6] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[7] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

we review the lower court's factual findings for clear error.[8] Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that we resolve independently of the lower court's decision.[9]

## IV. ANALYSIS

### 1. Alleged Ineffective Assistance of Trial Counsel

[6-9] On appeal, Jackson argues that he received ineffective assistance from his trial attorney. The State argues that Nebraska's procedural default rule bars Jackson's claim. Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[10] When reviewing a question of law, we resolve the question independently of the lower court's conclusion.[11] A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.[12] So a motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record.[13]

A different attorney, Hart, represented Jackson on his direct appeal. Jackson did not allege ineffective assistance of counsel as part of his direct appeal to this court.[14] All of Jackson's allegations regarding trial counsel's deficient performance would either have been apparent to Jackson at the time of appeal or would have been apparent from the record. As such, Jackson is

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[8] See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[9] See, *Miner, supra* note 6; *Gales, supra* note 8.

[10] See *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[11] See *id.*

[12] See *id.* (citing *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004), and *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003)).

[13] See *id.* (citing *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000); and *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000)).

[14] See *Jackson, supra* note 1.

prohibited from claiming that he received ineffective assistance of trial counsel in his postconviction motion under the procedural default rule.

2. Alleged Ineffective Assistance of Direct Appeal Counsel

Jackson argues that he received ineffective assistance from Hart, his appellate counsel. He claims Hart failed to argue that his trial attorney, Poepsel, provided ineffective assistance. Jackson also argues that Hart was ineffective because of a close personal relationship with Poepsel. Jackson claims that this relationship presented a conflict of interest and kept Hart from arguing that Poepsel was ineffective at trial.

(a) Alleged Conflict of Interest

[10-12] A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel.[15] In cases of such a conflict, there is no need to show that the conflict resulted in actual prejudice to the defendant, showing an actual conflict existed is sufficient.[16] Ordinarily, such a conflict arises when an attorney is representing multiple defendants.[17] This court, however, has previously defined "actual conflict" broadly. The term therefore encompasses any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another.[18]

The district court found no conflict of interest. It specifically found that Jackson was not credible in testifying that Hart adjusted his appeal strategy based on his alleged relationship with Poepsel. The court determined that no friendship or personal relationship existed between the two attorneys. Jackson fails to point to evidence which might show that Poepsel and Hart had a personal relationship. We will not disturb the district

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[15] See *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

[16] *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

[17] See, e.g., *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004).

[18] *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

court's conclusions unless they are clearly erroneous.[19] Jackson failed to show that the district court erred in concluding that Poepsel and Hart had no personal relationship.

(b) Failure to Argue Ineffective Assistance of Trial Counsel on Direct Appeal

Jackson next argues that he received ineffective assistance of counsel on direct appeal because Hart failed to assign and argue that Jackson received ineffective assistance of counsel at trial. Because Jackson's postconviction motion was his first opportunity to raise this claim, it is not procedurally barred.[20]

[13-16] We analyze Jackson's claim that he received ineffective assistance of appellate counsel in violation of the Sixth Amendment under the two-prong test set forth in *Strickland v. Washington*.[21] Under *Strickland*, Jackson has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area—and (2) this deficient performance actually prejudiced him in making his defense.[22] The prejudice prong requires that Jackson show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.[23] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[24] Notably, we can assess the prongs in either order.[25]

[17,18] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing

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[19] *Mata, supra* note 5.

[20] See *Marshall, supra* note 10.

[21] *Strickland, supra* note 7.

[22] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006) (construing *Strickland, supra* note 7).

[23] See *Al-Zubaidy, supra* note 13.

[24] *Strickland, supra* note 7.

[25] See *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

the strength of the claim appellate counsel failed to raise.[26] Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.[27] When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test.[28] If trial counsel was not, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.

[19] If trial counsel *was* ineffective, then the defendant suffered prejudice when appellate counsel failed to bring such a claim. We must then consider whether the appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland*. In other words, whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel.[29] If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel.

[20-22] Thus, although Jackson's claim that he received ineffective assistance of trial counsel is procedurally barred, we address the issue to determine whether he received ineffective assistance of appellate counsel. In assessing trial counsel's performance under *Strickland*'s two-prong test, there is a strong presumption that Poepsel acted reasonably.[30] This court has previously stated that trial counsel is afforded due deference to formulate trial strategy and tactics.[31] As such, when reviewing

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[26] *McFarland, supra* note 17.

[27] *Id.*

[28] See *Williams, supra* note 13. See, also, *Al-Zubaidy, supra* note 13.

[29] *McFarland, supra* note 17.

[30] See *Al-Zubaidy, supra* note 13.

[31] See *id.* (citing *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994)).

an ineffective assistance of counsel claim, we will not second-guess reasonable strategic decisions made by counsel.[32]

*(i) Trial Counsel Was Not Ineffective for Failing to Present Miller's Testimony*

Jackson argues that Poepsel was ineffective for failing to investigate and present evidence by Jackson's former girlfriend, Miller. Jackson claims that he told Poepsel that Miller would provide an alibi. Miller would testify that Jackson was at Miller's home around the time the shooting occurred. Moreover, Jackson claims that had Poepsel inquired, Miller would have testified that Jackson did not have blood on his clothing.

Regarding the alibi theory, Miller testified for the postconviction hearing that Jackson came to her residence around 9 o'clock on the night of the shootings. She stated that he stayed anywhere from 45 to 90 minutes. But other evidence undermines Miller's alibi testimony.

The evidence shows the shooting was reported to the police dispatcher around 8:33 p.m. and Jackson appeared at Miller's residence around 9 or 9:15 p.m. Miller also testified that Jackson was wearing the same clothes—tan jacket, tan shirt, jeans, and a knit hat—that she had seen him wearing hours before. However, the distance between the location where the shooting occurred and Miller's house is about 1.8 miles. Obviously, Jackson would have had ample time to travel from the scene of the shooting to Miller's house in the 30-plus minutes that elapsed between the shooting and Jackson's arrival at Miller's home. Thus, Miller's testimony that Jackson arrived at her residence around 9 p.m. would not have provided Jackson with an alibi.

Jackson also claims that Poepsel was ineffective for failing to elicit testimony from Miller whether she observed blood on Jackson's clothing that night. In a deposition taken after the trial, Miller stated that she did not see any blood on Jackson's clothing. Poepsel conceded that he did not ask Miller about this when preparing for trial. But the stain consisted of a few light smudges near the coat's bottom edge, toward the back. Miller's

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[32] See *id.*

testimony that she did not see blood on Jackson would not have shown that it was not there. She could have simply failed to notice the stain or failed to recognize that the stain was blood. She specifically testified that she would not have been looking at the back of his coat and did not know if there even had been an opportunity for her to see it. So Miller's testimony would not have conflicted with DNA evidence linking the victim's blood to Jackson's coat. We conclude that Jackson has failed to show a reasonable probability that eliciting Miller's testimony would have changed the outcome. Thus, Poepsel's failure to present Miller's testimony did not prejudice Jackson.

*(ii) Trial Counsel Was Not Ineffective for Failing to Present Welch-Brown's Testimony*

Jackson argues that Poepsel was ineffective for failing to present potentially exculpatory testimony from Welch-Brown. Welch-Brown is the unwed mother of children born to Jackson's brother. Jackson claims that Welch-Brown would also have provided an alibi. Welch-Brown, who lived at the Jackson residence, told police that she briefly saw Jackson there at about 9 o'clock on the evening of the shooting.

The Jackson residence is one-half mile southeast of where the shooting occurred. Obviously, Jackson would have had time to cover that distance in the approximate one-half hour between the shooting and when Welch-Brown saw Jackson. Welch-Brown's testimony leaves Jackson with a loose-fitting alibi. He ignores that Welch-Brown's testimony places him a few blocks from the murder scene with 30 to 45 minutes unaccounted for. So, Miller and Welch-Brown's testimony does nothing to refute the possibility that Jackson could have traveled the short distance to his home, stayed there briefly, then traveled the 1.65 miles to Miller's residence. Poepsel's failure to present Welch-Brown's testimony did not prejudice Jackson.

*(iii) Trial Counsel Was Not Ineffective for Failing to Undermine Iler's Testimony*

Jackson argues that Poepsel was ineffective for failing to focus the jury's attention on Iler. He contends Poepsel should have emphasized that Iler (1) testified the shooter wielded a gun in his left hand even though Jackson is right handed,

(2) initially told police that the shooter wore lime-green pants, and (3) could not identify Jackson as the shooter when shown a photographic lineup.

Poepsel concedes that he did not ask Jackson whether he was right handed or present such evidence to the jury. The question is whether Poepsel's failure to do so prejudiced Jackson's defense.

As Poepsel stated at his deposition, he did not believe Iler's testimony was critical because the State had DNA evidence linking the victim's blood to the clothing recovered from a vehicle used by Jackson. Miller testified that she saw Jackson wearing the same jacket within one-half hour of the shootings. Finally, one of the victims, Brewer, testified that Jackson shot Thornton from the back seat of the vehicle she was riding in and then chased her down the street. In light of such rock-hard evidence, it is unlikely that Iler's belief that the shooter was left handed would have impressed the jury. Poepsel's failure to specifically undermine Iler's testimony did not prejudice Jackson.

*(iv) Trial Counsel Was Not Ineffective for Failing to Object to .38-Caliber Bullets*

Jackson argues that Poepsel was ineffective in allowing the State to introduce two .38-caliber bullets and a gun case that police found while searching Jackson's bedroom. Poepsel did file a pretrial motion seeking to suppress the items, ostensibly because they were seized illegally. The trial court denied the motion. Poepsel renewed this motion at trial, which the court overruled. Jackson now argues that Poepsel also should have objected to the evidence on relevancy grounds. Specifically, Jackson argues that the police reports show that the .38-caliber bullets recovered from Jackson's house do not match the bullet fragments found at the scene.

The police reports show that officers compared bullet fragments test-fired from a .44-caliber handgun with the bullet fragments recovered from the crime scene. The record does not reflect why this test was performed. But the police report was inconclusive as to whether the .44-caliber ammunition matched the bullet fragments at the scene. Inconclusive means that the

police could not conclude the killer used a .44-caliber handgun in the shootings of Thornton and Brewer.

Obviously, an inconclusive comparison between the fragments recovered from the test-fired .44-caliber bullets and the fragments at the scene does nothing to disturb the inference that Jackson used a .38-caliber gun to commit the crime. Only a *conclusive* match would have supported Jackson's claim that the .38-caliber bullets were irrelevant. As such, in contrast to Jackson's claims, there is no inherent inconsistency in admitting the .38-caliber bullets found in Jackson's home. Because we conclude Poepsel was not ineffective, Hart was not ineffective for failing to raise the above issues.

### 3. Prosecution's Alleged Failure to Disclose Potentially Exculpatory Evidence

Jackson next argues that he is entitled to a new trial because the prosecution failed to disclose potentially exculpatory evidence. Specifically, Jackson points to four police reports in which several members of a drug conspiracy indicated that Donald Hughes, the conspiracy's ringleader, wanted Thornton killed. Thornton apparently owed a large debt to Hughes, and as a result, Hughes ordered Thornton's murder.

In the report, Andrew Adams, an inmate at the Douglas County Correctional Center, overheard a telephone conversation between Hughes and an individual named "Jason," which is Thornton's first name. An argument ensued during which Hughes demanded repayment of money and threatened "Jason." Adams stated that "Jason" hung up on Hughes. Hughes then retrieved a telephone number from his jail cell and placed a call to an individual identified as "Mike," a derivative of Jackson's first name. Adams overheard Hughes direct "Mike" to "'go ahead and take care of that business.'" After getting off the telephone, Hughes allegedly explained to Adams that he had fronted Thornton cocaine which Thornton had refused to pay for. Thornton was shot and killed shortly thereafter. Days later, Hughes and Adams were watching a news report about the shooting death of Thornton, after which Hughes told Adams, "'I told you that's how I take care of business, I told you he would be buried with it.'" Jackson argues that the prosecution's

failure to disclose these reports violated his right to exculpatory evidence under the Due Process Clause and Nebraska statutory law.

(a) Due Process Analysis

[23-25] Under *Brady v. Maryland*,[33] a prosecutor who fails to turn over evidence "favorable to an accused upon request violates due process where the evidence is material . . . to guilt." The Court expanded this rule in *United States v. Bagley*.[34] Under *Bagley*, prosecutors have a duty to present material exculpatory evidence even if defense counsel never requests the evidence.[35] Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[36] A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.[37] This standard is identical to the prejudice prong of the *Strickland* test for ineffective assistance of counsel.[38]

Poepsel testified that he did not see the reports before trial. The question is whether the State's failure to supply Poepsel with the four police reports violated Jackson's due process rights. The reports contain statements indicating that Jackson was one of several individuals who bought and sold drugs from a kingpin named "Hughes." They indicate that Hughes called a man named "Mike" and ordered him to "'take care of that business,'" referring to Thornton, and that Thornton was shot and killed a day later. The only other individual named "Michael" in Hughes' circle of drug dealers was incarcerated

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[33] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[34] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[35] See, *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006) (citing *Bagley, supra* note 34).

[36] See *id.*

[37] *Id.*

[38] See *supra* note 24 and accompanying text.

in the Douglas County Correctional Center along with Hughes when the shootings occurred.

Although Jackson claims that these reports open up the possibility that another individual named "Mike" was hired to kill Thornton, he ignores that the reports strongly suggest that Hughes hired Jackson to kill Thornton. As such, the reports not only fail to exculpate him, they provide the State with a motive.

Beyond the reports, Jackson repeatedly refers to the possibility that a search of Hughes' jail cell may have revealed a telephone number to other individuals, any of whom may have been the individual Hughes ordered to kill Thornton. Such evidence would have been more likely to be material under *Bagley* than the police reports themselves. But there is no evidence that the police found any telephone numbers when they searched Hughes' cell. The police report shows that police conducted a search of Hughes' cell; however, there is no indication that they found any useful information.

(b) Statutory Analysis

[26] Jackson also claims that the prosecution's failure to disclose the police reports violated his right to exculpatory evidence under Nebraska statutory law. In *State v. Castor*,[39] we held that Nebraska's disclosure statute[40] is more exacting than federal due process requirements. In particular, we held that

> whether a prosecutor's failure to disclose such evidence results in prejudice to the accused "depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal."[41]

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[39] *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

[40] Neb. Rev. Stat. § 29-1912 (Reissue 1995).

[41] *Castor, supra* note 39, 257 Neb. at 585, 599 N.W.2d at 211 (emphasis omitted) (quoting *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997)).

The standard under § 29-1912 for exculpatory evidence is slightly different from the due process standard announced in *Bagley*. Both standards require a showing that the nondisclosure prejudiced the defendant by preventing him or her from acquiring material evidence. Nebraska law, however, defines materiality more broadly to apply to evidence which strongly indicates it would play an important role in preparing a defense.[42] *Brady* did not focus on the defendant's ability to prepare for trial, because *Brady* was not a rule for discovery.[43]

It is plausible that having the police reports at trial might have prompted Jackson to request production of any telephone numbers or other evidence the police obtained from their search of Hughes' jail cell. If true, then arguably, the police reports would have played an important role in uncovering admissible evidence. Yet, Jackson has not shown that the police recovered any such evidence from Hughes' cell. So while disclosure of the police reports may have piqued Jackson's interest in any evidence found in Hughes' cell, at present, the record fails to show that officers did, in fact, find anything useful to Jackson's case. So Jackson has failed to carry his burden to show that the State withheld any material exculpatory evidence.

### 4. Alleged Erroneous Rulings by Trial Court

Related to Jackson's claim of prosecutorial misconduct is Jackson's postconviction request that the district court compel the State to produce (1) evidence the police might have found in the search of Hughes' jail cell and (2) records of Hughes' telephone calls and visitors while he was in the Douglas County Correctional Center. Jackson believes that this information may uncover evidence that Hughes called or was visited by the individual whom he hired to kill Thornton. If true, Jackson believes that such information might strengthen his claim of prosecutorial misconduct and ultimately lead to a new trial.

[27] The State objected to Jackson's request on relevancy grounds, and the court overruled Jackson's motion. The trial court has broad discretion in granting discovery requests and

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[42] See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998)

[43] See *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

errs only when it abuses its discretion.[44] Whether the court erred in denying Jackson's discovery request presents a more difficult issue than the propriety of the court's refusal to grant Jackson's request for a new trial.

[28,29] We believe the information Jackson sought to discover is relevant. We stated in *State v. Oliva*[45] that evidence is relevant if it tends in any degree to alter the probability of a material fact.[46] In other words, relevancy requires only that "the degree of probativeness be something more than nothing."[47] Evidence that Hughes may have been in contact with other individuals before Thornton was shot directly relates to the identity of the person he apparently hired to kill Thornton. Obviously, this is a material fact. Evidence that Hughes contacted other individuals makes it slightly more probable that one of those individuals was the shooter. More important, such evidence may well lead to other, more probative evidence. As such, this evidence is relevant.

Nevertheless, a question exists as to whether Jackson can request this evidence. In *State v. Thomas*,[48] we questioned whether a defendant could request discovery in a postconviction motion. We stated that we knew of no precedent that permits a defendant, in a postconviction proceeding, to request additional discovery which would facilitate making that same postconviction claim.[49] This suggests that the Nebraska Postconviction Act merely gives a defendant the right to present evidence he already possesses.[50] If true, then Jackson's requests would be barred.

But a procedural rule, which prevented prisoners from seeking any discovery at the postconviction stage, would make Nebraska unique among American jurisdictions. Numerous jurisdictions allow discovery requests at the postconviction

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[44] See *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990).

[45] *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988).

[46] See *id.*

[47] See *id.* at 189, 422 N.W.2d at 55.

[48] *Thomas, supra* note 44.

[49] *Id.*

[50] *Id.*

stage so long as the request concerns relevant evidence.[51] Other jurisdictions allow postconviction discovery more or less at the trial court's discretion.[52] A number of courts are more exacting and permit prisoners to seek discovery at the postconviction stage on a showing of good cause.[53] Montana and the federal government, by statute and rule, respectively, also require a showing of good cause for discovery at the postconviction stage.[54]

[30,31] The Nebraska Postconviction Act looks unfavorably on any attempts to rehash issues at the postconviction stage which were—or could have been—raised and disposed of at trial or on direct appeal.[55] Thus, prisoners cannot seek discovery at the postconviction stage if the requested evidence could have been obtained at trial. But when a postconviction discovery request is for evidence that the defendant would not have known to request until *after* the trial, the postconviction stage is the prisoner's first opportunity to make such a request.

Such a circumstance could exist when a prosecutor withheld evidence before trial that, although not exculpatory on its own, might have led to the defendant's discovery of exculpatory evidence. Perhaps there should be a limited exception to

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[51] See, e.g., *DeJesus v. State*, 897 P.2d 608 (Alaska App. 1995); *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996); *Gibson v. U.S.*, 566 A.2d 473 (D.C. 1989); *State v. Ferguson,* 20 S.W.3d 485 (Mo. 2000); *State v. Jensen,* 333 N.W.2d 686 (N.D. 1983); *State v. Ziebart*, 268 Wis. 2d 468, 673 N.W.2d 369 (Wis. App. 2003).

[52] See, e.g., *Marshall v. State*, No. SC05-2379, 2007 WL 4258618 (Fla. Dec. 6, 2007); *Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001); *Varney v. State*, 475 N.W.2d 646 (Iowa App. 1991); *Com. v. Daniels*, 445 Mass. 392, 837 N.E.2d 683 (2005) (construing Mass. R. Crim. P. 30(c) (2006)).

[53] See, e.g., *Ex parte Land*, 775 So. 2d 847 (Ala. 2000); *Dawson v. State*, 673 A.2d 1186 (Del. 1996); *Com. v. Carson*, 590 Pa. 501, 913 A.2d 220 (2006); *Personal Restraint of Gentry*, 137 Wash. 2d 378, 972 P.2d 1250 (1999).

[54] See, *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001); Mont. Code Ann. § 46-21-201 (2007).

[55] See, e.g., *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987); *State v. Bean*, 224 Neb. 278, 398 N.W.2d 104 (1986).

*Thomas*[56] for discovery requests concerning evidence which the prosecution withheld from the defendant at trial when there is a reasonable possibility that the requested evidence, if it exists, could have resulted in a different outcome at trial.

Nevertheless, the district court properly overruled Jackson's discovery request even assuming such an exception to *Thomas*. The best that Jackson could hope for with his discovery request is evidence that Hughes had information for a different "Mike" who was known to do contract killings for Hughes. But even in this best-case scenario, such evidence would not be able to overcome the direct proof—DNA evidence and eyewitness testimony—linking Jackson to these crimes. As such, Jackson's prosecutorial misconduct claim would not have undermined confidence in the outcome even if he obtained the evidence he sought from the prosecution. Therefore, while we might allow an exception to *Thomas* in the future, this is not the case.

## V. CONCLUSION

Jackson's claim that he received ineffective assistance of trial counsel is procedurally barred because he failed to raise that claim on direct appeal. Moreover, it appears that Jackson was not prejudiced by any of Poepsel's allegedly deficient actions at the trial stage. This forecloses the possibility that Hart, Jackson's appellate counsel, was ineffective for failing to bring an ineffective assistance of trial counsel claim on direct appeal.

Jackson's claim that his defense was prejudiced by the prosecution's failure to disclose several police reports is also meritless. Jackson has failed to provide any support for his belief that the prosecution had material evidence which it withheld from him. He also failed to show that having those police reports at the trial stage would have led to other material exculpatory evidence.

There is no merit to Jackson's claim that the district court abused its discretion when it denied Jackson's request for any evidence the police may have recovered regarding Hughes. While this information is relevant to Jackson's claim that

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[56] *Thomas, supra* note 44.

he was the victim of prosecutorial misconduct, the result of Jackson's trial would not change even if Jackson was able to obtain and present the evidence he seeks from the prosecution. Therefore, the request was properly denied.

Finally, we have considered Jackson's other assignments of error and arguments and conclude that none of those issues have sufficient merit to warrant further discussion.

AFFIRMED.

HEAVICAN, C.J., not participating.

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DOROTHY CAGUIOA, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF NICOSIO CAGUIOA, DECEASED, AND AS GUARDIAN OF JADE CAGUIOA, A MINOR, APPELLANT, V. THOMAS FELLMAN AND MARTIN MEYERS, DOING BUSINESS AS FELLMAN MEYERS BOAT VENTURES, APPELLEES.

747 N.W.2d 623

Filed April 18, 2008. No. S-06-1055.

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. **Trial: Evidence: Appeal and Error.** In determining the admissibility of evidence, the exercise of judicial discretion is implicit in determinations of relevancy and admissibility, and the trial court's decision will not be reversed absent an abuse of discretion.
3. **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.
4. **Negligence: Words and Phrases.** Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances or the failing to do something that a reasonably careful person would do under similar circumstances.
5. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
6. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (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.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joseph B. Muller and Ronald J. Palagi, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellant.

Dan H. Ketcham and Meredith J. Morgans, of Engles, Ketcham, Olson & Keith, P.C., for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, and McCormack, JJ.

Wright, J.

## NATURE OF CASE

Nicosio Caguioa (Caguioa) drowned in Lake Powell, Utah. His widow, Dorothy Caguioa (Plaintiff), brought suit against the owners of the houseboat upon which Caguioa was a guest. The trial court granted the defendants' motion for summary judgment. It concluded that the record did not demonstrate the defendants were negligent in their operation of the houseboat and that there was no factual dispute as to any wanton negligence on the part of the defendants.

## SCOPE 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. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[2] In determining the admissibility of evidence, the exercise of judicial discretion is implicit in determinations of relevancy and admissibility, and the trial court's decision will not be

reversed absent an abuse of discretion. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

## FACTS

Thomas Fellman and Martin Meyers (collectively the defendants) invited Caguioa to Lake Powell to spend time on their houseboat. Caguioa accepted the invitation and flew to Lake Powell to meet the defendants.

On August 20, 2001, while on the defendants' houseboat, Caguioa decided to go for a swim and jumped off the houseboat into the water. He was not wearing a lifejacket, nor did he have any flotation device. Meyers, who was steering the houseboat, saw Caguioa swimming in the water immediately after he jumped.

Meyers stated that he allowed the houseboat to drift the "length of a football field" or more from Caguioa. Meyers then started the houseboat and went back to get Caguioa. When Meyers got within approximately 50 feet of Caguioa, he turned off the engine, and Caguioa started to swim toward the left side of the houseboat. Meyers lost sight of Caguioa but stated that a passenger saw Caguioa approach the side of the houseboat and reach up. However, it was not possible to climb onto the houseboat at that location.

As Meyers came down from the helm, he saw Caguioa not more than 10 feet from the right side of the houseboat. Caguioa was looking at Meyers but did not say anything. Caguioa then went under the water, bobbed back up, raised his right arm, and went straight down into the water. Meyers screamed, "Nick's in trouble."

One passenger jumped into the water without a lifejacket. Another passenger retrieved snorkel gear from the back of the houseboat. Meyers radioed the National Park Service and stated that he had a man overboard. Efforts to rescue Caguioa were unsuccessful, and he drowned in the lake.

Plaintiff sued the defendants, alleging general acts of negligence and a cause of action based upon 46 U.S.C. app. § 688 (2000) (now codified at 46 U.S.C.A. § 30104 (West 2006)), commonly known as the Jones Act. The Douglas County

District Court granted summary judgment in favor of the defendants, and Plaintiff appeals.

## ASSIGNMENTS OF ERROR

Plaintiff assigns, restated, that the trial court erred (1) in granting the defendants' motion for summary judgment, because the court applied the wrong standard of care and the evidence showed a genuine issue of material fact, and (2) in excluding certain experts' affidavits regarding the negligence of the defendants.

## ANALYSIS

[3] 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. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

The trial court stated that the defendants' main basis for their motion for summary judgment was that the action was brought exclusively under the Jones Act, a type of workers' compensation claim for seamen. Under the Jones Act, the duty is to provide employed seamen with safe and seaworthy conditions. In order for an action to be brought under the Jones Act, the plaintiff must show that he was employed by the defendant as a seaman. Second, the plaintiff must show that his injury occurred during the course of his employment.

In their motion for summary judgment, the defendants claimed Caguioa was not an employee under the Jones Act and was not injured in the course of his employment. The trial court found that the evidence presented by the defendants established that Caguioa was not a seaman and was merely a guest on the houseboat, not a chef hired to prepare meals for the other passengers. This evidence was not controverted by Plaintiff, and to the extent that the action sought recovery based on the Jones Act, the defendants' motion for summary judgment was sustained.

The parties do not contest this issue, and it is not assigned as error on appeal. Therefore, the trial court's granting of

summary judgment as to the action brought under the Jones Act is affirmed.

The trial court also found that there were general allegations of wrongful death and negligence in addition to the claim raised under the Jones Act. The defendants argued that even if Plaintiff's claim was based on general negligence, there was no evidence of negligence on the part of the defendants.

The trial court analyzed the cause of action as if it were a claim based on premises liability. It relied upon *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997), in which the plaintiff was injured when he dove off a diving board and struck his head on the bottom of a swimming pool. In *Alexander*, the plaintiff was visiting residents of the apartment complex when the accident occurred. Because the plaintiff was a social guest, he was therefore considered a licensee. Under the law in effect at that time, an owner or occupant of a premises owed only the duty to refrain from injuring a licensee by willful or wanton negligence.

*Alexander* is inapplicable for two reasons: In the case at bar, Plaintiff's claim is not based upon premises liability, and even if it were, the duty owed is that of reasonable care. In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), we abrogated the distinction between invitees and licensees and held that owners and occupiers of land owe a general duty of reasonable care to all lawful entrants.

The trial court found that Caguioa was a guest and voluntarily left the houseboat to swim. There was evidence that Caguioa could swim, that he knew where the ladders and safety equipment were located, and that the houseboat was in good operating condition. Based on these facts, the court concluded there was no evidence in the record to indicate that the defendants were negligent in the operation of the houseboat. It concluded that there was no evidence as to any wanton negligence or designed injury on the part of the defendants.

We first address the standard of care to be applied in this negligence action. Generally, the owners and operators of boats and vessels have a duty to operate the boat in a careful and prudent manner. None of the parties have alleged that the law of the state where the accident occurred is different than

the law of Nebraska. In the absence of such a pleading, we conclude that the law of Utah is the same as that of Nebraska. "No person shall operate any motorboat or vessel . . . in a . . . negligent manner so as to endanger the life, limb, or property of any person." Neb. Rev. Stat. § 37-1254 (Reissue 2004).

[4] In *Reed v. Reed*, 182 Neb. 136, 153 N.W.2d 356 (1967), we recognized the duty of ordinary care in the operation of a vessel and a cause of action for negligently failing to observe such ordinary care. Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances or the failing to do something that a reasonably careful person would do under similar circumstances. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

[5] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006). In order to be granted summary judgment, a defendant must show that one of the required elements of a plaintiff's case cannot be established. 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. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

In the case at bar, the evidence presented on the motion for summary judgment created a genuine issue of material fact as to whether the defendants' conduct breached their duty of ordinary care. The defendants allowed their houseboat to drift over 100 yards from Caguioa. They knew he did not have a lifejacket or flotation device with him. There was also evidence that the houseboat may have run over Caguioa. Thus, summary judgment was not proper.

In addition, the trial court erroneously excluded the affidavits of Caguioa's expert witnesses. The affidavit of David Smith, Ph.D., averred that he was a retired commander from the U.S. Coast Guard. He graduated from the U.S. Coast Guard Academy

in 1960 with a bachelor of science degree in naval science. Smith had 21 years of experience as a U.S. Coast Guard officer with assignments including "Chief of the Boating Safety Division, Second Coast Guard District, St. Louis," Missouri. He had been a member of the "National Water Safety Congress, Recreation and Parks Association, and the Safe Boating Council."

Based on his education, training, skills, and experience and his review of the National Park Service's incident report and witness statements regarding the drowning, Smith stated that Meyers was negligent in his operation of the houseboat on Lake Powell in the following particulars: in allowing the houseboat to drift away from Caguioa, in failing to safely maneuver the houseboat back to retrieve Caguioa, and in failing to be properly trained and prepared in rescue operations or have someone present onboard who was properly trained in rescue operations. Smith opined that the above factors led to the death of Caguioa. Smith set forth his conclusions to a reasonable degree of certainty in his area of expertise. A similar affidavit was filed by Capt. Eugene Hickey, who had also graduated from the U.S. Coast Guard Academy with a bachelor of science degree in engineering.

[6] Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (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. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005); *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003).

In this case, the trial court excluded the affidavits of both of Caguioa's expert witnesses because the

> resumes and curriculum vitae presented for these witnesses do not indicate that they are experts in the area of

determining the negligence of a driver of a recreational boat, they do not indicate how their testimony is relevant, and, they do not indicate how they arrived at their opinions or state the basis for their opinions.

The resumes and curricula vitae of Caguioa's witnesses established that they were qualified as experts in matters involving the operation and use of pleasure boats. Both graduated from the U.S. Coast Guard Academy, and each had extensive experience with boats, including more than 20 years of experience as officers of the U.S. Coast Guard.

The affidavits were offered to show the experts' opinions that the defendants' conduct was negligent because it did not conform to a standard of ordinary care. Their affidavits were relevant and were sufficient to establish the foundation for their opinions. The affidavits were not unfairly prejudicial.

## CONCLUSION

We affirm the judgment of the trial court as to Plaintiff's claim based on the Jones Act. However, for the reasons set forth above, we conclude that the trial court erred in granting the defendants' motion for summary judgment based on a cause of action for negligence. We reverse the judgment as to Plaintiff's claims based on the alleged negligence of the defendants, and we remand the cause for further proceedings.

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

MILLER-LERMAN, J., not participating.

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IVAN EICHER AND DELORES EICHER ET AL., APPELLEES, v. MID AMERICA FINANCIAL INVESTMENT CORPORATION ET AL., APPELLANTS.

748 N.W.2d 1

Filed April 18, 2008. No. S-06-1206.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
6. **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.
7. **Property: Valuation: Witnesses.** A landowner is qualified to testify to the fair market value of his or her own property.
8. **Courts: Judgments: Time.** A district court can modify a judgment or order issued in a prior term only if it has specific statutory authority to do so.
9. **Statutes: Time: Words and Phrases: Appeal and Error.** "Pendency" in Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2006) refers to the period of time after notice of appeal has been filed but before the parties have submitted the case at argument.
10. **Judgments: Time: Words and Phrases.** "Submitted for decision" in Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2006) refers to the period after the case was submitted at oral argument but before the court's opinion has issued.
11. **Courts: Judgments: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2006), a district court may freely correct clerical errors after notice of appeal has been filed up until the time the parties submit the case at the conclusion of arguments.
12. **Consumer Protection.** The Consumer Protection Act only applies to unfair or deceptive practices which affect the public interest.
13. **Actions: Fraud: Proof.** To set forth a prima facie case of fraudulent misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
14. **Contracts: Fraud: Presumptions.** The general rule that an individual's knowledge of a contract's contents is presumed once the individual signs it applies only in the absence of fraud.

15. **Contracts: Fraud.** The doctrine that the carelessness or negligence of a party in signing a writing estops him or her from afterward disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made.
16. **Damages: Proof.** Nebraska law only requires a plaintiff to prove his or her damages to a reasonable certainty; it does not require proof beyond all reasonable doubt.
17. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
18. **Actions: Conspiracy.** A civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct.
19. **Conspiracy: Corporations: Pleadings.** To pursue a claim of civil conspiracy where the allegations involve a conspiracy between the corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

David A. Domina and Elias T. Xenos, of Domina Law Group, P.C., L.L.O., for appellants.

Mark C. Laughlin, Andrea F. Scioli, and Tamara D. Borer, of Fraser Stryker, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

## I. INTRODUCTION

William Street and David Welton, along with 11 other home mortgagors (collectively plaintiffs), brought various claims against Mid America Financial Investment Corporation (Mid America), Scott Bloemer, and Elaina Hollingshead (collectively defendants) in the district court for Douglas County. The district court found that defendants were liable to all the mortgagors except Welton and Street. The court found that Welton suffered no damage as a result of defendants' misconduct and that Street's claims were barred entirely by collateral estoppel. On appeal, we upheld the district court's findings regarding the other plaintiffs, but reversed the district court's determinations

and remanded the cause regarding Street and Welton.[1] On remand, the court ruled in favor of both Street and Welton, awarding each damages, attorney fees, and costs. Defendants now appeal, and for reasons set forth below, we affirm.

## II. BACKGROUND

In May 2001, Street, Welton, and numerous other individuals sued defendants based on an allegedly deceptive scheme to defraud homeowners out of their homes. Using Mid America as their alter ego, Bloemer and Hollingshead would contact homeowners facing imminent foreclosures and offer to help the homeowners by loaning them the money needed to avoid foreclosure. However, under the terms of the forms Bloemer and Hollingshead encouraged the homeowners to sign, Mid America would acquire title to the homes by warranty deed. When the homeowners would fail to make the scheduled payments to Mid America, defendants would evict the homeowners. As a result, the homeowners lost their homes and any equity they had therein.

After a bench trial, the district court found that defendants had engaged in a civil conspiracy to defraud plaintiffs out of their homes and that this conduct violated Nebraska's Consumer Protection Act (CPA). Accordingly, the district court entered judgments in favor of plaintiffs, but specifically denied relief to Welton and Street for the reasons set forth above.

On appeal, we affirmed the district court's judgment regarding plaintiffs' claims of civil conspiracy and violations of the CPA. However, we reversed the district court's decision to dismiss Street's claims and remanded the cause with directions to adjudicate the merits of those claims. We also reversed the district court's finding that Welton did not suffer damages and remanded the cause with directions "to award damages to Welton in an amount which it shall determine from the existing record."[2]

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[1] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[2] *Id.* at 390, 702 N.W.2d at 811.

On remand, the district court found that Welton was entitled to $35,532.40 in damages. The court based this figure on Welton's testimony that the fair market value of his property was $80,000 at the time of the Mid America transaction. The balance on the mortgage at the time was $41,000, which left Welton with $39,000 in equity in the home. The court found that Mid America paid a mortgage reinstatement fee of $5,947.80 and made $13,029.92 in mortgage payments for a total of $18,977.72. However, Welton made $15,330.12 in "loan" payments to Mid America, leaving Mid America with an interest of only $3,647.60 in the home. Accordingly, the court awarded Welton $35,532.40 in damages.

In that same order, the court also awarded Welton attorney fees in the amount of $12,108.20 and cited Neb. Rev. Stat. § 87-303 (Reissue 1999) as the basis for that award. It is worth noting at this juncture that § 87-303 pertains to Nebraska's Uniform Deceptive Trade Practices Act (UDTPA), yet Welton's judgment was based on the CPA.

Regarding Street, the district court found that he, too, was the victim of a civil conspiracy to commit fraudulent misrepresentation as well as violations of the CPA. The court calculated Street's damages at $35,478.98. This figure was based on Street's testimony that his home had a fair market value of $75,000 at the time of the Mid America transaction. Mid America paid $5,260.95 to reinstate the mortgage and $35,910.07 in mortgage payments for a total of $41,171.02. The court found that Street made one "loan" payment to Mid America of $800. The court also found that Street incurred $850 in damages when he was forced to move his family into a motel for a 17-day period after Mid America evicted him and his family.

As with Welton, the court awarded Street $12,108.20 in attorney fees. Once again, the court based the award on § 87-303, a section pertaining to the UDTPA, despite the fact that Street, like Welton, secured relief under the CPA.

Defendants filed notice of appeal on October 26, 2006, and submitted their opening brief on January 16, 2007. Shortly thereafter, the district court recognized that it mistakenly cited a section of the UDTPA rather than the CPA as the basis for Welton and Street's attorney fee awards. Accordingly, on

January 26, 2007, the district court issued a pair of orders nunc pro tunc explaining its mistake and making clear that attorney fees were awarded under the CPA.

## III. ASSIGNMENTS OF ERROR

### 1. Assignments Regarding Welton

Regarding Welton, defendants assign, restated and renumbered, that the district court erred (1) by miscalculating the amount of Welton's damages and (2) in awarding Welton attorney fees.

### 2. Assignments Regarding Street

Regarding Street, defendants assign, restated and renumbered, that the district court erred by finding that (1) defendants' transaction with Street violated the CPA, (2) Street successfully proved a case of fraudulent misrepresentation, (3) a civil conspiracy existed on the part of Bloemer and Hollingshead, and (4) Street was entitled to attorney fees.

## IV. STANDARD OF REVIEW

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.[3] An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[4] Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.[5]

[4,5] In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[6] When an appeal calls for

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[3] See *Eicher, supra* note 1.

[4] See *id.*

[5] See *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992).

[6] *Id.* See *Eicher, supra* note 1.

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.[7]

[6] 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.[8]

## V. ANALYSIS

### 1. Welton Judgment

Defendants raise two arguments regarding the judgment in favor of Welton. First, defendants argue that the district court erred in calculating the amount of Welton's damages. Second, defendants claim that the district court's award of attorney fees should not stand because the original basis for the award—the UDTPA—was erroneous and the court's attempt to change that mistake through an order nunc pro tunc was invalid. We address each argument in turn.

#### (a) Damage Computation

Defendants argue that the district court made two errors when calculating Welton's damages. First, they claim that the district court neglected to credit them with the value of the repairs they made to Welton's home. Second, defendants claim that the district court erred in identifying the fair market value of Welton's home at the time of the transaction with Mid America.

##### *(i) Repairs*

Our review of defendants' argument that the district court did not properly credit them for repairs made to Welton's home is hamstrung by their failure to adequately develop that claim. Defendants simply assert that they were not given adequate credit for the repairs even though "[t]he trial court knew from the uncontroverted evidence, admitted by Welton, that

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[7] *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[8] See *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

his property was improved by [defendants].”[9] This assertion, however, is not accompanied by any cite to the record, nor do defendants specify the exact repairs to which they refer.

The district court’s order may provide a clue as to the repairs at issue. In its order, the court discussed repairs made to the sidewalk in front of Welton’s home. The court found that defendants did, in fact, spend roughly $2,000 to have a third party deliver and pour cement in front of Welton’s home. But the district court also found that Welton had to remove the old sidewalk and set the forms in which the new cement was poured.

Because both parties contributed to those repairs through money or labor, the district court declined to credit either party with the value of those improvements. Defendants have not pointed to any evidence in the record which would undermine Welton’s testimony or the significance that the district court attached to it. Accordingly, this argument is without merit.

*(ii) Valuation of Welton’s Home*

Defendants next argue that the court erred when it concluded that Welton’s home had a fair market value of $80,000 at the time of the Mid America transaction. Instead, defendants believe the home was worth no more than $65,000.

The district court drew the $80,000 figure from Welton’s own testimony. Defendants’ $65,000 figure is drawn from the testimony of Bloemer, one of the defendants in this case. Apparently, Bloemer has some expertise in real estate. Defendants believe, therefore, that the district court should have relied on his appraisal rather than that of Welton, a lay witness without significant knowledge about real estate.

[7] But we have long held that a landowner is qualified to testify to the fair market value of his or her own property.[10] And while testimony of an expert in real estate may sometimes be more reliable regarding the value of property than testimony from a lay witness, that would not be true where the trial court had reason to doubt the expert’s credibility. The district court

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[9] Brief for appellants at 26.

[10] See *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998).

specifically found that Bloemer was not credible. Any additional skill that Bloemer had in identifying property values was rendered moot as a result. We cannot reassess the credibility of witnesses on appeal[11] and therefore conclude that defendants' argument in this regard is without merit.

(b) Attorney Fees

In defendants' opening brief filed with this court on January 16, 2007, they argued that Welton's attorney fee award was not valid because it was based on the UDTPA, while Welton's judgment was based on the CPA. However, on January 26, 2007, the district court issued an order nunc pro tunc, pursuant to Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2006). In that order, the court explained that it had accidentally cited the UDTPA when it awarded Welton attorney fees. The court made clear that it had intended to cite to the CPA instead.

In response, defendants contend that the order nunc pro tunc is not valid and that Welton's attorney fee award must be reversed. Defendants' arguments in this regard are twofold. First, defendants believe the timeframe for issuing an order nunc pro tunc under § 25-2001(3) had lapsed before the court actually issued the order. Second, defendants argue that the defect in the original order was not a true "clerical error" and therefore not the sort of error correctable under § 25-2001(3). We address each argument in turn below.

*(i) Timing*

Defendants point out that a district court's ability to make subsequent changes to orders after they have been issued diminishes considerably when the term in which the order was issued has ended.[12] A district court's term coincides with the calendar year.[13] The district court's order nunc pro tunc was issued January 26, 2007, and attempts to correct an error in an order issued September 29, 2006.

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[11] *Eicher, supra* note 1.

[12] See *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983).

[13] See *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003).

[8] Nonetheless, defendants mischaracterize the scope of a district court's authority in this regard. A district court's authority to modify prior orders does not end entirely with the conclusion of the term. Rather, what ends at the conclusion of the term is the district court's *virtually unlimited* ability to modify orders issued therein.[14] Thereafter, a district court can modify a judgment or order issued in a prior term only if it has specific statutory authority to do so. The various scenarios enumerated in § 25-2001—including § 25-2001(3)—provide such authority.[15]

Even assuming § 25-2001(3) allowed the district court to correct an order issued in the prior term, defendants contend that the district court did not follow the timing requirements in that section. Section 25-2001(3) provides, in pertinent part, "During the pendency of an appeal, [clerical] mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."[16]

To define "pendency" and "submitted for decision," defendants rely on Neb. Rev. Stat. § 25-1912(4) (Cum. Supp. 2006). That section provides that a district court is divested of jurisdiction when a party perfects an appeal by filing notice of that appeal in the district court. At that time, jurisdiction shifts from the district court to the appellate court. In so arguing, defendants suggest that "pendency" and "submitted for decision" are synonymous with filing notice of appeal. Accordingly, defendants essentially contend that any orders pursuant to § 25-2001(3) which come after notice of appeal has been filed would be void unless the district court obtained leave of the appellate court. Because the district court did not obtain leave from this court when it issued its order nunc pro tunc, the order would be void under defendants' reading of § 25-2001(3).

[9,10] But defendants' interpretation of § 25-2001(3) is foreclosed by the fact that § 25-2001(3) very clearly contemplates two distinct periods during the appellate process. In our view,

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[14] See *First Nat. Bank v. First Trust Co.*, 145 Neb. 147, 15 N.W.2d 386 (1944).

[15] See *State ex rel. Ward v. Pape*, 237 Neb. 283, 465 N.W.2d 760 (1991).

[16] § 25-2001(3).

"pendency" in § 25-2001(3) refers to the period of time after notice of appeal has been filed but before the parties have submitted the case at argument. "[S]ubmitted for decision" refers, therefore, to the period after the case was submitted at oral argument but before the court's opinion has issued.

[11] Under § 25-2001(3), a district court may freely correct clerical errors after notice of appeal has been filed up until the time the parties submit the case at the conclusion of arguments. After that time, the district court must obtain leave of the appellate court to fix a clerical error in a prior order. It is worth noting that the Court of Appeals has already interpreted and applied § 25-2001(3) in this fashion.[17]

Because this case had not yet been submitted when the district court attempted to correct the mistake in Welton's attorney fee award by issuing an order nunc pro tunc, the district court did not need leave from this court to issue that order. Therefore, assuming that the court's order nunc pro tunc concerns a clerical error in its prior order, the order was valid. The next question, then, is whether the district court's accidental citation to the UDTPA instead of the CPA can be characterized as a "clerical error."

*(ii) Nature of District Court's Original Error*

Defendants claim that the district court's citation to the UDTPA instead of the CPA is not a true clerical error and, therefore, that § 25-2001(3) does not permit the order nunc pro tunc. The district court itself explained that it "mistakenly" cited the UDTPA in its prior order through "oversight." This explanation finds support in the fact that the court made the exact same mistake in the original judgment that we affirmed on the first appeal in this case.

In the initial order following the first trial of this case, the district court awarded attorney fees under the CPA. "However, in its order following the subsequent hearing, the court referred to a provision in the UDTPA which permits an award of attorney fees to a prevailing party."[18] Then, while the parties were

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[17] See *State v. Ziemann*, 14 Neb. App. 117, 705 N.W.2d 59 (2005).

[18] *Eicher, supra* note 1, 270 Neb. at 382, 702 N.W.2d at 806.

submitting their briefs in the first appeal in this case, the district court issued "an order nunc pro tunc declaring that the award of attorney fees was pursuant to the CPA and that the reference to the UDTPA was a clerical error."[19] A nearly identical sequence of events occurred before and during the present appeal. It seems doubtful that the district court wanted to incite another "confusing sequence of events"[20] by intentionally referring to the UDTPA a second time.

Nor do we think it significant that the court did not specifically refer to its error as a "clerical error." Such errors are defined as errors which result "from a minor mistake or inadvertence" especially in "writing or copying something."[21] There is perhaps no better description of what transpired here than that. Accordingly, we conclude that the reference to the UDTPA in Welton's attorney fee award was the product of a clerical error and that the court had authority to change it pursuant to § 25-2001(3).

### 2. Street Judgment

#### (a) CPA Violation

[12] Regarding Street, defendants first argue that the district court erred in finding that any misconduct on their part amounted to a violation of the CPA. The CPA's scope is limited to "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."[22] Based on that language, we have held that the CPA only applies to unfair or deceptive practices which affect the "public interest."[23]

Drawing on that phrase, defendants contend that the CPA should not apply here because the transaction involved only Street and the named defendants, not the public at large. In this way, defendants believe this case is similar to *Nelson v.*

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[19] *Id.* at 374, 702 N.W.2d at 801.

[20] *Id.* at 382, 702 N.W.2d at 806.

[21] Black's Law Dictionary 582 (8th ed. 2004).

[22] Neb. Rev. Stat. § 59-1601(2) (Reissue 2004).

[23] See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 683, 605 N.W.2d 136, 141 (2000).

*Lusterstone Surfacing Co.*[24] In *Nelson*, we held that the CPA did not apply to the allegedly fraudulent sale of a single Jeep vehicle between a corporation and a private citizen.

Notably, defendants made the exact same argument with respect to the other plaintiffs in this case during the first appeal. Although we did not elaborate on our rationale at the time, it is clear that we found defendants' CPA argument unavailing, since we concluded that "plaintiffs are entitled to recover their damages and attorney fees under their alternative theories of fraud *and violation of the CPA*."[25] We see no reason to alter that conclusion now.

Nor is it significant that Street's claim was litigated separately from the remainder of plaintiffs' claims. Street would have recovered along with those plaintiffs but for the district court's mistaken conclusion that his claim was procedurally barred. Street's claim depends on the same allegations raised by the other plaintiffs—that is, that defendants engaged in a pattern of calculated conduct intended to defraud numerous citizens of this state of their homes. We find no merit in defendants' contention that the CPA does not apply to their transaction with Street.

(b) Fraudulent Misrepresentation

[13] Defendants next argue that the district court erred in neglecting to recognize Street's failure to prove a case of fraudulent misrepresentation. To set forth a prima facie case of fraudulent misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.[26] Defendants believe

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[24] *Id.*

[25] *Eicher, supra* note 1, 270 Neb. at 390, 702 N.W.2d at 811 (emphasis supplied).

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

that Street failed to prove several of these elements. We review each of defendants' arguments in the subsections that follow.

*(i) Existence of False Statement of Fact*

Street claimed at trial that defendants made numerous false statements that the transaction with Mid America was a loan and not a sale. Defendants point out, however, that the only real evidence of such statements is Street's own "self-serving" testimony.[27] But despite the potential for bias, the district court found that Street was a credible witness. Moreover, the only evidence that contradicts Street's testimony is testimony by Bloemer and Hollingshead, two of the defendants. This evidence carries the same potential for bias, and the district court specifically found that Bloemer and Hollingshead were not credible. The district court did not err in relying on Street's testimony regarding the existence of false factual statements.

*(ii) Reasonable Reliance*

[14,15] Defendants next suggest that Street did not reasonably rely on their false statements of fact because he signed forms which clearly indicated that the transaction was a sale, not a loan as Street claims he was told. But at trial, Street testified that he did not read the forms before signing them. The general rule that an individual's knowledge of a contract's contents is presumed once the individual signs it "applies only in the absence of fraud."[28] Or, as we said in the first appeal in this case,

> "The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made."[29]

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[27] Brief for appellants at 17.

[28] *Eicher, supra* note 1, 270 Neb. at 379, 702 N.W.2d at 804.

[29] *Id.* (quoting *West v. Wegner*, 172 Neb. 692, 111 N.W.2d 449 (1961)).

Because the district court specifically found that Street was fraudulently induced to sign the sale agreements with Mid America, he is not charged with constructive knowledge of their contents. Accordingly, it is irrelevant whether those agreements clearly identified the transaction as a sale.

*(iii) Actual Reliance*

Defendants next argue that even if it would have been reasonable for Street to rely on their false statements, there is proof that Street did not actually do so. In this regard, defendants point out that Street's home was listed as sold on his 1998 tax return. The desired inference is that Street knew his home had been sold and held it out as such.

However, Street testified at trial that he did not list the sale of his home on his tax return. Street first realized that his home was so listed when he reviewed the tax documents in May 2002 while preparing for trial. As Street explained, Mid America mailed him various tax-related documents early in 1999. Street apparently did not review these documents himself. Instead, Street took those and his other tax documents to a local office of "Professional Bookkeeping Service" (PBS) and asked them to prepare his tax return. When PBS completed Street's tax return, Street signed and mailed the return without reviewing it. Street also claims that he never spoke to any PBS employees about the contents of his tax return. Therefore, according to Street's testimony, he did not personally report the sale of his home on his 1998 tax return. The district court found Street to be a credible witness, and we cannot disturb that determination on appeal. Accordingly, the tax return does not support the inference that Street knew his transaction with Mid America was a sale and not a loan.

*(iv) Causation*

Defendants also contend that any fraud on their part did not cause Street to suffer damages because Street's home would have been foreclosed upon but for their intervention. In support of this argument, defendants offer Street's testimony wherein he concedes that he was not planning to take any steps to prevent foreclosure before Mid America contacted him. But

the suggestion that Street's home would have been foreclosed without their intervention reflects a fundamental misunderstanding of the proper causal inquiry in this case.

Street has not alleged that Mid America caused him to lose his home. Rather, Street alleged that Mid America caused him to lose his home *and any equity he had invested in it*. As the district court found, Street's home had a fair market value of approximately $75,000, with $41,171.02 remaining on his mortgage. This left Street with $33,828.98 in equity in his home. Even a foreclosure of Street's home would have permitted him to recover some if not all of that equity. By fraudulently inducing Street to convey his home to them, Mid America caused Street to lose his home *and* as much as $33,828.98 in equity.

*(v) Damages*

Defendants' final argument regarding Street's claim of fraudulent misrepresentation concerns damages. First, defendants claim that the district court erred when it relied on Street's testimony on his home's fair market value. Second, defendants claim that Street did not prove his damages with sufficient specificity.

Defendants' first argument is identical to the argument they made regarding the district court's decision to base Welton's damages on Welton's assessment of the fair market value of his own home instead of Bloemer's testimony. Again, as a landowner, Street—like Welton—was qualified to testify as to the value of his property.[30] And while Bloemer may have had more knowledge of the real estate market, the court found that unlike Street, Bloemer was not trustworthy. Accordingly, the court did not err in relying on Street's testimony to identify the fair market value of Street's home.

[16] As for the second argument, defendants point out that Street did not show how much he would have received for his home at a foreclosure sale. As such, defendants contend that Street did not prove his damages with the degree of specificity that the law requires. But Nebraska law only requires a plaintiff to prove his or her damages to a *reasonable certainty*; it does

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[30] See *Smith, supra* note 10.

not require proof beyond all reasonable doubt.[31] The district court's computation was a reasonable estimate of Street's damages based on the estimated value of his home, less the amount owed on his mortgage. This was the exact same method that we used in the first appeal of this case to speculate whether Welton had suffered any damages.[32] While it is true that Street did not prove that his home would have earned its full estimated value at the foreclosure sale, such proof is not needed to generate a reasonably certain estimate of his damages.

(c) Civil Conspiracy

[17] Defendants next contend that the district court erred in finding in favor of Street on his allegation of civil conspiracy. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[33] Defendants argue that Street's civil conspiracy claim was deficient in numerous respects.

*(i) Underlying Civil Violation*

[18] First, defendants argue that they cannot be held liable for a civil conspiracy because they did not commit any underlying violations. A civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct.[34] But as set forth above, we affirm the district court's conclusion that defendants violated the CPA and committed fraudulent misrepresentation. There are, therefore, multiple underlying violations to support a claim of civil conspiracy.

*(ii) Specificity in Pleadings*

[19] Defendants next argue that the district court erred in failing to recognize that Street did not properly allege a civil conspiracy. To pursue a claim of civil conspiracy where, as

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[31] See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003).

[32] See *Eicher, supra* note 1.

[33] *Id.* (citing *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997)).

[34] See *Treptow Co. v. Duncan Aviation, Inc.*, 210 Neb. 72, 313 N.W.2d 224 (1981).

here, the allegations involve a conspiracy between the corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties.[35] Defendants believe Street failed to do so in his pleadings and was therefore estopped from pursuing that claim at trial.

But the portion of Street's pleadings which set forth a claim of civil conspiracy is identical to the pleadings filed by each of the other plaintiffs in this case. In disposing of defendants' first appeal, we held that such language was "sufficient to set forth a claim of conspiracy among all three defendants."[36]

Defendants attempt to escape the force of that conclusion by arguing that it contradicts our decision in *Upah v. Acona Bros. Co.*[37] In *Upah*, we held that a plaintiff was estopped from pursuing a civil conspiracy claim due to a deficiency in the pleadings. But there is a notable difference between the pleadings at issue here and the pleadings in *Upah*.

In *Upah*, the pleadings alleged that defendants' wrongful actions "'were done *within* the scope of their corporate duties.'"[38] This presented an obvious problem because, as explained above, a claim of civil conspiracy requires exactly the opposite—an allegation that defendants' wrongful actions were done *outside* the scope of their authority.[39] But the pleadings involved in this case do not present such an inherent contradiction. The pleadings here allege that Bloemer and Hollingshead used the Mid America corporate entity as their "alter ego" and a "conduit" through which they defrauded the homeowners. Such allegations are sufficient to support a claim of civil conspiracy.

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[35] See *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980).

[36] *Eicher, supra* note 1, 270 Neb. at 381, 702 N.W.2d at 805.

[37] *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994), *disapproved in part on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).

[38] *Id.* at 592, 521 N.W.2d at 901 (emphasis supplied).

[39] *Eicher, supra* note 1.

*(iii) Proof Defendants Acted Outside Scope of Their Corporate Duties*

Defendants' final argument regarding Street's civil conspiracy claim is that the district court erred in finding that Bloemer and Hollingshead acted outside the scope of their corporate duties. Street's claim depends on the same evidence the trial court used to conclude that Bloemer and Hollingshead acted outside the scope of their corporate duties with respect to the other plaintiffs in this case. During the first appeal, we concluded that such evidence "supports the allegation that the individual defendants acted outside any legitimate scope of corporate employment by utilizing the corporate entity as part of a scheme to defraud third parties."[40] We see no reason to change that conclusion now.

(d) Attorney Fees

In their final assignment, defendants contend that the district court erred in awarding attorney fees to Street. As was true for Welton, the district court initially awarded Street attorney fees under the UDTPA, then issued an order nunc pro tunc clarifying that it meant to award attorney fees pursuant to the CPA. As noted above in our discussion of Welton's attorney fee award, the district court had authority to issue its orders nunc pro tunc under § 25-2001(3). The district court did not err in awarding attorney fees to Street.

## VI. CONCLUSION

We conclude that the district court did not err in resolving Welton's claims. The court properly relied on Welton's testimony regarding his home's fair market value when setting the amount of his damages. Moreover, the district court provided an adequate basis for its award of attorney fees in a valid order nunc pro tunc.

We also conclude that the district court properly handled Street's claims on remand. As with the other plaintiffs in this case, the district court accurately concluded that defendants' actions amounted to a violation of the CPA. The district court

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[40] *Id.* at 381, 702 N.W.2d at 805.

did not err in finding that Street successfully proved a case of fraudulent misrepresentation. Similarly, the district court did not err in finding that defendants engaged in a civil conspiracy. The district court properly considered Street's testimony regarding his home's fair market value in calculating Street's damages. Finally, as with Welton, the district court provided a proper basis for Street's attorney fee award in a valid order nunc pro tunc.

Having concluded that the district court did not err in resolving either Welton's or Street's claims against defendants, we affirm the district court's judgment.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. RICKEY L. JIM, APPELLANT AND CROSS-APPELLEE.

747 N.W.2d 410

Filed April 18, 2008. No. S-06-1217.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.
2. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. **Postconviction: Constitutional Law: Proof: Records.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
5. **Postconviction: Evidence.** If the court grants an evidentiary hearing in a postconviction proceeding, it is obligated to determine the issues and make findings of fact and conclusions of law with respect thereto.
6. **Appeal and Error.** 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.

7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act.
8. **Postconviction: Jurisdiction: Effectiveness of Counsel: Appeal and Error.** The power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
9. **Right to Counsel: Effectiveness of Counsel: Presumptions: Appeal and Error.** If counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant after a trial, conviction, and sentence, prejudice to the defendant will be presumed under the test articulated in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and need not be proved under the two-pronged test for determining ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This is so because the failure to perfect an appeal results in a complete denial of the assistance of counsel at a critical stage of the criminal proceeding.
10. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
11. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A new direct appeal is not an appropriate postconviction remedy where a criminal defendant claims that appellate counsel was ineffective in failing to raise and thus preserve a claim of ineffective assistance of trial counsel. Rather, such "layered claims" must be fully adjudicated in the postconviction proceeding using the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for determining the effectiveness of counsel.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Reversed and remanded for further proceedings.

Deborah D. Cunningham for appellant.

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

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

STEPHAN, J.

Following a jury trial in the district court for Douglas County, Rickey L. Jim was convicted of child abuse resulting in

death and sentenced to 40 to 50 years in prison. His conviction and sentence were affirmed by the Nebraska Court of Appeals.[1] In this postconviction proceeding, Jim alleged that the attorney who represented him on direct appeal was ineffective in failing to assign and thereby preserve his claim of ineffective assistance of trial counsel. Without conducting an evidentiary hearing, the district court ordered a new direct appeal. We granted the State's petition to bypass. We conclude that the district court erred in ordering postconviction relief without first conducting an evidentiary hearing and making findings of fact and conclusions of law. We also conclude that because of the nature of Jim's postconviction claim, a new direct appeal is not an appropriate form of postconviction relief even if Jim's claim is proved to have merit. We therefore reverse, and remand to the district court for further proceedings.

## BACKGROUND

The facts underlying Jim's conviction are set forth in detail in the opinion of the Nebraska Court of Appeals resolving Jim's direct appeal[2] and need not be fully reiterated here. We summarize those facts which relate directly to this postconviction proceeding.

Jim and Candice Bryan resided together with Bryan's two minor children. Emergency medical personnel found the deceased body of the younger child, Layne Bryan Banik, on the floor of his bedroom at approximately 10:50 a.m. on May 8, 2001.

Jim was arrested on August 23, 2001, and charged with child abuse resulting in death. During its opening statement at Jim's trial, the State alluded to injuries Layne suffered in the months prior to his death. Defense counsel objected, and opening statements were suspended while the court held a hearing on the admissibility of the prior injuries. The matter was resolved without a ruling because the State decided not to introduce evidence of prior injuries.

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[1] *State v. Jim*, 13 Neb. App. 112, 688 N.W.2d 895 (2004).

[2] *Id.*

During the trial, the State presented portions of videotaped interviews police conducted with Jim. Defense counsel and the prosecutor had agreed to redact a portion of one of the interviews in which Jim mentioned long bone fractures Layne had previously sustained. The videotape presented to the jury, however, included the following statement by Jim to police officers, which should have been redacted pursuant to the parties' agreement: "Well now that you guys tell me his arm is broke, it's something you know, maybe I did pull his arm too hard or you know, I've, if, if something like that happened, I didn't mean for it to happen you know."

Jim's counsel objected to this portion of the videotape and moved for a mistrial. He argued that while he believed the presentation of the redacted passage was inadvertent, it was nevertheless "extremely prejudicial." The court stated that it was not inclined to grant the mistrial but would consider an appropriate admonition to the jury. After presentation of the videotaped interview was completed, the court admonished the jury as follows:

> [T]he Court gives the following admonition concerning audio- and videotaped statements made by the defendant to police officers.
>
> During the course of the interrogation you heard statements made by the police officers to the defendant, including statements attributed to third parties. These statements are not offered for the truth of the matter contained in those statements and shall not be considered by you for that purpose. They're admitted solely to demonstrate the method of interrogation of the defendant and to put his statements in context.

At a bench conference held immediately following this admonition, defense counsel advised the court that he elected to "rest on my motion for mistrial" and not request an additional admonishment regarding the inadvertent presentation of the redacted passage, because he believed that any such admonishment would necessarily highlight the prejudicial information. The jury returned a verdict of guilty, and Jim was convicted and sentenced as noted above.

Jim's counsel on direct appeal was not the same attorney who had represented him at trial. Appellate counsel assigned several trial errors, including a claim that the district court erred in denying Jim's motion for a mistrial following the inadvertent presentation of the redacted portion of the interview.[3] However, appellate counsel did not raise any issue of ineffective assistance of trial counsel.[4]

The Court of Appeals affirmed the conviction, finding no merit in any of Jim's assignments of error.[5] In concluding that the district court did not abuse its discretion in denying Jim's motion for mistrial, the court reasoned that "the damaging effect of the statement was removed by the court's instruction to the jury and no substantial miscarriage of justice actually occurred . . . nor was a fair trial prevented."[6]

Jim filed a motion for postconviction relief, arguing that his trial counsel was ineffective in several respects and also that his appellate counsel was ineffective in failing to assert and preserve his claim of ineffective assistance of trial counsel on direct appeal. The record includes no indication that an evidentiary hearing was held. Approximately 6 months after Jim's motion was filed, the court entered an order finding, on the basis of its review of "the applicable pleadings, briefs, statutes, and case law[,] that said motion for post-conviction relief should be granted, and that [Jim] should be afforded a direct appeal to raise the issue of ineffective assistance of trial counsel." The order further stated that Jim's "right to appeal is reinstated" and gave him 30 days to "submit an appeal."

Jim filed a timely notice of appeal, and the State cross-appealed.

## ASSIGNMENTS OF ERROR

Jim proceeds as if he were before this court on a direct appeal. He assigns, restated, that his trial counsel was constitutionally

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 131, 688 N.W.2d at 912.

ineffective in his handling of the inadvertent presentation of the redacted portions of his videotaped interview.

The State cross-appeals and assigns, restated and consolidated, that the district court erred in granting postconviction relief without conducting an evidentiary hearing, in ordering a reinstated direct appeal, and in not dismissing Jim's postconviction motion.

## STANDARD OF REVIEW

[1] The dispositive procedural issues presented by the State's cross-appeal arise under the Nebraska Postconviction Act.[7] Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.[8]

## ANALYSIS

The State's cross-appeal raises two key procedural issues: first, whether a district court may grant any form of postconviction relief without first conducting an evidentiary hearing and making findings of fact and conclusions of law and, second, whether a new direct appeal is an appropriate form of postconviction relief where a direct appeal was resolved on its merits, but the defendant subsequently claims that appellate counsel was ineffective in not raising certain issues on appeal.

### Evidentiary Hearing

[2-5] The Nebraska Postconviction Act[9] is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.[10] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against

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[7] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995).

[8] *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[9] §§ 29-3001 to 29-3004.

[10] *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

the defendant to be void or voidable.[11] When a verified motion for postconviction relief is filed in the court which imposed the sentence, the act requires a form of judicial triage:

> Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.[12]

Under the act, an evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[13] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[14] If the court grants an evidentiary hearing in a postconviction proceeding, it is obligated to "determine the issues and make findings of fact and conclusions of law with respect thereto."[15]

Here, the district court granted postconviction relief without first conducting an evidentiary hearing and making findings of fact and conclusions of law. That is not permitted by the act and constitutes reversible error. The State argues on cross-appeal that the district court erred in not dismissing the motion for postconviction relief on the ground that the files and records established that Jim was not entitled to postconviction relief because it contained only conclusory allegations of ineffective assistance of counsel. Jim replies in his brief that the order granting postconviction relief was "submitted by the parties and approved by

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[11] *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

[12] § 29-3001.

[13] See, *id.*; *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[14] *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[15] § 29-3001; *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990).

the District Court."[16] The nature of the submission by the parties is not apparent from the record, which includes only the bill of exceptions from the original criminal proceeding.

We note that the Nebraska Court of Appeals has recently decided a case involving a similar procedural issue. In *State v. Murphy*,[17] the defendant did not file a timely appeal following her conviction. In a subsequent postconviction proceeding, she and the State stipulated that she should be permitted to file an appeal and the district court entered an order granting the stipulation and permitting the appeal to be filed. The record on appeal included the stipulation and order but did not include the motion for postconviction relief. The only record before the Court of Appeals was a stipulation that provided no facts pertaining to any claimed deprivation of constitutional rights, but, rather, "only the bare conclusory agreement that 'an Appeal' be allowed," and the order of the district court implementing the stipulation.[18] Noting that parties cannot stipulate to matters of law, the Court of Appeals held that "the stipulation was not sufficient to invoke the district court's jurisdiction pursuant to the postconviction statute and constituted an invalid attempt to extend the time for appeal."[19] The court concluded that it therefore lacked appellate jurisdiction and dismissed the appeal.

This case differs from *Murphy* in that the record includes a verified motion for postconviction relief. The filing of this motion was sufficient to invoke the court's subject matter jurisdiction under the Nebraska Postconviction Act. But the court erred in the exercise of its jurisdiction by granting postconviction relief without conducting an evidentiary hearing and making findings of fact and conclusions of law.

The determination of whether a motion for postconviction relief alleges facts which, if proved, would entitle the movant to relief should be made in the first instance by the district court. Because of the unusual procedural route by which this

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[16] Reply brief for appellant at 2.

[17] *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007).

[18] *Id.* at 404, 727 N.W.2d at 735.

[19] *Id.*

appeal comes before this court, we cannot be certain that this issue was ever addressed by the district court. Thus, on remand, the district court should determine the sufficiency of Jim's factual allegations and whether the files and records of the case affirmatively show that he is entitled to no relief. If the factual allegations are sufficient and are not refuted by the files and records, the court should conduct an evidentiary hearing and make findings of fact and conclusions of law with respect to the merits of Jim's postconviction claims.

## New Direct Appeal

[6] 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.[20] Because we reverse, and remand this cause for further proceedings which may result in an order of postconviction relief, we address the State's argument that a "reinstated" or "new" direct appeal would be an inappropriate form of postconviction relief in this case under any circumstance.

[7-9] Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act.[21] The specific relief in this circumstance is a "new direct appeal," rather than a "reinstated appeal."[22] The power to grant a new direct appeal is implicit in § 29-3001, and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.[23] Thus, we held in *State v. Trotter*[24]

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[20] *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

[21] *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[22] *State v. McCracken*, 259 Neb. 1049, 615 N.W.2d 882 (2000) (published order).

[23] See, *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[24] *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

that if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant after a trial, conviction, and sentence, prejudice to the defendant will be presumed under the test articulated in *United States v. Cronic*,[25] and need not be proved under the two-pronged test for determining ineffective assistance of counsel under *Strickland v. Washington*.[26] This is so because the failure to perfect an appeal results in a complete denial of the assistance of counsel at a critical stage of the criminal proceeding.[27]

[10] But this is not such a case. Jim's appellate counsel perfected a direct appeal from his conviction and sentence, and the Court of Appeals resolved all the issues presented by that appeal. Jim's postconviction claim is that appellate counsel was ineffective in failing to raise the additional issue of ineffective assistance of trial counsel. Such a failure can have significant consequences, because under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[28] Jim does not claim that he was completely denied the effective assistance of counsel on appeal, only that counsel failed to raise one specific issue.

In *State v. Meers*,[29] we held that a new direct appeal was not an appropriate form of relief as to a postconviction claim of ineffective assistance of trial counsel occurring prior to conviction. We noted that in such cases, a convicted defendant has not been completely deprived of a direct appeal, and that allowing

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[25] *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[26] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[27] See *State v. Trotter, supra* note 24. See, also, *Castellanos v. U.S.*, 26 F.3d 717 (7th Cir. 1994) (approved in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

[28] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[29] See *State v. Meers, supra* note 21.

a *new* direct appeal would not achieve the objective of restoring the convicted defendant's rights and status at the time of counsel's deficient performance.

[11] The same reasoning applies here. We hold that a new direct appeal is not an appropriate postconviction remedy where a criminal defendant claims that appellate counsel was ineffective in failing to raise and thus preserve a claim of ineffective assistance of trial counsel. Rather, such "layered claims"[30] must be fully adjudicated in the postconviction proceeding using the *Strickland v. Washington*[31] test for determining the effectiveness of counsel. In this type of claim, evaluation of the performance of appellate counsel necessarily requires an evaluation of the performance of trial counsel, because appellate counsel could not have been ineffective in failing to raise a nonmeritorious claim that trial counsel was ineffective.[32] If a court determines that appellate counsel *was* ineffective in failing to raise a meritorious claim of ineffective assistance of trial counsel, the appropriate postconviction remedy would be to vacate and set aside the judgment and either discharge, resentence, or grant a new trial as may be appropriate to the specific claim.[33]

## CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[30] *State v. Jackson, ante* p. 434, 747 N.W.2d 418 (2008).

[31] *Strickland v. Washington, supra* note 26.

[32] *State v. Jackson, supra* note 30; *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Bishop, supra* note 23; *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

[33] § 29-3001. See *State v. Bishop, supra* note 23.

# Donna Schwartz, appellee and cross-appellant, v. Rodney Schwartz, appellant and cross-appellee.

747 N.W.2d 400

Filed April 18, 2008. No. S-06-1271.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
4. **Actions: Pleadings.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
5. **Divorce: Modification of Decree: Property Settlement Agreements: Pensions.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of pension benefits will not thereafter be vacated or modified in the absence of fraud or gross inequity.
6. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
7. **Divorce: Property Division: Pensions.** In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties.
8. **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.
9. **Contempt.** When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.
10. **Contempt: Words and Phrases.** "Willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
11. **Contempt: Proof.** A party's contempt must be established by proof beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

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

Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee.

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

WRIGHT, J.

## NATURE OF CASE

The district court entered a decree in January 1999, dissolving the marriage of Donna Schwartz and Rodney Schwartz. In 2005, Donna alleged that Rodney's military pension was not being properly divided, and after a trial, the court entered an order effecting a division of the pension that was different than the decree. The main issue is whether the court could modify the dissolution decree.

## SCOPE OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001). 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. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[2] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[3] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. See *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

## FACTS

On January 8, 1999, the marriage of Donna and Rodney was dissolved pursuant to a decree that incorporated a property settlement agreement dividing the marital estate. In the agreement, the parties agreed that an attached qualified domestic relations order (QDRO) dividing Rodney's military retirement account

should be entered. The agreement stated that the proposed QDRO should provide Donna 43 percent of Rodney's monthly military retirement benefits and make her the beneficiary of the survivor benefit plan (SBP). The document specified that the parties had chosen the survivor benefit for Donna in lieu of an equal 50-percent distribution of the monthly benefits. The agreement further provided that the proposed QDRO was attached and marked as an exhibit. However, unknown to the parties, the proposed QDRO was not entered by the district court, though it appeared in the file.

We pause here to note that although the parties and the district court refer to this order as a QDRO, the order is actually a military court order, which is the military's version of a QDRO. To prevent confusion, we will also refer to the order as a QDRO.

The proposed QDRO was sent to the Defense Finance and Accounting Service (DFAS) office in January 1999, immediately following the district court's entry of the decree and property settlement agreement. In a letter dated January 21, 1999, the Denver, Colorado, DFAS office informed Rodney that it had received a QDRO pertaining to his divorce and that in order to comply with this order, the DFAS needed him to complete "ARPC Form 64, RCSBP Election Change," and "ARPC Form 14, RCSBP Election Statement for Former Spouse Coverage." Donna was required to, and did, complete a form 14. Rodney also completed a form 14, but he testified that he did not complete a form 64 because the DFAS indicated to him that the form was a change of beneficiary form and the decree provided that he was to keep Donna as the beneficiary.

Donna testified that she corresponded with the DFAS regarding the QDRO and that the DFAS informed her that she had taken all steps necessary to entitle her to the military retirement benefits. She further testified the DFAS told her that she was to contact that office again 6 months prior to Rodney's 60th birthday—the date he was entitled to begin receiving retirement benefits—to provide the office with her current mailing address.

After this correspondence with the DFAS, the parties believed the proposed QDRO had been approved by the DFAS because

they heard nothing more from the DFAS. Rodney continued in his duties with the Air Force for an additional 3 months and retired on April 30, 1999.

However, when Donna contacted the DFAS in March 2004—6 months before Rodney's retirement benefits were to start—she was informed that the military had no record of the QDRO. Donna worked to resolve the matter, but in the meantime, Rodney was required to designate a beneficiary of the SBP in his retirement application. Rodney testified that he selected Donna as the beneficiary, but that the military denied his request. He stated the military told him that he had the option of either electing his current wife—Rodney had remarried in 2000—as the beneficiary and later petitioning for a change or losing the opportunity to designate a beneficiary forever. Consequently, Rodney chose to elect his current wife as the beneficiary of the SBP. However, Rodney has since been unsuccessful in changing the beneficiary from his current wife to Donna.

Donna has also been unsuccessful in changing the SBP, though as of the time of trial, she was still trying. Additionally, she was unsuccessful in her attempt to enter the proposed QDRO with the DFAS, though not because the district court had not entered or signed it, but, rather, because the QDRO awarded her 43 percent of Rodney's retirement "as of the date of the Decree" and the DFAS stated that it had no way of determining that amount. The DFAS informed Donna that she needed to obtain a clarifying order that awarded her a fixed dollar amount or a percentage of Rodney's retirement pay.

In October 2004, Rodney began receiving his military retirement benefits. He did not forward any of the payments from 2004 to Donna and only began forwarding a portion of the 2005 payments after this action was filed.

In August 2005, Donna filed a verified motion to show cause why Rodney should not be held in contempt of the decree for (1) failing to provide her with amounts already received that should have been set aside to her, (2) not making appropriate arrangements to retain her as the SBP beneficiary, (3) purposefully reducing his benefits by taking disability, and (4) refusing to deliver necessary and requested documents regarding the account. In her motion, she sought, among other things,

equitable relief in the form of an award modifying her interest in Rodney's military retirement benefits from 43 to 50 percent if she could not be designated as the beneficiary of the SBP.

In October 2005, Donna filed a motion to determine the parties' rights and interests to the military retirement benefits. In her motion, she prayed that the district court enter a clarifying order consistent with the DFAS' requirements for the entry of a QDRO and "to the extent any benefit contemplated to be received by [Donna] is no longer available, that the Court enter an appropriate order requiring [Rodney] to provide an equivalent substitute performance." Rodney responded to Donna's motion, asking the court to "stay within its jurisdictional limits in regards to the Decree which was entered herein."

The district court consolidated Donna's motions for hearing. At the hearing, the parties presented evidence on what terms the QDRO should include, and on June 2, 2006, the court entered a memorandum regarding the QDRO. The court found, among other things, that based on the evidence before it, the court could not find fault on the part of either of the parties which led to Rodney's inability to name Donna as the surviving spouse and, consequently, the parties should bear the impact of the loss of this benefit between them. The court determined that Donna should receive the benefit of the cost of living and other adjustments that are made to the pension from time to time. The court then directed the parties to calculate the amounts which Rodney should have already paid Donna and to submit the calculation to the court at the time the new QDRO was submitted.

On August 24, 2006, the district court entered an order dividing Rodney's military retirement benefits in which it (1) awarded Donna $11,336.21 for unpaid amounts of retirement pay at an interest rate of 7.297 percent, (2) required the parties to pay their own attorney fees, and (3) held that all terms and provisions of the decree not in direct conflict with this order should remain in full force and effect.

The district court also entered an "Order Dividing Military Retirement" that replaced the proposed QDRO. In the order, the court ignored the point-value method the parties argued at the hearing and instead calculated Donna's share to be 50 percent.

Rodney filed a motion for new trial, requesting the district court to reconsider numerous provisions of the orders, including the interest rate and the percentage of Donna's share of the military retirement benefits. After a hearing on the motion, the court entered an "Amended Order Dividing Military Retirement" in which it addressed several of Rodney's concerns, but it did not change either the interest rate or the percentage of Donna's share. The court found that the order represented an equitable distribution.

## ASSIGNMENTS OF ERROR

Rodney assigns three errors: (1) The district court lacked jurisdiction to enter a QDRO not in accordance with the original decree and property settlement agreement; (2) the district court abused its discretion in entering a QDRO that varied from the terms of the original decree and property settlement agreement and was inconsistent with federal law; and (3) the district court abused its discretion in not including in said order, provisions that are material and necessary to the proper implementation of the order by the military.

Donna cross-appeals and assigns three errors: The district court erred (1) in not holding Rodney in civil contempt for failing or refusing to (a) take proper steps to ensure Donna would receive direct payment for her share of Rodney's military retirement or make those payments to Donna directly and (b) take proper steps to maintain Donna as the beneficiary of the SBP in connection with the military retirement; (2) in deducting one-half of the SBP premium from Donna's share of the military retirement; and (3) in failing to award Donna attorney fees.

## ANALYSIS

Rodney's entire argument rests on the premise that the district court "modified" the property settlement agreement when it entered an order dividing the military retirement benefits that varied from the terms of the proposed QDRO agreed to by the parties. Under Nebraska law, a district court can modify the division of pension benefits, upon application, notice, and hearing, if the failure to modify the decree would result in fraud

or gross inequity. See *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001).

The district court's entry of the order met the requirements to modify pension benefits, as it was (1) entered pursuant to an application, notice, and hearing for modification and (2) entered to remedy a gross inequity. In *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984), the former wife instituted contempt proceedings against her ex-husband, claiming that he withheld personal property assigned to her under the divorce decree. The district court, without notice or hearing, modified its original decree. The ex-husband appealed, and this court held that without notice, hearing, and a formal application to the district court for either interpretation of the decree or modification of the decree, the district court's order modifying the decree was void.

In the case at bar, Donna filed a motion entitled "Motion to Determine Rights and Interests" that sought relief in the form of

> a clarifying order consistent with any and all requirements of the United States Air Force and/or any other applicable military department effectuating the terms of the parties' agreement and the decree herein; and, *to the extent any benefit contemplated to be received by* [*Donna*] *is no longer available, that the Court enter an appropriate order requiring* [*Rodney*] *to provide an equivalent substitute performance*.

(Emphasis supplied.)

Although Donna's motion to determine rights and interests did not explicitly ask the district court to modify the proposed QDRO, her use of the phrase "equivalent substitute performance" indicates that she sought modification of the QDRO if she could not be named the beneficiary of the SBP. That she sought modification is further evident when her motion to determine rights and interests is viewed in conjunction with her motion for contempt, which asked for an "Order awarding [Donna] up to 50% of [Rodney's] total military retirement." Though the relief she sought in her motion for contempt cannot be granted in such a motion, when her two motions were combined for hearing, we conclude that Rodney was given notice

that Donna sought modification. In fact, the record reflects that Rodney presented evidence with respect to the terms of the modified QDRO at the hearing, thus making it apparent that Rodney knew Donna sought modification.

[4] The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. See *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). This determination is unaffected by the conclusions of the pleader or what the pleader calls it. *Id.* Thus, despite the fact that Donna never explicitly requested modification in a motion that could provide her such relief, the record reflects that when the circumstances are viewed as a whole, Donna's motion to determine rights and interests was a proper application for modification and provided Rodney notice that Donna sought modification. Therefore, we find that the first requirement to modify a QDRO was met.

The next question is whether the failure to modify the decree would result in fraud or gross inequity. We note that the district court did not technically determine that the property settlement agreement should be modified because of gross inequity; though, by implication, that is precisely what the court did when it entered an order inconsistent with the property settlement agreement.

[5] Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of pension benefits will not thereafter be vacated or modified in the absence of fraud or gross inequity. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001). In *Gruber*, the court modified the division of pension benefits on the basis of gross inequity upon an application to modify. The former wife sought modification of the divorce decree because the city board of trustees for the police and fire retirement system refused to recognize a QDRO pertaining to her former husband's pension. This court found that because neither party could reasonably have contemplated the city's refusal to recognize a QDRO, the district court did not abuse its discretion in finding that gross inequity would

result in the absence of modification of the decree that would allow the city to recognize the QDRO.

In the case at bar, the parties executed a property settlement agreement that was incorporated into a decree entered on January 8, 1999. The property settlement agreement provided for the division of Rodney's military retirement account by an attached QDRO. The parties agreed the QDRO would "[set] aside 43% of the value of such plan with [Donna] named as an alternate payee." The parties further agreed that in exchange for setting aside less than 50 percent of the plan to Donna, she would be the beneficiary of the SBP.

However, for reasons that were disputed by the parties, the proper forms were not in place at the DFAS to permit Donna to qualify as the beneficiary of the SBP. Rodney testified that this forced him to designate his new wife as the beneficiary because the military told him that he could not designate Donna as the SBP beneficiary without the proper forms, and that, consequently, he would lose the right to do so in the future if he did not designate his current wife as the beneficiary. The district court found merit in Rodney's explanation and stated that it could not find fault on the part of either of the parties which led to Rodney's inability to designate Donna as the beneficiary of the SBP.

Nevertheless, the change in beneficiary undoubtedly altered the parties' agreement. Therefore, because this change was material to the parties' agreement and could not be contemplated at the time of the decree, we find that a gross inequity existed.

Having determined that the district court could have modified the decree, we turn to whether the court abused its discretion in any of its modifications. Rodney argues that the district court incorrectly valued his retirement points and improperly awarded Donna an interest in the points Rodney accumulated subsequent to the marriage. He specifically argues Donna should not be entitled to share in the value of the 35½ points he earned during the 3 months he served subsequent to the parties' divorce. Implicitly, Rodney argues that the district court should have used the point-value method to value Donna's percentage of Rodney's military retirement benefits.

At the time the decree was entered, the court determined that Rodney had accumulated 3,991½ points. The evidence at the hearing showed that Rodney retired April 30, 1999, with 4,027 total points and that no additional points were subsequently earned. The 3,991½ points represented 99.118 percent of the retirement, and the district court merely rounded Donna's 49.559 percent upward to an even 50 percent. The court recognized that it had not used the point-value method that the parties had presented at the hearing to value Donna's percentage of Rodney's benefits, but it noted that even if it had used the point-value method, the difference between the point-value method and what the court had done amounted to less than one-half of 1 percent and only made a $7-per-month difference. The court found that this was not a material difference and that the order represented an equitable distribution.

[6-8] The purpose of a property division is to distribute the marital assets equitably between the parties. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). In dissolution proceedings, the trial court has broad discretion in valuing and dividing pension rights between the parties. *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006). 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. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

We find no abuse of discretion in the district court's valuation of Rodney's retirement points. Although Rodney's distribution amounted to a $7-per-month reduction from the amount that he would have received if the court had used the point-value method, the record does not reflect that this distribution was inequitable under the circumstances. The court's decision was not based on reasons that were untenable or unreasonable, nor was it against justice or conscience, reason, and evidence.

Rodney next argues that the district court abused its discretion in changing the judgment interest rate from 5.513 to 7.297 percent. However, Rodney fails to recognize that the agreed-upon interest rate in the decree related only to *unpaid alimony*: "[i]nterest shall be paid on unpaid alimony at the rate of 5.513%." Thus, because the court did not award alimony,

but, rather, entered a judgment as to the property settlement, the court did not abuse its discretion in fixing the judgment interest rate at the prevailing rate.

[9-11] In Donna's cross-appeal, she argues that the district court erred in not holding Rodney in contempt. When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). "Willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order. *Id.* A party's contempt must be established by proof beyond a reasonable doubt. *Id.*

In the case at bar, the district court found that based on the evidence before it, the court could "find no fault on the part of either of the parties which lead [sic] to [Rodney's] inability to name [Donna] as the surviving spouse." Therefore, the court did not hold Rodney in contempt for his failure to designate Donna as the beneficiary of the SBP. On review of the record, we find that the court's decision is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Donna also argues that Rodney failed to pay amounts due Donna under the proposed QDRO and, thus, should be held in contempt. The district court never explicitly stated that it was finding Rodney in contempt, but it did order Rodney to pay Donna $10,359.54 in arrearages. Thus, we find no merit to this argument.

Donna next argues that the district court erred in deducting one-half of the cost of the SBP premium from her share of the military retirement. The sole basis for her argument is that the change in beneficiary was Rodney's fault and that she should not have to pay for his mistake. Because we can find no error in the district court's determination that the change in beneficiary was neither party's fault, we find no abuse of discretion in the court's deducting one-half of the cost of the SBP premium from Donna's share.

Donna claims that the district court erred in failing to award her attorney fees. Again, the sole basis for her argument is that the change in beneficiary was Rodney's fault and that she

should not have to pay for his mistake. We find nothing in the record to show that the change in beneficiary was either party's fault. Therefore, we find no abuse of discretion. We find no merit to Donna's cross-appeal.

## CONCLUSION

For the above-stated reasons, we affirm the district court's order in its entirety.

AFFIRMED.

HEAVICAN, C.J., not participating.

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## CHAD A. HOFFERBER, APPELLANT, V. CITY OF HASTINGS, NEBRASKA, ET AL., APPELLEES.

747 N.W.2d 389

Filed April 18, 2008. No. S-06-1349.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Workers' Compensation.** If an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.
4. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
5. **Negligence: Property: Liability.** Ordinarily, a person who is not the owner and is not in control of property is not liable for negligence with respect to such property.
6. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Dirk V. Block and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

William T. Wright and Loralea Frank, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee City of Hastings.

Cathy S. Trent-Vilim, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Lavina Kramer.

Robert S. Lannin and Patrick M. Driver, of Shively Law Offices, P.C., L.L.O., for appellee Evalin Kleinjan.

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

STEPHAN, J.

Chad A. Hofferber, an employee of Hastings Utilities, was injured while attempting to read watermeters serving residential properties owned by Evalin Kleinjan and Lavina Kramer. After receiving workers' compensation benefits, Hofferber brought an action against the City of Hastings (City), Kleinjan, and Kramer, alleging that the negligence of each was a proximate cause of his injury and damages. In granting each defendant's motion for summary judgment, the district court for Adams County determined that Hofferber's claim against the City was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act[1] and that Kleinjan and Kramer owed no duty of care to Hofferber. We affirm the judgments entered in favor

[1] Neb. Rev. Stat. §§ 48-101 through 48-1,117 (Reissue 1998 & Cum. Supp. 2002).

of the City and Kramer, but reverse the judgment in favor of Kleinjan and remand for further proceedings.

## BACKGROUND

The record in this case discloses certain uncontroverted facts. The City, located in Adams County, is a city of the first class and a political subdivision of the State of Nebraska. Its mayor and city council are authorized by Nebraska law to establish and maintain various utilities, including waterworks.[2] The mayor and city council may "by ordinance confer upon the board of public works the active direction and supervision of such system of waterworks" and may empower the board to "employ necessary laborers and clerks."[3] Pursuant to this statutory authority, the City has enacted ordinances creating a board of public works charged with "the active direction and supervision of the plants and systems of waterworks" and other public works.[4] The board consists of five residents of the City "appointed by the Mayor by and with the assent of the Council."[5]

Hastings Utilities includes all employees associated with the operation of municipal natural gas, water, electrical, and sewer systems. It is under the supervision of a manager appointed by the board of public works pursuant to city ordinance.[6] The budget of the board of public works and the utility rates which it establishes are subject to the approval of the Hastings City Council. As a municipal utility which generates its own revenue, Hastings Utilities is required by Nebraska law to be audited separately from other functions of the municipality.[7] Audit reports for 2000 through 2005 identified Hastings Utilities as a "component unit of the City."

The City's personnel department functions as the initial contact for all applicants for employment by the City, including

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[2] See Neb. Rev. Stat. § 16-674 (Cum. Supp. 2006).

[3] Neb. Rev. Stat. § 16-691 (Reissue 1997).

[4] Hastings Mun. Code, ch. 32, art. I, §§ 32-101 and 32-104 (1973).

[5] Hastings Mun. Code, ch. 32, art. I, § 32-102 (1973).

[6] See Hastings Mun. Code, ch. 32, art. I, § 32-109 (1973).

[7] Neb. Rev. Stat. § 19-2903 (Cum. Supp. 2006).

persons applying for employment with Hastings Utilities. The manager of Hastings Utilities is authorized to appoint employees within Hastings Utilities, but is required to notify the Hastings Civil Service Commission of all such appointments and changes in employment status. All employees of Hastings Utilities are considered employees of an agency or department of the City and, therefore, employees of the City. A workers' compensation insurance policy issued to the City and in effect on the date of Hofferber's injury included coverage for claims by Hastings Utilities employees.

Hofferber submitted an application for employment to the City's personnel department on July 1, 1999. On August 27, the manager of Hastings Utilities sent written notice to the Hastings Civil Service Commission that he had appointed Hofferber to a "Pipefitter Apprentice" position in the "Utilities (Gas) Department." Hofferber subsequently signed a document indicating that he was employed by the "Hastings Utilities Department in the Hastings City Service" and acknowledging receipt of personnel rules and regulations adopted by the Hastings City Council. In July 2000, the manager of Hastings Utilities notified the Hastings Civil Service Commission that he was transferring Hofferber from the job classification of "Pipefitter Apprentice" to that of "Meter Reader I."

On October 3, 2000, Hofferber was attempting to read watermeters located in an underground pit located on residential property in Hastings. Although the meters served both the Kleinjan residence and the adjoining Kramer residence, the meter pit and its manhole cover were located entirely on the Kleinjan property. Hofferber claims that when he stepped on the manhole cover, it opened into the chamber, causing him to "drop into the hole where he landed on his groin area on the edge of the manhole cover." Hofferber subsequently filed an action against Hastings Utilities in the Nebraska Workers' Compensation Court, alleging that he was injured while in the course of his employment and was entitled to workers' compensation benefits. Hastings Utilities filed an answer in which it admitted that Hofferber's injuries were sustained in an accident arising out of and in the course of his employment and alleged that it had made payment for medical, surgical, and hospital

expenses and other workers' compensation benefits to which Hofferber was entitled. The final disposition of the workers' compensation action is not apparent from the record.

Hofferber brought this action against the City under the Political Subdivisions Tort Claims Act.[8] He alleged that the City had a duty to maintain the underground chamber and manhole cover and negligently failed to do so. He joined Kleinjan and Kramer as defendants, alleging that they also had a duty to maintain the underground chamber and manhole cover, that they knew or should have known that the manhole cover was unsafe, and that they negligently maintained the underground chamber and manhole cover so as to create an unreasonably dangerous condition. Hofferber alleged that the named defendants were jointly and severally liable for the special and general damages he incurred as a result of his injury.

The City filed an answer which included a general denial, an affirmative allegation that the claim was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act,[9] and an affirmative allegation that it retained sovereign immunity under specific exemptions of the Political Subdivisions Tort Claims Act.[10] It also alleged that pursuant to a city ordinance, the duty to maintain the meter pit was solely that of the consumer, and that Hofferber's injuries were proximately caused by his own contributory negligence. Kleinjan and Kramer filed answers denying any negligence on their part and alleging contributory negligence.

In an order entered on February 16, 2006, the district court granted motions for summary judgment filed by the City and Kramer. It concluded that Hastings Utilities was a component or department of the City and that therefore, Hofferber's claim was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act[11] and the exemption in the Political Subdivisions Tort Claims Act for workers' compensation

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[8] Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002).

[9] See §§ 48-111, 48-112, and 48-148.

[10] See § 13-910(2), (3), and (8).

[11] §§ 48-111, 48-112, and 48-148.

claims.[12] The court further determined that Kramer had no duty to inspect or maintain the meter pit because (1) it was situated on a utility easement belonging to a public utility and (2) it was not located on her property. Hofferber attempted to appeal from this order, but the Court of Appeals dismissed the appeal because the record did not show a full disposition of all claims of all parties.[13]

In an order entered on October 31, 2006, the district court granted Kleinjan's motion for summary judgment, reasoning that although the meter pit was located on her property, she had no right to exercise control over the manhole cover because it was situated within a utility easement, and that therefore, she owed no duty to Hofferber.

Hofferber perfected a timely appeal from the order dismissing his claim against Kleinjan and the prior order dismissing his claims against the City and Kramer. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[14]

## ASSIGNMENT OF ERROR

Hofferber assigns, restated, that the district court erred in granting summary judgment to the City, Kleinjan, and Kramer.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[15] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is

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[12] § 13-910(8).

[13] See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

[14] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[15] *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[16]

## ANALYSIS

### City of Hastings

[3] In concluding that the Nebraska Workers' Compensation Act constituted Hofferber's exclusive remedy against the City, the district court relied upon § 48-148, which provides in pertinent part:

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

Based upon this provision and §§ 48-111 and 48-112, we have held that if an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.[17] Because the City is a political subdivision, § 13-910(8) is also pertinent to our inquiry. This statute states that the Political Subdivisions Tort Claims Act does not apply to "[a]ny claim by an employee of the political subdivision which is covered by the Nebraska Workers' Compensation Act."[18]

It is undisputed that Hofferber's accidental injury arose out of and in the course of his employment with Hastings Utilities and that he brought a claim against Hastings Utilities under the Nebraska Workers' Compensation Act. The question is whether these facts necessarily bar his tort claim against the

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[16] *Id.*

[17] *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007). See, also, *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001); *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997).

[18] § 13-910(8).

City. Hofferber's argument that he may proceed against the City is based upon the following general principle:

> A parent corporation is generally not immune from an action in tort by an injured employee of its subsidiary by virtue of the employee's entitlement to workers' compensation. Where an employee of a subsidiary is injured while working on property owned by the parent corporation and receives workers' compensation benefits from the subsidiary, the employee may maintain an action in tort against the parent corporation even though parent and subsidiary are covered by [the] same policy of workers' compensation insurance.[19]

This court has never addressed this principle, but Hofferber urges that we should adopt it here and apply it here by treating the City and Hastings Utilities as separate entities analogous to a parent and subsidiary corporation. In this regard, Hofferber relies primarily on *Turner v. Richmond Power and Light Co.*,[20] in which a divided panel of an Indiana appellate court held that because a municipally owned electrical utility operated as a "'discrete business enterprise'" from the city with "little 'functional integration,'"[21] a city employee who was injured by a powerline and received workers' compensation benefits could maintain a negligence action against the utility. In reaching its conclusion, the court noted that the utility maintained its own budget and had its own financial officer whose decisions were binding upon the city. The court further noted that the utility conducted its legal affairs and maintained certain insurance coverage separately and distinctly from the city and that the utility's hiring, training, and firing process was independent of the city's. A dissenting member of the panel concluded that the relationship between the city and the utility was more

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[19] 82 Am. Jur. 2d *Workers' Compensation* § 90 at 102 (2003). See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 112.01 (rev. ed. 2007).

[20] *Turner v. Richmond Power and Light Co.*, 756 N.E.2d 547 (Ind. App. 2001).

[21] *Id.* at 558.

analogous "to the relationship between different branches of the same governmental unit."[22]

Hofferber argues that although Hastings Utilities is owned by the City, when the City engages in utility services it does so in its proprietary, rather than governmental, capacity.[23] Hofferber contends that because of this, "the utility becomes more like a private entity and separate and distinct from the City."[24] He notes that the board of public works is not composed of members of the Hastings City Council and that a "'Manager of Utilities'" has the right to hire and fire employees.[25] Also, he notes, the board of public works may obtain and pay for technical or professional services, make its own rules and regulations, and purchase materials and supplies. Hofferber argues that Hastings Utilities' funds are maintained separately from those of the City, that it generates its own revenue, and that it is audited separately from the City.

On the record before us, we need not decide whether a parent corporation is immune from a tort action by an injured employee of its subsidiary by virtue of the employee's entitlement to workers' compensation. Assuming without deciding that such an action would be allowed, we do not view the relationship between the City and Hastings Utilities as analogous to that of a parent corporation and its subsidiary. The record conclusively establishes that the City and Hastings Utilities are not separate entities, but, rather, that Hastings Utilities is an agency or department of the City. Although Hastings Utilities has specific proprietary responsibilities, it is functionally integrated with city government. Hastings Utilities employees are employees of the City subject to the same rules and regulations as other employees of the City. Hastings Utilities utilizes the

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[22] *Id.* at 560 (Mattingly-May, Judge, dissenting).

[23] See *Burger v. City of Beatrice*, 181 Neb. 213, 218, 147 N.W.2d 784, 789 (1967) ("[w]hen [a city] assumes the status of a private utility company in the production and distribution of water for the benefit of the inhabitants of the city, it subjects itself to the same rights and liabilities of a private water company").

[24] Brief for appellant at 11.

[25] *Id.* at 12.

City's personnel department, which maintains the records of Hastings Utilities' employees. Its budget and rates are subject to the approval of the Hastings City Council. Hastings Utilities is insured under the City's workers' compensation insurance policy. The fact that Hastings Utilities is audited separately is due to a requirement of state law and is not indicative of a separate corporate existence. The record does not reflect that the manager of Hastings Utilities has powers or responsibilities materially different from those of other department heads of the City. We therefore conclude that the district court did not err in determining as a matter of law that Hofferber's tort claim against the City was barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act[26] and the corresponding exemption in the Political Subdivisions Tort Claims Act.[27]

### Residential Property Owners

[4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[28] The district court held that Kramer had no duty to maintain the meter pit because it was situated on a utility easement belonging to a public utility and because it was not located on Kramer's property. Although it found that the pit was situated on Kleinjan's property, the district court held that Kleinjan had no duty to maintain it because she had no right or authority to exercise control over the manhole cover.

The district court relied upon this court's decision in *Harms v. City of Beatrice*[29] in concluding that neither property owner owed a duty. In that case, a pedestrian was injured when she fell through the defective cover on a meter box located on a service line which connected the city's water system with private property. The meter box was "between the sidewalk and the lot

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[26] §§ 48-111, 48-112, and 48-148.

[27] § 13-910(8).

[28] *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007); *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[29] *Harms v. City of Beatrice*, 142 Neb. 219, 5 N.W.2d 287 (1942).

line, a part of the area occupied as a street,"[30] but there is no indication as to whether it was situated in a utility easement. The meter box, including its ring and cover, was purchased by the city and furnished to the property owner at cost. The sole issue presented in *Harms* was whether the city had a duty to keep the meter box in repair, given the fact that the property owner was required to pay the cost of materials and installation. This court held that the city could not "delegate the duty it owes the public to maintain the water-works system in a safe condition"[31] and therefore concluded that the petition stated a cause of action against the city. The case did not address the question of whether the property owner served by the meter box would also have a duty to keep the meter box in good repair.

Subsequently, in *Crosswhite v. City of Lincoln*,[32] we considered the question of whether a city and property owner could be jointly liable for an injury caused by public utility equipment. In that case, a pedestrian tripped on a "stop box" which protruded above the concrete surface of a public sidewalk.[33] The stop box was part of a municipal water system. Ordinances required the property owner to install the stop box and keep it in good repair at the property owner's expense. Other city ordinances required that sidewalks be kept free of obstructions. Relying on *Harms*, this court held that the city could not delegate the duty it owed to the public to keep its water system in good repair. But because the stop box and the water system of which it was a part benefited the property owner and the stop box's placement within a public sidewalk served "a use independent of and apart from the ordinary and customary use for which sidewalks are designed,"[34] this court concluded that both the city and the property owner owed an independent "duty to the traveling public to maintain the stop box in a reasonably safe condition."[35] We held that

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[30] *Id.* at 220, 5 N.W.2d at 288.

[31] *Id.* at 223, 5 N.W.2d at 289.

[32] *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970).

[33] *Id.* at 333, 175 N.W.2d at 910.

[34] *Id.* at 335, 175 N.W.2d at 911.

[35] *Id.* at 336, 175 N.W.2d at 911.

> where persons are injured by a dangerous sidewalk condition created and maintained subject to the joint control of the city and an abutting landowner, and where the condition is maintained for the benefit of a proprietary business operated by the city, and is also for the benefit of the property of the abutting landowner, the city and the abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong.[36]

Neither *Harms* nor *Crosswhite* addresses the question of whether a utility customer may be liable to an employee of the utility for injury caused by a component of the utility which is situated on the private property of the consumer. A more pertinent case is *Fitzpatrick v. U S West, Inc.*,[37] in which an employee of an electrical utility was injured by an explosion in an underground vault where she was working. The vault was situated on private property, but the owner of the property had given the utility an easement to build, maintain, and repair the vault. All of the equipment located within the vault was owned by the utility. The injured utility employee brought an action against the property owner, alleging negligence and strict liability. Focusing on the question of control, we held that the property owner owed no duty to the utility company employee because it had no right or opportunity to control the employee's work activities within the vault.

Kleinjan and Kramer argue that *Fitzpatrick* supports the district court's determination that they owed no duty to maintain the meter pit because it was situated in a utility easement. However, our review of the record discloses no utility easement granted to the City or Hastings Utilities. In support of Kleinjan's motion for summary judgment, her attorney offered an exhibit identified as the "operative deed" by which Kleinjan obtained title to her property and two other exhibits which were identified as "copies of deeds . . . which established the easement in question." The latter two exhibits are 1919 deeds from "J.O. Rohrer" to "George B. Blackstone" and "Floyde H. Eldredge" which purport to convey the property now owned

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[36] *Id.*

[37] *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994).

by Kleinjan and adjacent property located immediately to the north, subject to a common driveway easement. The Eldredge deed recites, "Common and perpetual rights and privileges also granted and reserved hereby to and for the use of the water and sewer service to the main," and the Blackstone deed refers to the "common sewer and water privileges" referred to in the Eldredge deed. While these documents reflect rights shared by adjoining landowners, neither conveys an easement to the City or any municipal utility. From this record, we cannot determine whether or not the meter pit was situated on a utility easement belonging to a public utility.

In its discussion of such easement, the district court noted that by ordinance, the duty to maintain watermeters "is the obligation of the City." But we note that a city ordinance also provides that meter *pits* are to be "kept in good repair and free of water, oil, grease and trash at the consumer's own cost and expense."[38] Hofferber's injury was caused not by the meters, but, rather, by the cover on the pit which contained the meters.

[5] We conclude that the existence of a duty on the part of Kleinjan and Kramer depends upon their knowledge and control with respect to the apparently defective manhole cover which caused Hofferber's injury. As one commentator notes, "the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place."[39] And we have recognized the general rule that "[o]rdinarily a person who is not the owner and is not in control of property is not liable for negligence with respect to such property."[40] The record includes evidence that the meter pit was not located on Kramer's property and that for at least 15 years prior to Hofferber's accident, she did not exercise any form of control over the meter pit or its

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[38] Hastings Mun. Code, ch. 32, art. VI, § 32-604 (1973).

[39] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 57 at 386 (5th ed. 1984). Accord *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988).

[40] 65 C.J.S. *Negligence* § 94 at 1051 (1966). Accord, *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682 (1990); *Kliewer v. Wall Constr. Co.*, *supra* note 39.

cover. Based upon these uncontroverted facts, we conclude that Kramer owed no duty to Hofferber and that the district court did not err in entering summary judgment in her favor.

[6,7] It is likewise uncontroverted that the meter pit was situated on, and the accident occurred on, property owned by Kleinjan. A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.[41] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[42] Giving Hofferber the benefit of all favorable inferences as our standard of review requires, we conclude that Kleinjan did not make a prima facie showing sufficient to negate her potential liability for injury caused by a dangerous condition on her property so as to entitle her to judgment as a matter of law. Accordingly, we conclude that the district court erred in sustaining her motion for summary judgment, and we reverse, and remand for further proceedings as to this claim.

## CONCLUSION

For the reasons discussed, we conclude that Hofferber's claim against the City is barred by the exclusive remedy provisions of the Nebraska Workers' Compensation Act and the

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[41] *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005); *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

[42] *Malolepsy v. State*, 273 Neb. 313, 729 N.W.2d 669 (2007); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

corresponding exemption in the Political Subdivisions Tort Claims Act, and we affirm the judgment dismissing his claim against the City. We also affirm the entry of summary judgment in favor of Kramer, because the record reflects no genuine issue of material fact as to Hofferber's claim against her and she is therefore entitled to judgment of dismissal as a matter of law. However, we conclude that Kleinjan did not make a prima facie showing that she was entitled to summary judgment, and we therefore reverse the judgment entered in her favor and remand the cause to the district court for further proceedings consistent with this opinion.

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

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STATE OF NEBRASKA, APPELLEE, V.
DENISE R. WELCH, APPELLANT.

747 N.W.2d 613

Filed April 18, 2008. No. S-07-289.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
5. **Jury Instructions: Appeal and Error.** 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.
6. **Pedestrians: Motor Vehicles: Statutes.** Neb. Rev. Stat. § 60-6,109 (Reissue 2004) sets out a higher standard of care in the situations described in the statute.
7. **Pedestrians: Motor Vehicles: Proof.** In order for a driver to be held to the higher standard of care in Neb. Rev. Stat. § 60-6,109 (Reissue 2004), there must be evidence both that the person was actually confused or actually incapacitated and that such condition was objectively obvious to a reasonable driver.

8. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
9. **Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court reversed, and cause remanded with directions.

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

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

As a result of charges stemming from a motor vehicle-pedestrian accident, Denise R. Welch was convicted of misdemeanor motor vehicle homicide by a jury at a trial conducted in the county court for Lancaster County. Welch appealed her conviction to the district court for Lancaster County and claimed that the county court had erred in instructing the jury on a theory of guilt that was not supported by the evidence. The district court rejected Welch's argument and affirmed her conviction. Welch appeals. We conclude that the evidence did not support the challenged instruction regarding a driver's duty to exercise proper precaution with respect to an obviously confused or incapacitated person. We therefore reverse the decision of the district court and remand the cause with directions to reverse the conviction and remand the matter to the county court for a new trial.

## STATEMENT OF FACTS

Welch was charged in county court with misdemeanor motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Cum.

Supp. 2004). The charge arose from an accident that occurred on October 7, 2005, in which a van driven by Welch collided with a pedestrian, Mitchell Fitzgibbons, at the intersection of 19th and South Streets in Lincoln, Nebraska. Fitzgibbons was knocked to the ground and died as a result of injuries received in the accident.

Officer Bryan Tankesley testified at the trial in this matter. At approximately 12:30 p.m. on October 7, 2005, Tankesley responded to a report of an injury accident at 19th and South Streets. Nineteenth Street runs north-south, and South Street runs east-west. When he arrived at the intersection, he observed a Dodge Caravan that appeared to have been turning right off of 19th Street to go eastbound on South Street. He also saw Fitzgibbons lying on the ground near the passenger side of the van. Fitzgibbons appeared to have suffered significant head trauma. Tankesley spoke with Welch, who had been identified as the driver of the van.

Tankesley testified regarding Welch's statements to him at the scene. Welch was driving northbound on 19th Street and stopped at the stop sign south of the intersection with South Street. Welch saw Fitzgibbons standing at the corner but "she didn't pay all that much attention to him" because he had stopped walking and she "figured that he was going to stop and wait for her to proceed with her turn." Welch looked to make sure traffic was safe and proceeded with her turn. She then "heard a bang, felt a thud, felt the van rock just a little bit" and realized that her van had come into contact with Fitzgibbons. She stopped the van, got out and ran to see what had happened. She saw that her front passenger tire was on Fitzgibbons' upper arm area and so she backed the van off of him. By that time, witnesses had stopped to help.

After questioning Welch, Tankesley referred her to another officer, Richard Roh, for further questioning. Roh testified that he asked Welch to make a taped statement of what she recalled about the accident and that Welch agreed to do so. Roh took Welch to the main police station to make the taped statement, which was admitted into evidence at trial and played for the jury without objection. A transcript of the taped statement was also admitted into evidence without objection, and the jury was

allowed to use the transcript to follow along while the tape was played.

In the taped statement, Welch stated that she saw Fitzgibbons at the southeast corner of 19th and South Streets and that she was not sure whether he was intending to go west across 19th Street or north across South Street. She also stated that she thought that Fitzgibbons was "not all there, so I was afraid you know, I don't know what it is, it's a weird feeling I had with him, and I don't really know the guy, but I've seen him before, and I, I was wondering if he was mentally retarded or something." Welch further stated that she did not remember whether she was talking on her cellular telephone at the time she was turning onto South Street.

Fitzgibbons' mother testified at trial. At the time of his death, Fitzgibbons was 49 years old and lived with his mother at a home near the accident scene. He worked part time at an insurance company in Omaha, Nebraska, as an internal auditor. Fitzgibbons was visually impaired as a result of diabetes and could not drive due to this impairment. However, Fitzgibbons' mother testified that he did not let the diabetes "keep him from doing most everything he wanted to do"; that his visual impairment was not such that it would have prevented him, under ordinary circumstances, from safely negotiating the path he was taking at the time of the accident; and that he did not carry a white cane.

On the morning of October 7, 2005, Fitzgibbons and his mother had been working on a rental house they owned that was across the street from their home. Their home was on the south side of South Street east of 19th Street, and the rental house was on the north side of South Street west of 19th Street. They walked home to have lunch, and afterward, Fitzgibbons left to return to the rental house while his mother stayed to finish tasks at home. Shortly thereafter, she noticed that traffic had slowed on South Street and she looked out her front door and saw that Fitzgibbons had been injured.

Four persons who witnessed the accident testified for the State. Susan Blasius testified that she was driving eastbound on South Street and that she did not see the actual collision, but saw Fitzgibbons walking west down the sidewalk and Welch's

van on 19th Street. She testified that afterward, she saw that Fitzgibbons had been hit. Carole Maasch testified that she was traveling in the right eastbound lane of South Street. She saw Welch's van moving north on 19th Street, and she "wasn't quite sure the van was going to stop, and so [she] wanted to stay aware" and pulled into the left lane in case the van did not stop. Maasch testified that "the van wasn't speeding or anything, but the van didn't stop and slow down, and I saw the van hit a man." Maasch saw the driver of the van looking westward toward oncoming traffic but did not see the driver look to check the other direction. Maasch testified that she was "fairly positive" that the driver was using a cellular telephone at the time of the accident.

Robin Derr testified that at the time of the accident, he was painting a house on the northeast corner of 19th and South Streets. He saw Fitzgibbons standing on the southeast corner of the intersection; he then saw the van pull up and "they were both kind of facing the same direction." Derr did not see the collision but he heard a screech and a thud. Derr ran across South Street to assist and saw Fitzgibbons lying on the ground underneath the van's front tire. Derr noted injuries to Fitzgibbons' head and bleeding from his ears and nose. Derr testified regarding his observation of Fitzgibbons after the accident that "by his facial expression, I thought maybe he [Fitzgibbons] was maybe mildly retarded or something . . . like maybe he was a little slow."

Sean Barry testified that he was eastbound on South Street and that he saw Welch's van stopped about 10 feet back from the intersection and Fitzgibbons walking west on the sidewalk. Barry saw the van begin to move forward, and he moved from the right lane to the center lane either "because the van was in the street or I was moving over in anticipation of the van entering." Barry saw Fitzgibbons continue walking despite the fact that the van had started to move, and he saw Fitzgibbons' arms fly up in the air as Fitzgibbons and the van collided.

The State's other witnesses included a pathologist who testified that Fitzgibbons died as the result of head injuries that were caused by a fall to the ground rather than by his head striking the vehicle. The State also presented testimony

by an accident reconstructionist who opined that based on his investigation, Fitzgibbons had been crossing 19th Street in the crosswalk when he was struck by Welch's vehicle, causing him to fall over backward and hit his head on the pavement.

In her defense, Welch presented the testimony of a professor with experience in accident reconstruction who opined that based on his investigation, a dent in the side of the van was caused by Fitzgibbons tripping or stumbling forward and hitting his head on the side of the van. Welch did not testify.

After both sides rested, the county court instructed the jury regarding, inter alia, the elements of motor vehicle homicide, § 28-306(1), as charged. In instruction No. 3, the court instructed that the elements of motor vehicle homicide included:

> Welch proximately caused the death of Mitchell Fitzgibbon [sic] unintentionally while in the commission of any of the following unlawful acts:
>
> a. Careless driving as described in Instruction 4; or
>
> b. Failure to Yield the Right of way as described in Instruction 5; or
>
> c. Failing to exercise due care with a pedestrian as described in Instruction 6.
>
> The elements described in paragraphs 3(a) – 3(c) of this instruction constitute a single offense. Therefore, you need not agree unanimously on which unlawful act listed in element 3(a) – 3(c) was committed by . . . Welch, so long as you are unanimous that the State has proven beyond a reasonable doubt that an act of . . . Welch was unlawful as described in paragraphs 3(a) – 3(c).

In instruction No. 6, the court instructed:

> As to failure to exercise due care with a pedestrian the State must prove beyond a reasonable doubt, each of the following elements:
>
> (A) . . . Welch was driving a motor vehicle in this state;
>
> (B) . . . Welch did fail to exercise due care to avoid colliding with any pedestrian and give an audible signal when necessary; or
>
> (C) . . . Welch failed to exercise proper precaution upon observing a [sic] obviously confused or incapacitated person upon a roadway.

Instruction No. 6 was based on Neb. Rev. Stat. § 60-6,109 (Reissue 2004). At the instruction conference, the court overruled Welch's objection to instruction No. 6 and the portion of instruction No. 3 referring to instruction No. 6.

The jury found Welch guilty of motor vehicle homicide. The county court sentenced Welch to probation for 2 years.

Welch appealed her conviction to the district court for Lancaster County. She claimed that the county court erred in giving instructions Nos. 3 and 6 and, in particular, in instructing the jury regarding the duty owed by motorists to an obviously confused or incapacitated person, as set forth in instruction No. 6 which was derived from § 60-6,109. She argued that instruction No. 6 was not supported by the evidence because there was no evidence that Fitzgibbons appeared obviously confused or incapacitated and no evidence that he was on the "roadway." The court rejected Welch's arguments, finding that there was evidence, including photographs and drawings of the scene of the collision, which showed that Fitzgibbons was on the roadway. The court also noted Welch's statement to police that she thought that Fitzgibbons was "mentally retarded or something" and that he was "not all there" as evidence that Fitzgibbons was obviously confused or incapacitated. The district court affirmed Welch's conviction.

Welch appeals.

## ASSIGNMENT OF ERROR

Welch challenges the giving of instructions Nos. 3 and 6 and claims that the county court erred in instructing the jury on a theory of guilt that was not supported by the evidence.

## STANDARDS OF REVIEW

[1-3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id*. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id*.

## ANALYSIS

*Evidence Does Not Support Instruction Regarding "Obviously Confused or Incapacitated Person."*

Welch argues that the county court erred in giving instructions Nos. 3 and 6 because there was no evidence to support a finding that Fitzgibbons was "obviously confused or incapacitated." We agree that the evidence did not support an instruction regarding the care required with respect to an obviously confused or incapacitated person. We conclude that the county court erred in giving instruction No. 6(C) and that the instruction was prejudicial to Welch. We do not find error in instruction No. 3's reference to instruction No. 6, because, with a minor exception, the remainder of instruction No. 6 was proper and supported by the evidence.

[4,5] Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Fischer, supra*. 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. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). Welch does not claim that the instructions do not correctly state the law. Instead, she argues that instruction No. 6(C), the portion of the instruction relating to the duty of care to an obviously confused or incapacitated person, was misleading because the issue of a driver's duty to an obviously confused or incapacitated person was not supported by the evidence in this case.

Instruction No. 6 was adapted from § 60-6,109, which provides:

> Notwithstanding the other provisions of the Nebraska Rules of the Road, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway.

Section 60-6,109 sets forth both the duty a driver owes with respect to any pedestrian and the duty a driver owes with respect to particular persons, including children and persons who are obviously confused or incapacitated. The county court instructed on both duties in subparagraphs (B) and (C) of instruction No. 6. The county court instructed that in order to find that Welch had failed to exercise due care with a pedestrian, the jury would need to find either that "Welch did fail to exercise due care to avoid colliding with any pedestrian and give an audible signal when necessary" or that "Welch failed to exercise proper precaution upon observing a [sic] obviously confused or incapacitated person upon a roadway." The court therefore instructed on all parts of the statute except the reference to children which was not relevant in this case.

[6] This court has previously considered § 60-6,109 and found that the statute "sets out a higher standard of care in the situations described in the statute." *Hines v. Pollock*, 229 Neb. 614, 619, 428 N.W.2d 207, 210 (1988) (interpreting Neb. Rev. Stat. § 39-644 (Reissue 1984), which was later transferred to § 60-6,109). See, also, *Dutton v. Travis*, 4 Neb. App. 875, 551 N.W.2d 759 (1996). Although our pronouncement was made in a civil case, it applies equally to the criminal case under consideration. Thus, § 60-6,109 requires a driver to exercise "due care" with any pedestrian, but the statute requires a higher standard of care, described as "proper precaution," when the person is a child or the person is an obviously confused or incapacitated person. At issue in this case is consideration of the evidence necessary to support an instruction that a person is "obviously confused or incapacitated," thereby imposing a higher standard of care on a driver.

[7] As we read § 60-6,109, "obviously" refers to both "confused" persons and "incapacitated" persons and thus modifies both categories of persons. In the context of § 60-6,109, "confused" and "incapacitated" describe conditions which actually affect a person's ability to avoid coming to harm on a roadway, and the presence of persons with such conditions requires a driver to take greater care with regard to such persons. The statute's use of "obviously" means that the conditions

referred to must be displayed. For a condition to be obvious, the condition must be objectively apparent through conduct or other unequivocal means such that a driver should be aware of the condition. We conclude that in order for a driver to be held to the higher standard of care in § 60-6,109, there must be evidence both that the person was actually confused or actually incapacitated and that such condition was objectively obvious to a reasonable driver.

In the present case, although there was evidence that Fitzgibbons suffered some degree of visual impairment, this evidence was not sufficient to characterize Fitzgibbons as either an actually "confused" or an actually "incapacitated" person under § 60-6,109 at the time of the accident, and, in addition, there is no evidence that his limitation, such as it was, was obvious. To the contrary, Fitzgibbons' mother testified that Fitzgibbons' sight was not such that it prevented Fitzgibbons from safely walking the path he was on at the time of the accident and that he had safely walked that route at other times. Further, although there was some evidence that Welch wondered about Fitzgibbons' condition and that another witness observed Fitzgibbons' facial expression after the accident and thought maybe he was mentally retarded, neither witness gave descriptions of Fitzgibbons' behavior or even appearance which warrants an objective conclusion that Fitzgibbons was an obviously confused or incapacitated person. Referring to the record as a whole, no witness described actions or conduct by Fitzgibbons or anything definitive about Fitzgibbons immediately prior to the accident which would objectively lead a reasonable driver to conclude that Fitzgibbons was an obviously confused or incapacitated person at the time of the accident.

In concluding that there was evidence to support the challenged instruction and affirming the decision of the county court, the district court relied on Welch's statements to police that she had seen Fitzgibbons before and had wondered whether he was "mentally retarded or something." Given the requirements of § 60-6,109, which we have described above, the district court's reliance on Welch's subjective feeling, without more, was misplaced. The record did not support an instruction that assumed without evidence that Fitzgibbons was an

obviously confused or incapacitated person. We therefore conclude that the evidence did not support giving subparagraph (C) of instruction No. 6.

[8] As we have noted, there was no evidence from which the jury could have found that Fitzgibbons was "obviously confused or incapacitated," and therefore, the county court should not have instructed the jury it could find that Welch had failed to exercise due care with a pedestrian if it found that "Welch failed to exercise proper precaution upon observing a [sic] obviously confused or incapacitated person upon a roadway." A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). Subparagraph (C) of instruction No. 6 misstated the issues because it implied that there was evidence from which the jury could find that Fitzgibbons was "obviously confused or incapacitated" and that therefore, Welch was required to exercise the heightened standard of care described as "proper precaution" rather than the due care owed to any pedestrian. The county court erred in giving this portion of the instruction, and the district court erred when it affirmed the giving of this portion of the instruction.

Although instruction No. 6(C) was not supported by the evidence, we conclude that the remainder of instruction No. 6 and instruction No. 3 were not erroneous. As noted above, a driver can violate § 60-6,109 either by failing to exercise proper precaution with the specifically listed types of persons or by failing to exercise due care with any pedestrian on the roadway. Although there was not evidence to support an instruction regarding whether Fitzgibbons was obviously confused or incapacitated requiring Welch to exercise the legally heightened duty of proper precaution, there was evidence to support an instruction regarding whether Fitzgibbons was a pedestrian in the roadway with respect to whom Welch was required to exercise due care. In this regard, we note that in *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981), this court determined that evidence was sufficient to find that the defendant caused the death of a pedestrian while operating a vehicle in violation of § 60-6,109 (then § 39-644). This court determined that there was evidence in *Mattan* that the driver failed to see a pedestrian

who was in plain sight which could support a finding that the driver failed to "exercise due care to avoid colliding with any pedestrian upon any roadway" as required under § 60-6,109.

We note that there was evidence in the present case, in particular, the testimony of the State's accident reconstructionist, from which the jury could find that Fitzgibbons was a pedestrian upon the roadway when the collision occurred. There was also evidence from which the jury could find that although Welch had seen Fitzgibbons before the collision, she was looking in a different direction and did not see that he had left the corner at the time of the collision. From such evidence, the jury could have found that Welch failed to exercise due care to avoid colliding with a pedestrian on the roadway. Therefore, although the evidence did not support subparagraph (C) of instruction No. 6, the evidence supported the remainder of the instruction. For completeness, we note that subparagraph (B) of instruction No. 6 as given by the county court failed to specify that under § 60-6,109, the pedestrian must be "upon any roadway." In a new trial upon remand, instruction No. 6, subparagraph (B), should so specify.

Finally, we conclude that the error in giving subparagraph (C) of instruction No. 6 was prejudicial to Welch and requires reversal of her conviction. Although, as indicated above, there was evidence, if believed, from which the jury could have found that Welch had violated § 60-6,109 on another basis, it is important to note that in instruction No. 3, the jury was instructed that it need not be unanimous in determining which unlawful act Welch had committed in order to find her guilty and that it need be unanimous only in finding that the State had proved beyond a reasonable doubt that Welch had committed at least one of the unlawful acts described in the instructions. Therefore, it is possible that at least one juror could have found that although Welch exercised due care with a pedestrian as described in instruction No. 6(B), she did not, however, meet the higher standard of exercising proper precaution with an obviously confused or incapacitated person as described in instruction No. 6(C) and then based his or her decision to convict on the basis described in instruction No. 6(C). Because the jury was given an improper basis upon which to convict

Welch and was not required to specify the basis or bases on which it found Welch guilty, we conclude that subparagraph (C) was prejudicial to Welch. Therefore, the erroneous instruction requires reversal of her conviction.

*Double Jeopardy Does Not Bar New Trial on Other Bases.*

Welch was charged with motor vehicle homicide which involves causing a death unintentionally while engaged in an unlawful act involving the operation of a motor vehicle. See § 28-306. The State alleged alternate "unlawful acts" as the basis for the charge. Such acts included careless driving, failure to yield, failure to exercise due care with a pedestrian, and failure to exercise proper precaution with an obviously confused or incapacitated person. We conclude that although Welch cannot be retried for motor vehicle homicide on the basis that she failed to exercise proper precaution with respect to an obviously confused or incapacitated person, double jeopardy does not prevent a new trial for motor vehicle homicide on the remaining bases upon which the county court instructed in the first trial.

[9] We have noted that generally, "if a convicted defendant obtains a reversal and remand for a new trial on appeal, the State may reprosecute." *State v. Palmer*, 257 Neb. 702, 726, 600 N.W.2d 756, 774 (1999). However, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." 257 Neb. at 727, 600 N.W.2d at 775 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

In the present case, our conclusion that Welch's conviction should be reversed is premised on our determination that there was not sufficient evidence at trial to support instruction No. 6(C) regarding the duty of a driver to exercise proper precaution with an obviously confused or incapacitated person and that at least one juror could have relied on that unwarranted basis and corresponding instruction in voting to convict Welch. Because the State failed to produce evidence to support a conviction on the basis of Welch's alleged failure to exercise proper precaution with an obviously confused or incapacitated person, double jeopardy precludes the State on remand from attempting

to convict Welch of motor vehicle homicide on the basis of such alleged unlawful act. However, as noted above, there was sufficient evidence from which the jury could have found that Welch failed to exercise due care with a pedestrian as instructed in instruction No. 6(B), and she may be retried on such basis. Further, Welch made no argument on appeal that the evidence was insufficient to support the instructions on careless driving in instruction No. 4 and on failure to yield the right of way in instruction No. 5, and we have not analyzed these instructions and corresponding evidence. Therefore, on remand, Welch may be tried on these bases without violating double jeopardy.

## CONCLUSION

We conclude that the evidence did not support instruction No. 6(C) regarding failure to exercise proper precaution with an obviously confused or incapacitated person. The county court therefore erred in giving the instruction, and the instruction was prejudicial to Welch. The district court erred in affirming Welch's conviction. We remand the cause to the district court with directions to reverse Welch's conviction and to remand the matter to the county court for a new trial in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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NELVADENE MALCHOW, APPELLANT AND CROSS-APPELLEE, V. DEAN L. DOYLE, D.D.S., APPELLEE AND CROSS-APPELLANT.

748 N.W.2d 28

Filed April 24, 2008. No. S-06-219.

1. **Trial: Appeal and Error.** A trial judge has broad discretion over the general conduct of a trial; therefore, an appellate court reviews complaints about trial conduct for abuse of discretion.
2. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
3. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

4. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
5. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
6. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
7. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed as modified.

Vincent M. Powers, of Vincent M. Powers & Associates, and, on brief, Alan L. Plessman for appellant.

Patrick G. Vipond, Kyle Wallor, and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

PER CURIAM.

## NATURE OF CASE

Nelvadene Malchow brought this professional negligence action against Dean L. Doyle, D.D.S., alleging that she sustained injuries as the result of Doyle's insertion and later removal of a dental implant. A jury returned a verdict for Doyle, and the district court overruled Malchow's motion for judgment notwithstanding the verdict or for new trial and Doyle's motion for reconsideration. Malchow appeals, and Doyle has filed a cross-appeal.

## FACTS

Doyle was Malchow's dentist, and in July 1997, he placed a metal device in Malchow's mouth that would allow the permanent implant of prosthetic teeth. The device was embedded

underneath the gum tissue into and along her lower jaw. Malchow suffered from swelling, pain, and repeated infections for several years because Doyle allegedly improperly inserted the device.

On February 26, 2002, during removal of part of the dental implant, Doyle fractured the right side of Malchow's mandible. He referred Malchow to the University of Nebraska College of Dentistry in Lincoln, Nebraska, for further dental and medical care. She underwent emergency surgery and was then referred to the University of Nebraska Medical Center in Omaha, Nebraska. There, she underwent additional surgeries to repair the fracture and reconstruct the mandible.

Malchow brought this action, alleging that Doyle was negligent in failing to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession; that Doyle should have advised her that she was not a proper candidate for the dental implant; and that he failed to inform her of the risks associated with the implantation. She also claimed that Doyle failed to exercise reasonable care and skill in removing the implant, causing further injury, including the fracture of Malchow's mandible. In her amended complaint, Malchow sought recovery for hospital, medical, and dental costs and services that exceeded $145,000.

In his answer to Malchow's amended complaint, Doyle asserted that Malchow's claims were barred by the statute of limitations, that the complaint failed to state a claim upon which relief could be granted, and that he had met the applicable standard of care in the treatment rendered to Malchow.

After a 5-day trial, the jury returned a verdict in favor of Doyle, finding that Malchow had not met her burden of proof. Malchow moved for new trial and judgment notwithstanding the verdict, and Doyle filed a motion for reconsideration. The district court overruled the motions. Malchow appeals, and Doyle cross-appeals.

## ASSIGNMENTS OF ERROR

Malchow assigns the following errors: The district court abused its discretion (1) in sustaining Doyle's renewed motion to continue the trial on September 26, 2005; (2) in "the number

of hours during which the court was in session, conducting the trial"; (3) in overruling the motions for mistrial made by Malchow during the trial; (4) in refusing to assemble the jury during the hearing on the motion for new trial in order to investigate claims of juror misconduct; and (5) in overruling Malchow's motion for judgment notwithstanding the verdict or for new trial.

On cross-appeal, Doyle claims the district court erred (1) in ordering Doyle to pay for the time two of Malchow's experts spent preparing for depositions and (2) in ordering Doyle to pay sanctions with respect to the failure to produce certain models of Malchow's dental implant that were in Doyle's possession.

## STANDARD OF REVIEW

[1] A trial judge has broad discretion over the general conduct of a trial; therefore, an appellate court reviews complaints about trial conduct for abuse of discretion. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[2] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

[3] 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. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

## ANALYSIS

### Conduct of Trial

Malchow argues that the district court imposed "an unnecessary, unreasonably ambitious and daunting time table [sic] for the trial," which denied her a fair trial, and that the parties, the jury, and counsel "became prisoners to the trial court's unreasonable trial schedule." See brief for appellant at 22-23. Malchow contends that the trial schedule prejudiced the jury against her.

It is helpful in this case to review the pretrial history. Malchow's original complaint was filed on August 19, 2003. After many disputes regarding discovery, the district court scheduled a pretrial conference for August 15, 2005, and the

trial was originally scheduled for September 26 to October 3. Malchow's pretrial memorandum listed 40 witnesses and 123 exhibits. Doyle's pretrial memorandum listed 10 witnesses and 128 exhibits. On September 6, the court, on its own motion, set a cutoff date of September 9 for further pretrial motions.

On September 9, 2005, Doyle moved to continue the trial, claiming that Malchow was scheduled for additional surgery on September 13 and that the surgery could affect her appearance and her speech at trial, which would unfairly prejudice Doyle. The district court denied Doyle's motion to continue the trial, as well as his pending request for a separate trial on the statute of limitations issue.

On September 20, 2005, Doyle filed another motion to continue the trial based on issues related to his health. Doyle had previously suffered a heart attack and had recently been experiencing chest and back pain. A heart catheter procedure revealed a blockage in his heart, and his cardiologist recommended that Doyle have stents inserted to correct the blockage. The procedure was scheduled for September 21, and Doyle claimed that his cardiologist ordered him not be placed under the stress of trial for at least 2 weeks following that date.

The district court initially denied Doyle's motions for continuance, but after receiving testimony from Doyle's cardiologist, the court granted the motion because of serious health risks to Doyle. The court then set the trial to begin on Monday, October 24, 2005. The court allotted 1 week for trial, with jury selection scheduled for October 18.

When jury selection began, the district court informed the prospective jurors that the trial would begin on Monday, October 24, 2005, at 8 a.m. The court stated: "We're starting somewhat early in an effort to get the case done in a week. This case is going to take some time, and hopefully, it will be done within next week." After the jury had been selected, the court and counsel discussed the trial schedule. The court stated that it was "going to push this case along," beginning at 8 a.m. and running until 6 p.m. if necessary. Malchow had previously told the court that her case in chief would be concluded on Wednesday, October 26, but Malchow's counsel asked whether she would be able to call one of her expert witnesses the following week.

The expert would not be present until Monday, October 31. The court stated that although it was willing to consider going into the next week, it was reluctant to do so.

Trial began at 8:05 a.m. on Monday, October 24, 2005, and continued until 8:58 p.m. On Tuesday, proceedings began at 8:19 a.m. and continued until 6:16 p.m. The trial resumed at 8:08 a.m. on Wednesday and continued until 10:05 p.m. On Thursday, trial began at 8:33 a.m. and adjourned at 8:45 p.m. Friday's session began at 8:01 a.m. and lasted until 9:48 p.m. Thus, the district court allotted approximately 62 hours for the trial, including recesses, over a 5-day period.

In its posttrial order, the district court noted that the time allotted for trial had been discussed extensively at a hearing on the day of jury selection, October 18, 2005.

> [I]t is obvious from those proceedings that previous discussions had occurred. It is clear from that transcription, that [Malchow] had represented that her case in chief would be concluded on Wednesday. [Malchow's] counsel inquired about the possibility of going into the following week, and the Court did not foreclose that possibility, but made it clear that it was very reluctant to go into the following week, and the parties should expect to conclude within the week. The Court indicated that trial days would start earlier and go later than usual, if necessary, and that [Malchow] should plan on having rebuttal witnesses available Friday afternoon. . . .
>
> [Malchow] took far longer in presenting her case in chief than what had been represented to the Court. Although there were numerous bench conferences, the court reporter's affidavit shows that they were quite short. Throughout the trial, the Court inquired how long proceedings would take, and the time estimates given by [Malchow's] counsel in response varied substantially, without any apparent reason, from time actually consumed. The direct examination by [Malchow] of Dr. Doyle was very slow-paced and repetitive. The Court made every reasonable effort to give [Malchow] the same amount of time which had been allocated prior to the continuance, and [Malchow] in fact was able to use far more time than was estimated.

Malchow does not offer any precedent to support her claim that the district court imposed a daunting trial schedule on the parties. She cites only this court's definition of a judicial abuse of discretion. We have held that a trial judge has broad discretion over the general conduct of a trial. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). We therefore review Malchow's claims for an abuse of discretion. The record does not establish that the district court abused its discretion by depriving Malchow of a fair trial through the scheduling of the proceedings, unless it can be shown that the jury was prejudiced because the trial days were longer than usual.

We note that on the fourth day of trial, the district court expressed its frustration at the time the trial was taking and stated it was concerned that the time estimates given by Malchow had been incorrect. Doyle moved for a mistrial, noting that there was insufficient time left for two expert witnesses he had expected to call that day. Doyle's counsel stated that Malchow had taken "inordinate amounts of time with everything . . . to slow this case down," delay Doyle's experts, and extend the trial into the following week to allow one of Malchow's experts to testify.

Malchow's counsel responded:

> That isn't true *any longer*, Your Honor. . . . The motivation is incorrect. *At one time it was*, but it's not the motivation for us trying this case at the pace we are, and we don't have any intention of delaying anything for any purpose at all except to make sure the evidence gets in that we want to present . . . .

(Emphasis supplied.)

The above statement implied that Malchow's counsel had previously attempted to extend the time of trial in order to call an expert witness who was not available until the following week. The district court allowed more time for Malchow's case in chief than had originally been discussed among the parties. Under the circumstances presented in this case, Malchow was responsible for the extra time that was required of the jury. We conclude that the court did not abuse its discretion in extending the length of the trial days. This assignment of error has no merit.

## Motions for Mistrial

[4] Malchow's argument concerning the conduct of the trial is also expressed in her assignment of error claiming that the district court abused its discretion in overruling each of the several motions for mistrial made during the trial. A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005). A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Id*. Events which may require the granting of a mistrial may include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters. See *id*.

Malchow argues that the length of the trial days was so daunting that the jurors were prejudiced against her. We have noted that the length of the trial days was related to Malchow's presentation of the evidence. Some of Malchow's motions for mistrial, however, did not specifically relate to the length of the trial days or the timing of the trial. The first motion, made on the third day of trial, was based on the district court's "preventing [Malchow] from putting on evidence to impeach . . . Doyle's evidence and from putting on evidence concerning the facts in this case that occurred on the date of the severe injury to . . . Malchow." On the fourth day, Malchow moved for mistrial because she felt that due to the time constrictions imposed by the court, she had not been able to present the evidence that she needed to fully meet her burden of proof.

Malchow offers no authority to support her contention that the trial schedule prevented her from having a fair trial. As noted earlier, a trial judge has broad discretion over the general conduct of a trial, and we review complaints about the conduct of a trial for abuse of discretion. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

This court has previously addressed the imposition of time limits on a trial in *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994), in which the trial court used stopwatches to keep track of the time allotted for the parties to present their case,

including cross-examination and arguments on objections. Each had been given 10½ hours. Although the issue was not raised by the parties, we noted that a trial judge has broad discretion over the conduct of a trial. We cautioned trial courts against the use of stopwatches or other similar limitations on time. "Such methods of controlling the course of trial might well overly restrict the presentation of evidence and could prejudice a party's right to fully present that party's case." *Id*. at 30, 516 N.W.2d at 599. The Nebraska Court of Appeals has also stated, "Arbitrary time limits can easily become the enemy of justice in our adversarial system." *Gohl v. Gohl*, 13 Neb. App. 685, 702, 700 N.W.2d 625, 638 (2005).

In the case at bar, the trial was conducted over a 5-day period and 62 hours were devoted to the trial. The record does not show that either party was restricted in the presentation of its evidence. Malchow has not demonstrated that she was prejudiced in presenting her case based on the length of each trial day, and she is not entitled to an inference that the jury resented her because of the length of the trial. We conclude that the district court did not arbitrarily place time limits on either party or restrict the presentation of evidence. Thus, the court did not abuse its discretion in overruling any motions for mistrial on the basis of the conduct of the trial.

### Juror Misconduct

Malchow claims the district court abused its discretion in refusing to assemble the jury to investigate claims of juror misconduct. At the hearing on the motion for new trial, Malchow offered into evidence the affidavits of three jurors, and Doyle objected based upon Neb. Rev. Stat. § 27-606 (Reissue 1995), which generally precludes a juror from testifying as to any matter or statement occurring during the course of the jury's deliberations. The court sustained Doyle's objection and refused to receive the evidence.

We note that Malchow did not assign as error the court's refusal to receive the affidavits. Errors argued but not assigned will not be considered on appeal. *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007). Thus, we do not consider the ruling on the affidavits.

Malchow's assignment of error claims that the district court abused its discretion in refusing to have the jurors return after trial to be examined for possible juror misconduct. The motion for new trial submitted by Malchow did not request such a hearing, but during the hearing on the motion for new trial, Malchow asked the court to gather the jurors to question them about the verdict. This assignment of error appears to be based on Malchow's claim that the jurors were unduly influenced by the jury foreperson, who allegedly repeatedly told the jury that the proof had to be beyond a reasonable doubt to find in Malchow's favor.

Section 27-606(2) precludes a juror testifying "as to any matter or statement occurring during the course of the jury's deliberations . . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention." Malchow claims that the jury foreperson's incorrect statement concerning the burden of proof was extraneous information and did not relate to any statement made during the jury's deliberations. Therefore, Malchow asserts that the jurors should have been able to testify about it.

In *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999), the appellant claimed juror misconduct because one of the jurors, an attorney, had allegedly intimidated the other jurors concerning the definition of proximate cause. The appellant alleged that the attorney-juror's legal knowledge constituted extraneous prejudicial information within the meaning of § 27-606. Conflicting affidavits were offered. We held that the juror's general legal knowledge was personal knowledge not directly related to the litigation and was not extraneous information within the meaning of § 27-606.

[5] Here, it is alleged that the foreperson incorrectly stated the burden of proof. A juror's knowledge about the burden of proof is personal knowledge that is not directly related to the litigation at issue and is not extraneous information. The jury was instructed by the court that Malchow's burden of proof was to show, *by the greater weight of the evidence*, that Doyle was negligent. Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by

the pleadings and evidence. *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007). The jury instructions were correct, and there is no prejudicial error evident with regard to the instructions to the jury.

Malchow was not entitled to an evidentiary hearing to investigate the allegations of juror misconduct. The jurors' affidavits were not admissible, and Malchow's claims of misconduct were unsupported by any evidence. See *Leavitt v. Magid, supra*. The district court did not abuse its discretion in failing to conduct a hearing to question the jurors about their verdict, and this assignment of error has no merit.

## REMAINING ASSIGNMENTS OF ERROR

Malchow assigns as error the district court's sustaining Doyle's renewed motion to continue the trial on September 26, 2005, and its overruling Malchow's motion for judgment notwithstanding the verdict or for new trial. However, Malchow does not argue these assignments of 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. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

## CROSS-APPEAL

On cross-appeal, Doyle asserts that the district court erred (1) in ordering Doyle to pay for the deposition preparation time of two of Malchow's experts, Drs. Richard Burton and Michael Miloro, and (2) in ordering Doyle to pay sanctions with respect to the failure to produce certain models of Malchow's dental implant that were in Doyle's possession.

### Standard of Review

[6,7] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *In re Guardianship & Conservatorship of Borowiak*, 10 Neb. App. 22, 624 N.W.2d 72 (2001). See, also, *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). The standard of review of a trial court's determination of a request for sanctions is

whether the trial court abused its discretion. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

### Deposition Expenses

On February 17, 2005, Malchow moved to compel Doyle to pay the fees for certain expert witnesses to prepare their responses to Doyle's discovery pursuant to Neb. Ct. R. of Discovery 37 (rev. 2000). The district court had previously overruled Malchow's objections to several interrogatories submitted by Doyle to Malchow's expert witnesses. However, the court had ordered Doyle to pay Malchow's expert witnesses to respond to said discovery if, after being informed of the estimated charges, Doyle still wished to obtain the responses. Malchow provided the required estimation of charges, but received no response from Doyle.

In her motion to compel, Malchow claimed that defense counsel then served notices of deposition on two of Malchow's expert witnesses, Burton and Dr. J. Bruce Bavitz, seeking the same information as had previously been sought through the written interrogatories. Malchow claimed that by deposing such witnesses, Doyle was attempting to obtain the same information by deposition that he had previously sought through written discovery. Burton's deposition was held on December 28, 2004, and Bavitz' deposition was held on January 12, 2005.

Burton sent Doyle a bill of $3,000 for his deposition and his preparation time, including his time to compile answers to a list of questions that were asked of him in the notice of deposition. Doyle's attorney paid $2,000 but refused to pay the other $1,000, which was based on Burton's charge for 4 hours at $250 per hour to review all materials, answer the interrogatories, and conduct other research in preparation for the deposition. Doyle argued he should not be required to pay for the trial preparation of Malchow's expert.

Malchow alleged that Doyle was attempting to circumvent the district court's prior order by restating the same questions in a notice of deposition to the expert witness rather than by submitting written interrogatories to Malchow. In addition, because the issue had previously been ruled on in the court's order of

December 12, 2003, Malchow claimed that Doyle should be ordered to pay Malchow's attorney fees incurred in filing the motion to compel.

The district court ordered Doyle to pay the entire amount billed by Burton, which included his preparation time for answering the interrogatories and participating in the deposition. The court overruled Malchow's request for attorney fees. Under the circumstances presented, we conclude the court did not abuse its discretion in ordering Doyle to pay Burton's charges of $3,000.

Each party moved for a protective order regarding the fees charged by Miloro. Doyle had been advised that several of Malchow's expert witnesses required a fee of $1,000 to $1,500 at least 1 week in advance of the deposition, based on a rate of $500 to $750 per hour. Miloro's deposition was scheduled for 2 hours on August 29, 2005, but Miloro canceled it when Doyle did not pay $1,500 at least 1 week in advance. Doyle alleged that Miloro's charges were unreasonable.

Subsequent to the cancellation of his deposition, Miloro demanded a total of $7,500. In addition to $1,500 for the deposition, Miloro claimed he had incurred 12 hours of preparation between August 27 and 28 reviewing records, and he charged $500 per hour for preparation. Miloro stated that on Friday, August 26, 2005, his office left a voicemail message for Malchow's counsel that the $1,500 advance fee had not been received. In spite of not being paid, Miloro said he felt it necessary to review the records in the event that all parties appeared for the deposition. Miloro claimed he had spent 12 hours over the weekend reviewing the records. The district court ordered that Doyle was responsible for Miloro's "time for the deposition to be taken the morning of August 29," but which did not occur because of nonpayment by Doyle. The court also overruled Doyle's motion for a protective order.

Doyle subsequently filed an application for leave to file an original action in this court seeking a writ of mandamus relating in part to the $6,000 charge for Miloro's deposition preparation time. We denied Doyle's application to file an original action.

On September 23, 2005, Malchow again brought the issue of Miloro's $7,500 charge before the district court. The court then

inquired of Malchow's counsel whether there would be a problem with Miloro's appearing for trial because he had not been paid. Counsel responded that Miloro would not appear until the bill was paid. "We've paid him a lot of money in the past. He's been paid for every minute that we've seen him before." Cocounsel then added, "We've paid him in advance for his trial appearance, but he hasn't [been] paid the $7[,]500." Miloro was scheduled to appear on the third day of the trial. Counsel stated that Miloro would fill up his calendar if he was not paid the $7,500 immediately and that he would not testify at trial, which was scheduled at that time to begin the following week. The court ordered Doyle to pay $7,500 to Miloro no later than 5 p.m. on Monday, September 26.

The record indicates that Miloro had spent considerable time with Malchow's lawyers prior to trial and that he had been paid for his time, which according to counsel was "a lot of money." Miloro had been paid by Malchow for his trial appearance. The remaining question is whether Doyle should have been required to pay Miloro for 12 hours of preparation for a 2-hour deposition that was requested by Doyle but was never taken because Miloro was not paid in advance.

This court has not previously addressed the question of payment of an expert witness for time spent in preparation for a deposition. The Nebraska discovery rules for civil cases are, with some modification, based on the federal rules of discovery. See, Neb. Ct. R. of Discovery 26(b)(4) (rev. 2001); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993).

Doyle relies on *Rhee v. Witco Chemical Corp.*, 126 F.R.D. 45 (N.D. Ill. 1989), which held that a deposing party need not compensate the opposing party's expert for time spent preparing for a deposition. The court noted that the preparation time included not only the expert's review of his or her conclusions and the basis for the opinion, but also consultation between counsel and the expert to prepare the expert for testifying. "An expert's deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation. One party need not pay for the other's trial preparation." *Id*. at 47.

Malchow relies on *Hose v. Chicago and North Western Transp. Co.*, 154 F.R.D. 222 (S.D. Iowa 1994), in which the railroad objected to the plaintiff's expert witness' charging the railroad for time spent reviewing medical records in preparation for a deposition. The court distinguished *Rhee*, in part, because the expert in *Hose* was the plaintiff's treating neurologist and was not retained specifically for the litigation. In addition, the expert was not seeking compensation for any time spent in conference with plaintiff's counsel, but merely for time spent reviewing the plaintiff's medical records. The court noted that compensating the expert for time spent reviewing medical records would speed along the deposition process and would save costs over having the expert refresh his memory during the deposition using the medical records.

Other cases represent a split of authority regarding payment of an expert's time in preparing for a deposition. In *M. T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491 (N.D. Ill. 1997), the court stated that as a general rule, Fed. R. Civ. P. 26(b)(4)(C) does not require the deposing party to bear the expense of the expert's deposition preparation time. *M. T. McBrian, Inc.* was a simple contract case between two parties, and the court stated that without more compelling circumstances, time spent preparing for a deposition should fall on the party responding to a discovery request. See, also, *Benjamin v. Gloz*, 130 F.R.D. 455 (D. Colo. 1990) (compensation denied for time spent by expert preparing for deposition).

There are exceptions where the case is complex or where there has been a considerable lapse of time between an expert's work on a case and the date of the actual deposition. In *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212 (E.D. Wis. 1994), the court found that the issues were complex and that the deposition would occur 4 to 5 months after the expert prepared his report. It ordered the party responding to the discovery to pay for 5 hours of the expert's deposition preparation time. See, also, *E.E.O.C. v. Sears, Roebuck and Co.*, 138 F.R.D. 523 (N.D. Ill. 1991) (cost of time spent for experts to review voluminous documents may be recovered in complex case, but range of activities performed by experts for which party can be reimbursed is very narrow).

[8] The question of whether time spent by Miloro in responding to discovery should include his time preparing for a deposition is left to the discretion of the trial court. The control of discovery is a matter for judicial discretion. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007). In this case, Doyle did not pay certain specified fees to Miloro in advance as agreed upon, which resulted in the deposition's being canceled.

We conclude that the district court abused its discretion in ordering Doyle to pay the $6,000 charged by Miloro as compensation for time he spent preparing for the deposition. The facts herein are similar to those in *Rhee v. Witco Chemical Corp.*, 126 F.R.D. 45 (N.D. Ill. 1989). Miloro was Malchow's witness, and he was scheduled to testify on the third day of the trial. Malchow's counsel stated that he had spent considerable time with Miloro and that Miloro had been paid for every minute of his time. Whether Miloro needed to spend 12 additional hours to prepare for a 2-hour discovery deposition by Doyle is not the question, but, rather, whether Doyle should have been ordered to pay such charges. We conclude that the district court's order on this issue was in error. We therefore modify that portion of the judgment in order to tax $6,000 as additional costs to Malchow.

## Sanctions

On December 15, 2003, Malchow issued Doyle a notice for deposition and a subpoena duces tecum, asking Doyle to provide the following materials: "[a]ll records, documents, billings, and other tangible things in your possession or control" pertaining to Malchow, including but not limited to x rays.

As Doyle's deposition began on December 19, 2003, he was asked whether he brought those items requested in the subpoena duces tecum. Doyle stated that he had brought all documents

pertaining to Malchow, x rays, and the instruments used for the surgery. Later in the deposition, Doyle mentioned that models of Malchow's jawbone had been made between the first and second surgeries. When a second deposition of Doyle was taken on April 8, 2005, he was asked if he was in possession of any models, and he indicated he would have to check. Dental impressions were eventually provided to Malchow's counsel on April 13.

In Malchow's motion for sanctions under rule 37, she alleged that she had learned on January 24, 2005, that an exhibit contained the "right strut of the Malchow subperiosteal implant," which had never before been produced by Doyle or properly made a part of the contents of the exhibit. Malchow claimed that the strut was added to the exhibit while it was in the possession of Doyle or his counsel. Malchow claimed that at Doyle's second deposition on April 8, the right strut of Malchow's implant was produced. And at a third deposition on June 13, models of Malchow's jaw and implant device were produced.

In her motion for sanctions, Malchow asked the district court to find that Doyle and his counsel were in contempt and to order that they purge themselves of contempt by either (1) paying Malchow's counsel full compensation for the time expended as a result of taking Doyle's deposition on three occasions, (2) forfeiting the right to refer to or use the strut or models as evidence at trial, or (3) admonishing and instructing Doyle's expert witnesses that their opinions should not be based on the strut or models.

In the alternative, Malchow sought payment for the time expended in revisiting all of Malchow's expert witnesses to allow them to review the strut and models; payment for the time spent taking the depositions of Bavitz and Burton, who were not allowed to view the strut and models prior to their depositions; and forfeiture of Doyle's right to use the depositions of Bavitz and Burton as substantive evidence or as impeachment at trial.

The district court found that Doyle was negligent in failing to produce the strut and models related to his treatment of Malchow at either of his depositions. Pursuant to the subpoena duces tecum, Doyle was required to bring all "tangible things"

to the deposition. The court found it would be an extreme remedy to exclude the models from use but found it appropriate to impose sanctions in the amount of one-half of the costs of the subsequent depositions and Malchow's attorneys' preparation time for those depositions. Doyle was ordered to pay $7,717.50 in attorney fees and $685.58 in expenses to Malchow's counsel as sanctions by August 31, 2005.

After the trial, Doyle moved the district court to reconsider its sanctions. He argued there was no testimony that the models changed the opinion of any expert or that any expert spent a great deal of time looking at the models to reevaluate his opinion. Doyle claimed the sanctions were excessive and asked that they be set aside because there was no prejudice to Malchow. The court overruled this motion for reconsideration.

Doyle argues that the district court abused its discretion. He claims that there was no prejudice to Malchow because the expert witnesses testified that their opinions did not change after they saw the models. Burton stated in a second deposition that none of his opinions had changed following his review of the models and implant. Bavitz stated at trial that he had not changed his opinions based on his review of the models.

The subpoena duces tecum directed Doyle to bring with him "[a]ll records, documents, billings, and *other tangible things* in your possession or control" pertaining to Malchow, including but not limited to x rays. (Emphasis supplied.) The models would certainly fall within the definition of "other tangible things." Thus, the district court did not abuse its discretion in sanctioning Doyle for the failure to provide the models until 16 months after the subpoena duces tecum was issued. This assignment of error has no merit.

## CONCLUSION

The judgment of the district court is affirmed as modified in accordance with this opinion.

AFFIRMED AS MODIFIED.

CONNOLLY, J., participating on briefs.

# J.R. Simplot Company, appellant, v. James Jelinek, as Personal Representative of the Estate of Edward F. Jelinek, deceased, and individually, et al., appellees.

748 N.W.2d 17

Filed April 24, 2008. No. S-06-666.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Equity: Jurisdiction: Appeal and Error.** The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of law and fact.
3. **Decedents' Estates: Executors and Administrators.** A personal representative's duty is to act on behalf of an estate with the end goal of distributing and closing that estate.
4. **Decedents' Estates: Notice: Claims.** Mere notice to a representative of an estate regarding a possible demand or claim against the estate does not constitute presenting or filing a claim under Neb. Rev. Stat. § 30-2486 (Reissue 1995).
5. **Open Accounts: Actions.** An action on account or open account is appropriate where the parties have conducted a series of transactions for which a balance remains.
6. **Open Accounts: Limitations of Actions.** In an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation of the statute of limitations.
7. ____: ____. Not every entry in an open account is an item that restarts the applicable statute of limitations.
8. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

Appeal from the District Court for Box Butte County: Paul D. Empson, Judge. Affirmed.

David A. Dudley and Jacob P. Wobig, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Terry Curtiss, of Curtiss, Moravek, Curtiss, Margheim & Miller, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

## INTRODUCTION

This case presents several issues relating to a claim filed against the estate of Edward F. Jelinek. We are first asked to determine whether crop services provided to the estate by J.R. Simplot Company (Simplot) are administration expenses under Neb. Rev. Stat. § 30-2485(b) (Reissue 1995). If so, then Simplot's claim should be allowed, because under § 30-2485, no statute of limitations barred the claim. However, if the claim was not for administration expenses, we are presented with the question of whether Simplot's "Demand for Notice" or, alternatively, the filing of this suit in district court, operated as a timely claim under Neb. Rev. Stat. § 30-2486 (Reissue 1995).

## FACTS

The facts of this case are largely uncontested. Edward passed away testate on May 21, 1999, leaving an estate primarily consisting of approximately 4,500 acres of farmland. James Jelinek, Edward's grandson, was named personal representative of the estate. Edward's will specifically authorized the personal representative to keep the administration of his estate open for up to 15 years and directed that the farming operation on the estate should be continued during that time.

In September 1999, crops located on land owned by the estate suffered significant hail damage. The crops were uninsured. Accordingly, there were insufficient funds to pay operating debt due in 1999. Due to the inability to pay this debt, the lender declined to provide further financing of the estate's operations. New financing was obtained through Ag Services of America, Inc. (Ag Services). This financing lasted from the 2000 through the 2002 growing seasons. In order to receive goods or services under this new agreement, the estate had to specifically request the goods or services. Ag Services would then either approve or decline the request, with Ag Services

actually purchasing the goods or services. These goods and services were then sold to the estate at a markup.

At this same time, the estate's account with Simplot was also changed to cash on delivery, meaning that no goods or services were to be provided without payment up front. During the 3 years at issue, there were times when Ag Services would not approve certain requests made by James on behalf of the estate. Given the payment status at Simplot, the estate could not itself contract for the goods or services. Nevertheless, Simplot's local branch manager continued to provide certain goods and services to the estate. The payment status was circumvented with the manager's simply keeping track of the goods and services provided, but not issuing invoices. It is clear from the record that with respect to the goods and services at issue, the manager was aware that he was dealing with James in James' capacity as personal representative for Edward's estate.

Eventually, the circumvention was discovered. On February 26, 2003, the goods and services provided to the estate were invoiced for a total of $161,053.78. That invoice provided for a due date of March 20, 2003. The estate did not pay that invoice and was billed again on March 26 in the amount of $174,504.98, with a due date of April 20. That invoice was also not paid.

The reason put forth by James for the nonpayment of the bill was that during the 2000 growing season, some of the estate's dryland corn fields had a lower yield than James had expected. James believed the cause of this poor yield was the spraying of an herbicide recommended by Simplot, and he estimated a loss of approximately $150,000 to $160,000. James refused to pay the Simplot bill despite acknowledging that at least some of the goods and services were provided. James' refusal was based upon his belief that Simplot owed the estate for the poor yield caused by the spraying of the herbicide.

On June 10, 2003, Simplot filed a "Demand for Notice" in the county court for Box Butte County. That demand stated that "[Simplot] has a financial interest in the estate of the deceased and holds an outstanding claim," but included no basis for the potential claim and listed no amount due.

On March 25, 2004, Simplot filed this suit against the estate in Box Butte County District Court. The estate denied it was liable

and asserted a cross-claim against Simplot for $175,085.09 for damages to the estate's 2000 dryland corn crop. That cross-claim was later dismissed by the district court. On May 16, 2006, the district court dismissed Simplot's claim, finding the claim was barred by the statute of limitations set forth in § 30-2485. The district court also found Simplot's "Demand for Notice" did not qualify as a claim under § 30-2486.

## ASSIGNMENTS OF ERROR

On appeal, Simplot assigns, restated, that the district court erred in (1) determining that expenses of conducting farm operations were not "administration expenses" under § 30-2485(b); (2) determining that Simplot's filing entitled "Demand for Notice" was insufficient as a filing of claim under § 30-2485(b); (3) not determining that the estate's account with Simplot was open, which would toll the applicable statute of limitations; and (4) determining Simplot's equitable actions were barred.

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[1]

[2] The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of law and fact.[2]

## ANALYSIS

On appeal, Simplot's basic contention, broadly stated, is that the district court erred in concluding that its claim was barred by the statute of limitations set forth in § 30-2485(b). Section 30-2486 provides a framework for analyzing this assertion. That section provides that someone with a claim against an estate may present it in one of two ways. Under § 30-2486(1), the claim may be filed with the probate court. Alternatively, under § 30-2486(2), a claimant may file suit to recover the amount of the claim, so long as the suit is filed within the time period provided for filing the claim with the estate.

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[1] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[2] *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

The time period for filing claims with the estate is set forth in § 30-2485(b). That section generally provides that with respect to claims arising at or after the death of the decedent, as is presented in this case:

> All claims, other than for administration expenses, against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;
>
> (2) Any other claim, within four months after it arises.[3]

*Simplot's Claim Not For Administration Expenses.*

In its first assignment of error, Simplot argues that its claim was an administration cost and, under § 30-2485(b), did not need to be filed with the probate court within the 4-month time period. In support of this contention, Simplot argues that the overriding goal of Edward's will was a concern over the continuation of his farming operations and that Edward had specifically authorized keeping the estate open for up to 15 years. Simplot asserts that given the possibility of a long-term administration of the estate, the crop services it provided were necessary to maintain the cropland, were incurred in the administration of the estate, and therefore were administration expenses as envisioned by § 30-2485(b).

The current Nebraska Probate Code was enacted in 1974 and became operative on January 1, 1977. While it closely follows the language of the Uniform Probate Code, it differs in one particular way that is significant to our analysis in this case. While the Uniform Probate Code requires *all* claims to be filed with the estate or the probate court,[4] § 30-2485(b) specifically

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[3] § 30-2485(b).

[4] Compare Unif. Probate Code § 3-803, 8 U.L.A. 41 (Cum. Supp. 2007).

exempts administration expenses from such requirement. It appears that Nebraska is unique in providing such an exemption. The term "administration expenses" is not defined in the probate code. Nor has the term been precisely defined by Nebraska case law, though the topic has been generally discussed.

In cases decided since the adoption of the current probate code, this court has concluded that expenses paid to engage in litigation on behalf of the estate were administration expenses for the purposes of § 30-2485(b),[5] as were the attorney fees of a party other than the administrator.[6] Furthermore, in cases predating the current probate code, we held that guardian ad litem fees[7] and reimbursement for legal services provided by the administrator[8] were properly considered administration expenses.

Simplot's contention that its claim constituted an administration expense under § 30-2485(b) suffers from a fatal flaw. If the crop services Simplot provided are properly considered administration expenses, such ignores altogether § 30-2485(b)(1), which provides for the 4-month claim period for "[a] claim based on a contract with the personal representative . . . ."

[3] If this court were to adopt Simplot's reasoning—that the services in question should be considered administration expenses—then § 30-2585(b)(1) would be rendered virtually meaningless. A personal representative's duty is to act on behalf of the estate with the end goal of distributing and closing that estate.[9] In general, each and every contract entered by the personal representative is intended to assist the personal representative in his or her administration of the estate. Under Simplot's reasoning, all of those expenses could reasonably be construed as administration expenses, resulting in a situation in which it would rarely, if ever, be necessary for someone to

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[5] *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988).

[6] *Roberts v. Snow Redfern Memorial Foundation*, 196 Neb. 139, 242 N.W.2d 612 (1976).

[7] *Hauschild v. Hauschild*, 176 Neb. 319, 126 N.W.2d 192 (1964).

[8] *In re Estate of Wilson*, 83 Neb. 252, 119 N.W. 522 (1909).

[9] See, generally, Neb. Rev. Stat. §§ 30-2462 to 30-2482 (Reissue 1995 & Cum. Supp. 2006).

actually file a claim with the probate court. We therefore reject Simplot's contention and hold that the claim in this case was not for administration expenses.

In support of this holding, we rely on our previous case law regarding administration expenses. As noted, this court has never defined administration expenses. This court has, however, indicated that certain claims were administrative in nature; many of those cases predate our current probate code. We conclude that the Legislature adopted the current probate code, including its unique exemption for administration expenses, with the knowledge of what expenses this court had held to be administration expenses. We decline to expand the list of expenses determined to be administrative to include the services provided by Simplot in this case, particularly when those services are so clearly "based on a contract with the personal representative" and thus fit neatly within § 30-2485(b)(1).

Also supporting our conclusion are the purposes behind § 30-2485(b). We have stated that

> [t]he purpose of the nonclaim statute, § 30-2485, is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate. As a result of the nonclaim statute, the probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and project a probable time at which the decedent's estate will be ready for distribution.[10]

Where the purpose behind § 30-2485(b) is to facilitate and expedite the distribution of a decedent's estate, defining administration expenses broadly, as Simplot would essentially have us do, would not forward this goal.

We also note that we have examined both the cases and regulations to which Simplot directs us and find them all distinguishable and inapplicable. In *Perez v. Gil's Estate et*

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[10] *In re Estate of Feuerhelm*, 215 Neb. 872, 874-75, 341 N.W.2d 342, 344 (1983).

*al*[11] and *Evans v. Carroll*,[12] the administrators of the estate in each case wished to recover expenses incurred while continuing decedent's business following decedent's death; the court in each case concluded that the expenses in question were expenses of administration. However, there is no indication that the court in either case was presented with the statutory distinction that we have here: namely, the distinction made between "administration expenses" and "claims based upon a contract with the personal representative."

We also find Simplot's argument based upon Internal Revenue Code regulations unpersuasive. The regulations in question discuss expenses which are deductible from a decedent's gross estate and define administration fees as executor's commissions, attorney fees, and miscellaneous administration expenses.[13] Miscellaneous administration expenses are defined in this context to include those "[e]xpenses necessarily incurred in preserving . . . the estate," including "the cost of . . . maintaining property of the estate."[14]

We, of course, agree that under the regulations, the cost of maintaining the property of an estate could, in certain circumstances, be properly considered a miscellaneous administration expense for the purposes of the Internal Revenue Code. We conclude, however, that such is of no import to our analysis of whether the services in question are "administration expenses" under the Nebraska Probate Code.

We also reject Simplot's argument that the estate is estopped from now arguing that the expenses in question were not "administration expenses" when the estate referred to the expenses as such throughout the administration of the estate. We conclude that the terminology the estate employed in characterizing the expenses in question is of no consequence, particularly as it does not appear the nature of the expenses was at issue at the time the statements and filings were made by the estate.

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[11] *Perez v. Gil's Estate et al*, 29 N.M. 313, 222 P. 907 (1924).

[12] *Evans v. Carroll*, 167 Ga. 68, 144 S.E. 912 (1928).

[13] 26 C.F.R. § 20.2053-3(a) (2007).

[14] § 20.2053-3(d)(1) at 362.

We reject Simplot's contention that its claim was for administration expenses. Such a conclusion is supported by our prior case law on administration expenses in general and also by the purposes behind § 30-2485(b). As such, Simplot's first assignment of error is without merit. Because the expenses in question were not administrative, Simplot was required under §§ 30-2485(b)(1) and 30-2486 to file a claim with the probate code within 4 months. We discuss below whether Simplot filed such a claim.

*Simplot's Demand for Notice Did Not Comply With § 30-2486(1).*

Having concluded the district court was correct in finding the services provided by Simplot did not qualify as administration expenses, we are next presented with Simplot's second assignment of error. In particular, Simplot argues that its June 10, 2003, "Demand for Notice" qualified as a claim under § 30-2486(1). That section provides:

> The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

Simplot's "Demand for Notice" provided that

> [p]ursuant to Nebraska Probate Code §30-2413, the undersigned hereby demands mailed notice pursuant to Nebraska Probate Code § 30-2220(a)(1) of any of the following orders or filings pertaining to the estate of the above deceased: . . . Inventory or any supplementary inventory [and a]ll other filings made by the Personal Representative or his attorney in this matter.

The notice further stated that "[Simplot] has a financial interest in the estate of the deceased and holds an outstanding claim." Simplot claims this demand was sufficient because § 30-2486

provides that the "[f]ailure to describe correctly the security, the nature of any uncertainty, and the due date . . . does not invalidate the presentation made."

[4] *In re Estate of Feuerhelm*[15] is instructive with respect to whether Simplot's "Demand for Notice" was sufficient as a statement of claim under § 30-2486(1). In that case, we held the purported claim against the estate was filed by the wrong entity, but also noted the claim was further deficient:

> Although the language of [the] claim did alert the personal representative to the possibility of a claim by the trust, [the] claim did not contain a demand . . . upon the estate for satisfaction of any obligation. Mere notice to a representative of an estate regarding a possible demand or claim against the estate does not constitute presenting or filing a claim under § 30-2486. If notice were accorded the stature of a claim, the resultant state of flux and uncertainty would frustrate and avoid the purpose and objectives of the nonclaim statute.[16]

We conclude the "Demand for Notice" filed by Simplot was at most "notice to a representative of an estate regarding a possible demand or claim against the estate."[17] Simplot's "Demand" requested notice of any filings or orders in the estate and indicated, without providing any basis for the claim or amount due, that "[Simplot] has a financial interest in the estate of the deceased and holds an outstanding claim."

Moreover, we note this "Demand" referenced not § 30-2486(1), but Neb. Rev. Stat. § 30-2413 (Reissue 1995), which provides that interested parties can request notice from the court of any order or filings pertaining to an estate. Lending further support to the conclusion that Simplot had not intended this as a claim is the fact that Simplot had, on July 16, 1999, filed a "Statement

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[15] *In re Estate of Feuerhelm, supra* note 10.

[16] *Id*. at 875, 341 N.W.2d at 345. See, also, *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988) (citing with approval language in *In re Estate of Feuerhelm, supra* note 10, noting that notice should not be accorded status of claim).

[17] See *In re Estate of Feuerhelm, supra* note 10, 215 Neb. at 875, 341 N.W.2d at 345.

of Claim" with the estate in connection with services provided to Edward prior to his death, which services were unrelated to this case. That "Statement of Claim" provided a description of the claim, a due date, and the name and address of the claimant or authorized party.

The "Demand for Notice" filed on June 10, 2003, did not qualify as a statement of claim under § 30-2486(1). The record reveals no other filings which might otherwise qualify as a statement of claim filed with respect to amounts owed to Simplot. Simplot's second assignment of error is without merit.

*Simplot's Filing of Suit Did Not Qualify as Claim Under § 30-2486(2).*

Having concluded that Simplot's "Demand for Notice" was insufficient as a claim under § 30-2486(1), we must next determine whether the filing of suit against the estate in the Box Butte County District Court was sufficient as a claim under § 30-2486(2). Such filing may qualify as a claim so long as "the commencement of the proceeding . . . occur[ed] within the time limited for presenting the claim,"[18] which under these facts was "within four months after performance by the personal representative is due."[19]

The operative question presented, then, is when "performance by the personal representative [was] due" in this case. Simplot contends that because it charged a finance charge on unpaid amounts, the account was an open one and "there was no dedicated time at which performance from the Personal Representative was due, and the limitations period set forth in the Probate Code has not run."[20]

[5] We have noted that with respect to open accounts, "'"[a]n action on account or open account is appropriate where

[18] § 30-2486(2).

[19] § 30-2485(b)(1).

[20] Brief for appellant at 17.

the parties have conducted a series of transactions for which a balance remains.'"'"[21]

> Openness is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined. . . . The critical factor in deciding whether an account is open is whether the terms of payment are specified by the agreement or are left open and undetermined.[22]

It is clear that the estate's account with Simplot was an open account. The record in this case clearly shows that the parties "conducted a series of transactions for which a balance remains" and that the terms of payment between the estate and Simplot were left open and undetermined.

[6,7] While Simplot may be correct that the account between it and the estate was open, such fact is not dispositive. In *Sodoro, Daly v. Kramer*,[23] a law firm was attempting to recover unpaid funds from a former client. The last charge on the client's account was a fee transaction dated April 4, 1997, for the preparation of correspondence to the client regarding oral argument. The final transaction in the account, however, was a credit for the return on an appeal bond dated June 19. The firm did not file suit against the client until June 7, 2001. We held that the suit was barred by the statute of limitations.

> It is well established that in an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation of the statute of limitations. . . . However, not every entry in an account is an "item" that restarts the statute of limitations.[24]

We noted that while part payment may remove the bar to recovery imposed by the statute of limitations, the credit for

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[21] *Sodoro, Daly v. Kramer*, 267 Neb. 970, 975, 679 N.W.2d 213, 219 (2004) (quoting *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999)).

[22] *Id.* at 976, 679 N.W.2d at 219 (citation omitted).

[23] *Sodoro, Daly, supra* note 21.

[24] *Id.* at 976-77, 679 N.W.2d at 220.

the return of the appeal bond did not qualify as part payment. We reasoned that the purpose behind removing the bar in certain circumstances was that part payment acted as recognition and acknowledgment of the entire debt; reasoning which did not apply in the case of a credit where there was no affirmative action by the client.

We find the reasoning from *Sodoro, Daly* equally applicable here. Further contracting for and receipt of services requires an affirmative action by a debtor and would likely be seen as recognition and acknowledgment of the entire debt. However, simply being charged a finance charge on amounts already owed requires no affirmative action by a debtor. As such, it should not be treated as a debtor's recognition and/or acknowledgment of a debt sufficient to toll the applicable statute of limitations.

Adopting such a position—wherein simply charging a finance charge or interest could keep the statute of limitations from running—would undermine the concept of a statute of limitations. If this were all that was necessary to keep a limitations period from running for an action on account, then accounts could remain unpaid for years with little or no incentive for creditors to attempt to recover the amounts due.

The record in this case shows the estate was billed for services provided to it on February 26, 2003, with a due date of March 20, and again on March 26, with a due date of April 20. Under §§ 30-2485 and 30-2486(2), suit had to be filed within 4 months of the date the underlying obligation was due. Simplot acknowledges that suit was not filed until March 25, 2004, approximately 1 year after the estate was first billed and well outside the 4 months permitted under § 30-2485. It is apparent that Simplot's suit does not qualify as a claim under § 30-2486(2). Simplot's third assignment of error is without merit.

*Simplot Is Not Entitled to Equitable Relief.*

Finally, Simplot argues that even if it was found to have not filed a claim, "the Estate should be estopped from asserting the statute of limitations as a defense to Simplot's claim."[25]

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[25] Brief for appellant at 19.

The basis for this contention is the alleged deception perpetrated against it when Simplot's local branch manager failed to invoice the estate for services provided by Simplot.

[8] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.[26]

Assuming the doctrine of equitable estoppel is available in actions such as this,[27] we conclude that Simplot has not shown the estate should be estopped from arguing the application of § 30-2485.

Simplot argues that James and Simplot's local branch manager acted to conceal from Simplot the fact that Simplot was providing services to the estate without invoicing those services. What Simplot fails to show, though, is how it changed its position as a result of this alleged concealment. While it is true that the estate was not initially invoiced for the services, the manager's actions were eventually discovered and in February and March 2003, the services were invoiced. Under § 30-2485, a claim or suit should have been filed within 4 months of this date. Simplot did not file such a claim until 1 year later, nor has Simplot provided any reason why timely filing was not possible.

We further note that not only has Simplot failed to show that it changed its position in reliance on the alleged concealment, it

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[26] *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

[27] See *In re Estate of Masopust*, 232 Neb. 936, 443 N.W.2d 274 (1989).

likely would not be able to show the necessary "lack of knowledge . . . as to the facts in question" in order to be entitled to an estoppel defense. This is so because the manager, a Simplot employee, was involved in the alleged concealment, and his knowledge would likely be imputed to Simplot.[28]

Simplot's final assignment of error is without merit.

## CONCLUSION

The crop services for which Simplot seeks payment are not "administration expenses" under § 30-2485. As such, it was necessary that Simplot file either a claim or a lawsuit within 4 months from when the sums were due. Since Simplot failed to do either, it is barred from recovering any amounts due. The district court did not err in dismissing Simplot's claim.

AFFIRMED.

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[28] See, e.g., *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

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GLENN POPPERT, APPELLANT, V.
BILL D. DICKE ET AL., APPELLEES.

747 N.W.2d 629

Filed April 24, 2008. No. S-06-741.

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. **Actions: Words and Phrases.** A "claim for relief" within the meaning of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is equivalent to a separate cause of action, as opposed to a separate theory of recovery.
4. **Final Orders: Words and Phrases.** A final judgment is the functional equivalent of a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
5. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
6. **Actions: Pleadings.** Two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.

7. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief.
8. **Final Orders: Appeal and Error.** Without a final order, an appellate court lacks jurisdiction and must dismiss the appeal.

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

R.J. Shortridge, Corey L. Stull, Jeanette Stull, Shawn P. Dontigney, and Derek A. Aldridge, for appellant.

John C. Chatelain and John J. Maynard, of Chatelain & Maynard, for appellees Bill D. Dicke and Cattlemen's Nutrition Services, L.L.C.

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

HEAVICAN, C.J.

## INTRODUCTION

Glenn Poppert filed this action against Bill D. Dicke; Cattlemen's Nutrition Services, LLC (CNS); McDermott and Miller, P.C. (McDermott & Miller); and Donald A. Schaller. Poppert appeals from the district court's dismissal of his claims for breach of the fiduciary duties of loyalty, care, and good faith and fair dealing.

## FACTUAL BACKGROUND

Poppert and Dicke organized Cattlemen's Consulting Service, Inc. (CCS). Poppert was a 10-percent equity owner; Dicke was a 90-percent equity owner. Before entering into the business, Poppert sought and received the professional opinion of McDermott & Miller, an accounting firm, and Schaller, a certified public accountant. CCS dissolved in 2000, and Poppert resigned in 2003. Dicke formed CNS in 2004.

In his amended complaint, Poppert alleged 10 discrete "causes of action." The first three "causes of action" claimed a breach of the duties of loyalty, care, and good faith and fair dealing.

With respect to each duty, Poppert alleged that Dicke breached it by paying himself and others an excessive salary, failing to distribute earnings after October 13, 2003, selling CCS' assets piecemeal to himself rather than preserving its goodwill by selling as an ongoing business, and operating a competing business at the same time as he was a member of CCS.

In his fourth "cause of action," misappropriation of company opportunities, Poppert alleged that Dicke purchased CCS assets piecemeal, acquiring goodwill and trade secrets for insufficient consideration. Poppert's fifth and sixth "causes of action" alleged that Dicke negligently and fraudulently misrepresented the value of CCS.

Poppert's seventh "cause of action," unjust enrichment, alleged that Dicke paid himself an excessive salary, failed to distribute earnings, and dissolved CCS for less than fair market value, thus acquiring goodwill and trade secrets for less than fair market value. In his eighth and ninth "causes of action," Poppert alleged professional negligence and negligent misrepresentation on the part of Schaller and McDermott & Miller, contending that these defendants misrepresented the value of CCS. Poppert's tenth "cause of action" alleged the misappropriation of trade secrets involving CCS' secrets' being given to CNS without proper consideration.

Dicke and CNS filed a motion to dismiss, which was granted in part. In particular, the district court concluded that as to the first three "causes of action"—breach of the duties of loyalty, care, and good faith and fair dealing—no such duties existed. The district court reasoned that under Nebraska's Limited Liability Company Act, Neb. Rev. Stat. § 21-2601 et seq. (Reissue 1997), there was no express fiduciary duty relating to the conduct of members and managers of a limited liability company. The district court certified its dismissal under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), and Poppert appeals.

## ASSIGNMENT OF ERROR

Poppert assigns, restated, that the district court erred in finding that there was no fiduciary duty imposed upon members and managers in a limited liability company.

## 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.[1]

## ANALYSIS

[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.[2] The procedural posture of this case presents an issue under § 25-1315(1).

Section 25-1315(1) provides that

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1315(1), therefore, is limited to circumstances "[w]hen more than one claim for relief is presented" and the court's order finally adjudicates "one or more but fewer than all of the claims." Before § 25-1315 was enacted, the dismissal of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was

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[1] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[2] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

not a final order for appellate purposes.[3] Section 25-1315 was an attempt by the Legislature to clarify questions regarding final orders where there were multiple claims, but it permits a judgment to become final only under the limited circumstances set forth in the statute.[4] It does not provide "magic words," the invocation of which transforms any order into a final judgment for purposes of appeal.[5]

[3,4] A "claim for relief" within the meaning of § 25-1315(1) is equivalent to a separate cause of action, as opposed to a separate theory of recovery.[6] And a final judgment is the functional equivalent of a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).[7] Thus, for an order appealed from to be certifiable as a final judgment under § 25-1315(1), (1) the case must involve multiple causes of action, as opposed to theories of recovery, and (2) the order must completely dispose of at least one of those causes of action.

[5-7] A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.[8] Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.[9] Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and

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[3] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[4] See, *Cerny, supra* note 3; *Malolepszy, supra* note 3; *Keef, supra* note 3.

[5] *Keef, supra* note 3.

[6] See, *Keef, supra* note 3; *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

[7] See *Cerny, supra* note 3.

[8] *Keef, supra* note 3.

[9] See *id*.

(4) whether separate causes of action could be maintained for separate relief.[10]

Poppert's operative complaint in this case purports to allege 10 discrete "causes of action." Further review of the complaint, however, suggests that there are at most only three causes of action. Poppert's "causes of action" Nos. 1 through 3, which were dismissed by the order from which Poppert now appeals, are instead part of the *same* cause of action, as the allegations supporting each are effectively identical and more appropriately labeled "theories of recovery." With respect to these theories of recovery, Poppert alleges that Dicke breached the fiduciary duties of loyalty, care, and good faith and fair dealing by paying himself and others an excessive salary, failing to distribute earnings, selling CCS' assets piecemeal to himself rather than preserving its goodwill by selling as an ongoing business, and operating a competing business at the same time as he was a CCS member.

"Causes of action" Nos. 8 and 9, directed at defendants Schaller and McDermott & Miller, are also just different theories of recovery for the same single cause of action and therefore compose Poppert's second cause of action. Poppert alleges in these theories of recovery that Schaller and McDermott & Miller engaged in professional malpractice and negligent misrepresentation when each defendant allegedly overrepresented the value of CCS at formation. And arguably, "causes of action" Nos. 5 and 6, while directed at Dicke, are coextensive with "causes of action" Nos. 8 and 9, as all four allege that Poppert was deceived about the capitalization and value of CCS.

But most importantly, "causes of action" Nos. 1 through 3 are coextensive with "causes of action" Nos. 4, 7, and 10. The same operative facts support all six of these theories of recovery: Dicke allegedly paid excessive salaries, did not pay Poppert cash distributions, and sold the business to himself piecemeal so as to acquire its goodwill and trade secrets without paying fair market value. "Causes of action" Nos. 1 through 4, 7, and 10 are, in fact, all theories of recovery for the same underlying cause of action. And the district court's order dismisses *some*

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[10] *Id.*

of those theories of recovery, i.e., "causes of action" Nos. 1 through 3, but does not dismiss *all* of them.

[8] In short, the district court's order was not a "'final order' . . . as to one or more but fewer than all of the causes of action."[11] To be appealable, an order must satisfy the final order requirements of §§ 25-1902 and 25-1315(1).[12] "'[S]ince the judgment does not dispose of the entirety of any one claim [for relief], it cannot be made an appealable judgment by recourse'" to § 25-1315(1).[13] And without a final order, this court lacks jurisdiction and must dismiss the appeal.[14]

We conclude this court lacks jurisdiction over this appeal, and it must be dismissed.

## CONCLUSION

The trial court did not have the authority to certify the order appealed from as a final judgment, as that order disposes of three theories of recovery for a particular cause of action, but does not dispose of three other theories of recovery for the same cause of action. This appeal is dismissed.

APPEAL DISMISSED.

STEPHAN, J., not participating.

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[11] *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 547, 657 N.W.2d 916, 924 (2003).

[12] See *Cerny, supra* note 3.

[13] See *Monument Mgt. Ltd. Partnership I v. Pearl, Miss.*, 952 F.2d 883, 885 (5th Cir. 1992).

[14] See *id.*

GERRARD, J., concurring.

I agree completely with the court's analysis of the jurisdictional issue presented in this appeal, and I join the court's opinion. I write separately to comment on these proceedings, in the hope of limiting similar jurisdictional defects in future cases.

The parties have represented, and the record suggests, that the district court certified this appeal as a final judgment on its own motion. Despite the fact that a party aggrieved by a certified final judgment may be required to perfect a timely appeal

from that judgment to preserve a claim of error,[1] sua sponte certification of a final judgment is generally considered to be within a trial court's discretion.[2]

This discretion, however, should be exercised sparingly by trial courts. The purpose of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is to make interlocutory review available in the "'''infrequent harsh case'''" in which the general policy against piecemeal appeals is outweighed by the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.[3] It will be an "'unusual case'" in which certification of a final judgment should be entered at all.[4] It should be an even more unusual case in which a court should certify a final judgment without a party's request.

Because certification is primarily intended to serve the needs of the parties, it would be preferable for a trial court to seek the input of the parties before proceeding to certify a judgment, because factors unknown to the court may affect the equities of certification. It may be that hardship to the parties will be exacerbated, and not relieved, by an interlocutory appeal. In this case, for example, the certification order has required the parties to expend time and "to incur costs and significant attorneys' fees appealing and briefing the certified issues."[5] It is also possible that the jurisdictional defect presented in this appeal might have been called to the attention of the trial court, and avoided, had the parties been invited to participate in determining whether or not a final judgment should be certified.

I note, for the benefit of future litigants, that because a certified judgment is considered final for all purposes, a party can ask a trial court to reconsider a decision to certify a final

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[1] See, e.g., *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995); *Federal Deposit Ins. Corp. v. Tripati*, 769 F.2d 507 (8th Cir. 1985).

[2] See, e.g., *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001); *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944 (7th Cir. 1980).

[3] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 809, 733 N.W.2d 877, 886 (2007).

[4] See *id*.

[5] Supplemental brief for appellant at 2.

judgment, with a timely motion to alter or amend the certified judgment.[6] This presents parties with a way to present jurisdictional or prudential concerns to the trial court, even after a final judgment has been certified.

Nonetheless, the pitfall of defective appellate jurisdiction was not avoided in this case. While it is unfortunate, the terms of § 25-1315(1) simply do not permit us to exercise jurisdiction in this case. Therefore, I join the opinion of the court dismissing this appeal.

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[6] See, Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006); 10 James Wm. Moore et al., Moore's Federal Practice § 54.26[1] (3d ed. 2008).

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## State of Nebraska, appellee, v. Chad Kinkennon, appellant.

747 N.W.2d 437

Filed April 24, 2008. No. S-07-654.

1. **Prosecuting Attorneys: Appeal and Error.** A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.
2. **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.
3. **Prosecuting Attorneys.** When a disqualified attorney is effectively screened from any participation in the prosecution of a defendant, the prosecutor's office may, in general, proceed with the prosecution.
4. ____. What constitutes an effective procedure for screening a disqualified lawyer from the prosecution of a defendant will depend on the particular circumstances of each case. At a minimum, the disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the matter. The other lawyers in the office who are involved with the matter should be informed that the screening is in place and that they are not to discuss the matter with the disqualified lawyer.
5. ____. In order to be effective, procedures for screening a disqualified lawyer from the prosecution of a defendant must be implemented as soon as practical after the lawyer or a government office employing the lawyer knows or reasonably should know that screening is needed.
6. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
7. **Constitutional Law: Self-Incrimination.** The Fifth Amendment right to be free from self-incrimination is a personal right of the witness.

8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Buffalo County: TERESA K. LUTHER, Judge. Affirmed.

Mitchel L. Greenwall, of Yeagley, Swanson & Murray, L.L.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

## NATURE OF CASE

Chad Kinkennon was convicted in a bench trial of one count of possession of methamphetamine with the intent to deliver[1] and one count of possession of cocaine.[2] Kinkennon argues on appeal that the district court erred in denying his motion for appointment of a special prosecutor, based on an alleged conflict of interest. Kinkennon also argues that the district court erred in imposing excessive sentences, and in the manner in which the court instructed a witness regarding that witness' Fifth Amendment rights. For the following reasons, we affirm the judgment of the district court.

## FACTS

Kinkennon was charged by amended complaint in the district court for Buffalo County with one count of possession of methamphetamine with intent to deliver, one count of possession of a controlled pharmaceutical substance without a prescription, one count of possession of a controlled substance other than marijuana without a valid prescription, and possession of cocaine.

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[1] See Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2006).

[2] See § 28-416.

The charges against Kinkennon were based on evidence seized in a search of Kinkennon's residence. That evidence included, among other things, a digital scale and several small baggies containing methamphetamine and cocaine residue.

### Alleged Conflict of Interest

On August 4, 2006, the court appointed Heather Swanson-Murray, of the law firm Yeagley Swanson Murray, L.L.C., to serve as counsel for Kinkennon. Yeagley Swanson Murray represented Kinkennon from that date forward, through his May 10, 2007, sentencing and the filing of the present appeal on June 8. Mandi Schweitzer was employed as an associate attorney with Yeagley Swanson Murray at the time Swanson-Murray was appointed to represent Kinkennon. Schweitzer remained an employee of the firm through January 19, 2007; on January 22, she began employment with the Buffalo County Attorney's office as a deputy county attorney.

On February 26, 2007, Kinkennon filed a motion for appointment of a special prosecutor. In his motion, Kinkennon alleged that "[a] conflict of interest exist[ed] within the Buffalo County Attorney's office by virtue of . . . Schweitzer's previous association with Yeagley Swanson Murray . . . and current association with [the] Buffalo County Attorney's office."

At the hearing on the motion for appointment of a special prosecutor, three affidavits relating to Schweitzer's knowledge of and participation in Kinkennon's case were offered and received into evidence. Swanson-Murray, in her affidavit, averred, among other things, that she "recall[ed] discussing . . . Kinkennon's case, including pretrial motions and trial strategy[,] with all of the attorneys in the office, including . . . Schweitzer prior to January 19, 2007." Swanson-Murray also averred that she specifically recalled "discussing with . . . Schweitzer the propriety of filing a motion to suppress in . . . Kinkennon's case, as well as discussing legal issues surrounding the use of a confidential informant." Similarly, another associate attorney with Yeagley Swanson Murray averred that he "recall[ed] discussions regarding . . . Kinkennon's case within the office that took place prior to January 19, 2007," and that "Schweitzer, . . . Swanson-Murray and [he] were present at the office during these discussions."

Schweitzer, in her affidavit, denied ever discussing Kinkennon's case with any attorney while she was employed with Yeagley Swanson Murray. Schweitzer averred that she had no contact with Kinkennon, did not review or examine his file, and did not even know his file existed. Schweitzer further averred that she "was not consulted by any other attorneys in the firm with regard to . . . Kinkennon in any way" and that "[a]ny other representations by anyone else to the contrary are false." Finally, Schweitzer averred that since joining the Buffalo County Attorney's office, she had not participated in the prosecution of Kinkennon's case, and that she did not have any knowledge of the matter.

The district court denied Kinkennon's motion for appointment of a special prosecutor, and the case proceeded to trial.

### Fifth Amendment Rights of Witness

At trial, Kinkennon called as a witness Caroline Callaghan, a woman who was living with Kinkennon at the time the police executed the search. Prior to Callaghan's testimony, the trial judge instructed Callaghan that if she believed the testimony she was about to give would incriminate her, she was "at liberty not to testify" and could "invoke her Fifth Amendment right." She was further instructed that her testimony could be used against her and that if she chose to begin testifying, she would have to complete her testimony. Callaghan stated that she understood and chose to testify.

Callaghan then testified and admitted on direct examination to, among other things, using methamphetamine. On cross-examination, the State asked Callaghan how long she had been an intravenous drug user. Callaghan responded by stating, "I plead the Fifth on that." The State moved to have all of Callaghan's testimony stricken. After briefly discussing the issue with counsel, the court asked Callaghan if she would like to talk to a lawyer before continuing with her testimony, at which point Callaghan responded, "Yes, sir."

Following a short recess, the court reconvened. Callaghan was instructed that the State had a right to cross-examine her as to the testimony she had already given and that she had to answer, but that on unrelated issues, she might be allowed to

assert her Fifth Amendment right. Callaghan was told she could confer with her counsel before answering questions. She was also told that if she was instructed to answer a question, but refused, she could be remanded to custody until she complied, or her related testimony could be stricken.

Neither the State nor counsel for Kinkennon raised any objection to this procedure. Callaghan was cross-examined and did not assert her Fifth Amendment privilege, nor did counsel for Kinkennon object during cross-examination of Callaghan.

### Sentencing

Following the bench trial, the district court convicted Kinkennon of one count of possession of methamphetamine with the intent to deliver and one count of knowingly or intentionally possessing cocaine. The matter proceeded to sentencing. The presentence investigation report indicated that Kinkennon has a lengthy criminal history including, among other things, multiple convictions for assault and possession of marijuana. Kinkennon was sentenced to 8 to 12 years' imprisonment for possession of methamphetamine with the intent to deliver and to a concurrent term of 20 months' to 5 years' imprisonment for possession of cocaine. Kinkennon appealed.

## ASSIGNMENTS OF ERROR

Kinkennon assigns, restated, that the district court erred in (1) failing to appoint a special prosecutor, (2) improperly informing Callaghan of the manner and scope of her right to assert her Fifth Amendment privilege, and (3) imposing excessive sentences.

## STANDARD OF REVIEW

[1] A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.[3]

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[3] See, *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[4]

## ANALYSIS

### Appointment of Special Prosecutor

Kinkennon contends that the district court erred in denying his motion for appointment of a special prosecutor. Specifically, Kinkennon argues that when the Buffalo County Attorney's office hired Schweitzer, a conflict of interest arose because Schweitzer, before joining the county attorney's office, was formally employed as an associate for Yeagley Swanson Murray, the firm that is presently representing Kinkennon. Kinkennon claims that to avoid the "appearance of impropriety,"[5] this conflict of interest should be imputed to the other prosecutors in the office, thus disqualifying the entire Buffalo County Attorney's office.

We have not previously addressed whether an entire prosecutor's office should be disqualified when one attorney, after joining the prosecutor's office, is alleged to have been involved in the representation of a defendant on charges being prosecuted at the time the attorney joined that office. Several other jurisdictions, however, have considered this issue. A few courts have followed a per se rule of disqualification where the mere appearance of impropriety is enough to warrant disqualification of an entire prosecuting office.[6] In cases where such rule was followed, screening the attorney at issue to remedy the imputed conflict is generally not allowed and disqualification of the office is required, irrespective of whether confidences were breached or prejudice to the defendant resulted.[7] Courts that employ this approach reason that a per se rule is required

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[4] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[5] Brief for appellant at 10.

[6] See, *State v. Ross*, 829 S.W.2d 948 (Mo. 1992); *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981).

[7] See *id*.

because it eliminates any appearance of impropriety and preserves public confidence in the criminal justice system.[8]

However, the overwhelming majority of courts to have considered this issue have rejected this type of per se rule. Instead, most courts have adopted a less stringent rule, pursuant to which the trial court evaluates the circumstances of a particular case and then determines whether disqualification of the entire office is appropriate.[9] Under this approach, courts consider, among other things, whether the attorney divulged any confidential information to other prosecutors or participated in some way in the prosecution of the defendant.[10] The prosecuting office need not be disqualified from prosecuting the defendant if the attorney who had a prior relationship with the defendant is effectively isolated from any participation or discussion of matters concerning which the attorney is disqualified.[11] If impropriety is found, however, the court will require recusal of the entire office.[12]

We agree with the majority view and do not adopt a per se rule of disqualification. We believe the ultimate goal of maintaining both public and individual confidence in the integrity of our judicial system can be served without resorting to such

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[8] See *id.*

[9] See, *U.S. v. Goot*, 894 F.2d 231 (7th Cir. 1990); *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981); *Hart v. State*, 62 P.3d 566 (Wyo. 2003); *Matter of R.B.*, 583 N.W.2d 839 (S.D. 1998); *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991); *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987); *State v. Bunkley*, 202 Conn. 629, 522 A.2d 795 (1987); *State v. McKibben*, 239 Kan. 574, 722 P.2d 518 (1986); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985); *Young v. State*, 297 Md. 286, 465 A.2d 1149 (1983); *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982); *State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982); *State v. Cline*, 122 R.I. 297, 405 A.2d 1192 (1979); *State v. Bell*, 346 So. 2d 1090 (La. 1977); *Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974).

[10] See, e.g., *State ex rel. Romley v. Superior Court*, 184 Ariz. 223, 908 P.2d 37 (Ariz. App. 1995).

[11] See, e.g., *State v. McKibben, supra* note 9; *Young v. State, supra* note 9; *State v. Cline, supra* note 9; *State v. Pennington*, 115 N.M. 372, 851 P.2d 494 (N.M. App. 1993).

[12] See *State v. Stenger*, 111 Wash. 2d 516, 760 P.2d 357 (1988).

a broad and inflexible rule. As declared by the Maryland Court of Appeals, "'[t]he appearance of impropriety alone is "simply too slender a reed on which to rest a disqualification order except in the rarest of cases."'"[13]

And we recently endorsed a more flexible rule by adopting the Nebraska Rules of Professional Conduct. Rule 1.11(d),[14] which addresses conflicts of interest for current government officers and employees, provides in relevant part that "[e]xcept as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: . . . (2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment."

The official comment 2 to rule 1.11 explains that "[b]ecause of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." This rule recognizes the distinction between lawyers engaged in the private practice of law, who have common financial interests, and lawyers in a prosecutor's office, who have a public duty to seek justice, not profits.[15]

The per se rule would result in the unnecessary disqualification of prosecutors where the risk of a breach of confidentiality is slight, thus needlessly interfering with the prosecutor's performance of his or her constitutional and statutory duties.[16] Furthermore, a per se rule would unnecessarily limit mobility in the legal profession[17] and inhibit the ability of prosecuting

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[13] *Young v. State, supra* note 9, 297 Md. at 294, 465 A.2d at 1153.

[14] Neb. Ct. R. of Prof. Cond. 1.11(d) (rev. 2005).

[15] See, *United States v. Caggiano, supra* note 9; *State v. Camacho, supra* note 9; *State v. Stenger, supra* note 12; *Frazier v. State, supra* note 9; *State v. Tippecanoe County Court, supra* note 9.

[16] *State v. Camacho, supra* note 9; *Lux v. Com.*, 24 Va. App. 561, 484 S.E.2d 145 (1997).

[17] See *Young v. State, supra* note 9.

attorney's offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.[18]

[3] We recognize that complete disqualification of a prosecutor's office may be warranted in cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our judicial system simply could not be maintained otherwise. Such an extreme case might exist, even where the State has done all in its power to establish an effective screening procedure precluding the individual lawyer's direct or indirect participation in the prosecution.[19] But when the disqualified attorney is effectively screened from any participation in the prosecution of the defendant, the prosecutor's office may, in general, proceed with the prosecution.

Whether the apparent conflict of interest justifies the disqualification of other members of the office is a matter committed to the discretion of the trial court.[20] In exercising that discretion, the court should consider all of the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breaching any of the privileged communications. A flexible, fact-specific analysis will enable a trial court to protect a criminal defendant from the due process concerns at issue, while at the same time avoiding unnecessary disqualifications of government attorneys. Whether the State has established an effective screening procedure will obviously be part of that analysis.

[4] What constitutes an effective screening procedure will depend on the particular circumstances of each case. However, at a minimum, the disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the matter. Similarly, the other lawyers in the office who are involved with the matter should be informed that the screening is in place and that they are not to discuss the matter with the disqualified lawyer.

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[18] *State v. Pennington, supra* note 11.

[19] See *Collier v. Legakes, supra* note 9.

[20] See, *State v. El-Tabech, supra* note 3; *State v. Bruna, supra* note 3.

[5] Depending on the circumstances, additional screening procedures may be appropriate. These procedures may include a written undertaking by the screened lawyer to avoid any communication with other lawyers in the office and contact with files or other materials relating to the matter, notice and instructions to all relevant governmental office personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and other government personnel.[21] In order to be effective, screening procedures must be implemented as soon as practical after a lawyer or government office knows or reasonably should know that screening is needed.[22]

Having rejected Kinkennon's argument that the entire Buffalo County Attorney's office should have been, per se, disqualified, we must determine whether, under the particular facts of this case, it should have been. Based on the affidavits submitted by the parties, it is unclear exactly what, if any, information Schweitzer acquired relating to Kinkennon's case before she joined the county attorney's office.

We conclude, however, that even assuming Schweitzer had acquired some limited knowledge of Kinkennon's case, there is nothing in the record to suggest, nor does Kinkennon allege, that any of this information was communicated by Schweitzer to the county attorney's office to aid in the prosecution of this case. Nor is there any evidence in the record to indicate that Kinkennon's defense was prejudiced, or even affected, by Schweitzer's employment with the county attorney's office. Given the record before us, we cannot conclude that the district court abused its discretion in denying Kinkennon's motion for appointment of a special prosecutor.

### Fifth Amendment Privilege

Kinkennon argues that the district court committed reversible error by failing to properly instruct the defense witness,

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[21] See Neb. Ct. R. of Prof. Cond. 1.0(k) and comment 9 (rev. 2005).

[22] See *id.*, comment 10.

Callaghan, of her rights under the Fifth Amendment. Kinkennon claims that the district court "essentially scared [Callaghan] away from feeling that she had the power to exercise her constitutional rights under the circumstances."[23]

[6,7] This argument fails for two reasons. First, Kinkennon did not object during trial to what he now assigns as error on appeal. It is well established that failure to make a timely objection waives the right to assert prejudicial error on appeal.[24] Second, and more importantly, Kinkennon lacks standing to challenge the alleged violation of Callaghan's rights under the Fifth Amendment. The Fifth Amendment right to be free from self-incrimination is a personal right of the witness.[25] And the personal nature of this right precludes Kinkennon from claiming a Fifth Amendment violation on Callaghan's behalf.[26] Accordingly, this assignment of error is without merit.

### Excessive Sentences

For his remaining assignment of error, Kinkennon argues that his sentences were excessive and that the district court failed to properly consider the factors relevant to his sentencing.

[8] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[27] Kinkennon's presentence investigation report reveals an extensive criminal record including, among other things, convictions for multiple assaults, issuing bad checks, possession of drug paraphernalia, carrying a concealed

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[23] Brief for appellant at 10.

[24] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[25] *State v. Perea*, 210 Neb. 613, 316 N.W.2d 312 (1982). See, also, *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973).

[26] See *State v. Perea, supra* note 25.

[27] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

weapon, reckless driving, and possession of marijuana. At sentencing, the court explained that "[t]he information provided by [Kinkennon] indicates that [he] is really not even coming to the threshold of understanding or being of a mindset that he really truly seeks a rehabilitative program." We agree with this assessment.

Possession of methamphetamine with intent to deliver is a Class II felony,[28] punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[29] Possession of cocaine is a Class IV felony,[30] punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both.[31] The district court reviewed the record, considered the appropriate sentencing factors, and imposed sentences within the statutory limits. Based on our review of the record, we conclude that the district court did not abuse its discretion in sentencing Kinkennon.

## CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

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[28] § 28-416(2).

[29] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

[30] § 28-416(3).

[31] § 28-105(1).

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# MICHAEL D. McCLELLAN ET AL., APPELLANTS, V. THE BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, AND INTERCESSORS OF THE LAMB, INC., APPELLEES.

748 N.W.2d 66

Filed May 2, 2008. No. S-06-1072.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **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.

3. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **Standing: Municipal Corporations.** Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public.
6. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** It is generally the case that only parties to a judgment or their privies have standing to invoke a higher court's jurisdiction for review of the judgment.
7. **Taxation: Appeal and Error.** Neb. Rev. Stat. § 77-202.04 (Cum. Supp. 2006) delineates who may appeal from the decision of the county board of equalization on a tax exemption determination.
8. **Appeal and Error: Words and Phrases.** The word "appeal" is a word of general application in the law. Ordinarily it refers to the removal of proceedings from one court or tribunal to another for review.
9. **Statutes: Legislature: Intent.** The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature; all subordinate rules are mere aids in reaching this fundamental determination.
10. **Statutes.** In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Vacated and dismissed.

Michael D. McClellan, of Gast & McClellan, for appellants.

Kristin M. Lynch, Douglas County Attorney, for appellee Board of Equalization of Douglas County.

Gerard T. Forgét III, of Forgét Firm, and William E. Pfeiffer, of Raynor, Rensch & Pfeiffer, for appellee Intercessors of the Lamb, Inc.

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

MCCORMACK, J.

## NATURE OF CASE

The appellants, taxpayers and homeowners in Douglas County, appeal from the denial of their petition in error to the

district court, which petition sought review of tax-exempt status granted to three neighboring residential properties owned by the Intercessors of the Lamb, Inc. (Intercessors). We determine that the taxpayers lack standing to seek direct review of the exempt status of another's property and that the district court lacks subject matter jurisdiction over appeals from tax exemptions, which appeals should instead be lodged with the Tax Equalization and Review Commission (TERC).

## BACKGROUND

The Intercessors are a Catholic religious organization formed as a nonprofit corporation.[1] The Archdiocese of Omaha describes the Intercessors as a public association of approximately 40 laypersons conducting their activities under the authority of the Archbishop of Omaha. The core group of laypersons have taken hermit vows which are recognized by the Catholic Church. Four priests are also affiliated with the association.

Eleven residences and some real property owned by the Intercessors in an area known as Ponca Hills have already been deemed tax exempt and are not the subject of the current appeal. The Intercessors acquired three additional residences in Ponca Hills that, in 2005, they asked also to be designated as tax exempt pursuant to Neb. Rev. Stat. § 77-202(1)(d) (Reissue 2003). Each of the three residences has a chapel, and the Intercessors living there adhere to a schedule of approximately 10 hours a day of prayer and ministry.

A public hearing before the Douglas County Board of Equalization (Board) was held on the Intercessors' request to exempt the three properties from taxation. Michael D. McClellan, a taxpayer in Douglas County and an attorney for a neighborhood association in Ponca Hills, along with several residents and members of the Ponca Hills community, were allowed to express their objections before the Board. The residents were concerned about the declining tax base of the area which, they argued, increased the tax burden of the nonexempt residents. In addition, one of the houses under consideration

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[1] See, generally, *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

and two previously designated exempt residential properties are located in a Sanitary Improvement District (SID). Members of this SID raised concerns to the Board regarding the ability to fund the SID, although there was evidence that the Intercessors were voluntarily making SID payments for that property. The Board ultimately granted the exemptions.

On September 7, 2005, McClellan and the other objectors (hereinafter petitioners), filed a petition in error in the district court contesting the Board's grant of exempt status for the three properties. The district court affirmed the decision of the Board, and the petitioners appeal.

## ASSIGNMENTS OF ERROR

The petitioners assign that the district court erred in not overturning the decision of the Board, because (1) the Board did not follow the applicable law, (2) there was insufficient evidence to support a finding that the residences were used exclusively for tax-exempt purposes, and (3) the court erroneously based its ruling on a presumption that the Board faithfully performed its official duties and acted upon sufficient competent evidence.

In addition, we entered an order to show cause directing the parties to brief (1) whether neighboring taxpayers have standing to bring a petition in error contesting a board of equalization's decision to grant a tax exemption to another and (2) whether the TERC has exclusive jurisdiction over disputes involving tax-exempt status for real or personal property.

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[2]

## ANALYSIS

[2,3] Two jurisdictional questions are raised by the petitioners' action in seeking review of the Board's decision by petition in error to the district court: (1) who has standing to seek review of the Board's decision and (2) where any such review must take place. Both issues concern the district court's subject matter jurisdiction, which is a court's power to hear and determine

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[2] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

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.[3] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[4]

[4-6] As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.[5] Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public.[6] It is also generally the case that only parties to a judgment or their privies have standing to invoke a higher court's jurisdiction for review of the judgment.[7]

While there is an exception to the special injury rule for persons objecting to an illegal expenditure of public funds or an illegal increase in the burden of municipal taxation,[8] there does not appear to be any common-law right to seek direct review of an order relating to the exemption of another taxpayer's

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[3] *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

[4] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[5] *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[6] See *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[7] See, *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999); *Peterson v. Martin*, 60 Neb. 577, 83 N.W. 831 (1900).

[8] *Holland v. Brownville Grain Co.*, 174 Neb. 742, 119 N.W.2d 304 (1963). See, also, *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004); *Chambers v. Lautenbaugh, supra* note 5; *Jacob v. State*, 12 Neb. App. 696, 685 N.W.2d 88 (2004).

property.[9] Nor is there any constitutional right to lodge such an appeal.[10] Thus, as is generally the case regarding the right to appeal,[11] the question of whether a taxpayer may seek review of the exempt status of another taxpayer's property depends on whether the Legislature conferred such a right. It is to that analysis that we now turn.

In considering the legislation on this point, and, particularly, in clarifying some confusion that has developed in this area, it is helpful to review the historical evolution of the relevant statutory provisions. Section 77-1510[12] has, since its enactment in 1903, provided a specific mode of direct appeal from any action of a board of equalization.[13] Until the creation of the TERC, such appeal was taken to the district courts. But the initial inquiry concerns whom the statutes permit to appeal.

Section 77-1513,[14] which was repealed in 2002, originally indicated that an appeal under § 77-1510 could be made by "any person . . . appeal[ing] from the assessment of another as fixed by the County Board of Equalization."[15] In *State v. Drexel*,[16] we thus held that because there was "a plain adequate remedy prescribed by the statute" for the taxpayer seeking review of the board of equalization's grant of exempt status to another

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[9] See, *Colella v. Assessors of Cty. of Nassau*, 95 N.Y.2d 401, 741 N.E.2d 113, 718 N.Y.S.2d 268 (2000); *Clayton v. School Bd. of Volusia County*, 696 So. 2d 1215 (Fla. App. 1997); *Scott v. Harris Methodist HEB*, 871 S.W.2d 548 (Tex. App. 1994); *Highland Park Women's Club v. Dep't of Rev.*, 206 Ill. App. 3d 447, 564 N.E.2d 890, 151 Ill. Dec. 435 (1990); *Kaup v. Department of Revenue*, 1996 WL 23500 (Or. Tax Jan. 5, 1996); Annot., 9 A.L.R.4th 428 (1981) (cases cited therein).

[10] See, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *Highland Park Women's Club v. Dep't of Rev., supra* note 9. See, also, Neb. Const. art. I, § 23 (limiting right to appeal to aggrieved "party").

[11] See, e.g., *Karnes v. Wilkinson Mfg.*, 220 Neb. 150, 368 N.W.2d 788 (1985).

[12] See Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2006).

[13] Comp. Stat. § 5045 (1903), later § 77-1510 (1943).

[14] See Neb. Rev. Stat. § 77-1513 (Reissue 1996).

[15] Comp. Stat. § 5054 (1903), later § 77-1513 (1943).

[16] *State v. Drexel*, 75 Neb. 751, 757, 107 N.W. 110, 113 (1906).

taxpayer's property, the taxpayer did not have an action for writ of mandamus to compel the county clerk to place such property on the tax rolls.

[7] In 1963, however, the Legislature passed 1963 Neb. Laws, ch. 441, § 4, p. 1461 (L.B. 386). In *Bemis v. Board of Equalization of Douglas County*,[17] we described L.B. 386 as "a complete and comprehensive act dealing with the [specific] matter of tax exemptions." We further explained that Neb. Rev. Stat. § 77-202.04 (Reissue 1976), enacted in L.B. 386, delineated "who may appeal from the decision of the county board of equalization on a tax exemption determination."[18]

At the time that *Bemis* was decided, § 77-202.04 provided for appeals by "[p]ersons, corporations, or organizations denied exemption from taxation" and it made no provision for who could appeal the grant of an exemption. We held in *Bemis* that the county assessor, because he was not specified in § 77-202.04, had no standing to appeal the grant of an exemption of a taxpayer's property. In so holding, we clarified that the more general provisions of §§ 77-1510 through 77-1513 (Reissue 1976), which described "any person" appealing the "assessment" of another,[19] were no longer applicable to exemptions.

After *Bemis*, § 77-202.04 was amended. At the time the Intercessors' exemptions were upheld by the Board in this case, the statute stated:

> Persons, corporations, or organizations may appeal denial of an application for exemption by a county board of equalization. *Only the county assessor may appeal the grant of such an exemption* by a county board of equalization. Appeals pursuant to this section shall be made to the [TERC]. The Property Tax Administrator may in his or her discretion intervene in any such appeal pursuant to this section.[20]

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[17] *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 177, 247 N.W.2d 447, 449 (1976).

[18] *Id.*

[19] *Id.*

[20] § 77-202.04(1) (Cum. Supp. 2006) (emphasis supplied).

This leads to the second inquiry presented here: to what body such appeals should be taken. As previously noted, until 1995, appeals from the Board were taken to the district court. The TERC was created in 1995 by the Tax Equalization and Review Commission Act (TERC Act). The TERC Act provided that the TERC had "the power and duty to hear and determine appeals of . . . (2) [d]ecisions of any county board of equalization granting or denying tax-exempt status for real or personal property."[21] To the extent that the TERC Act contains any ambiguity as to whether this power and duty is exclusive and no longer lies with the district courts, the legislative history makes this clear. The sponsor of the TERC Act explained that the TERC Act was "*replacing* the district court with a body that does this full-time, is more professional, [and] will give you better values."[22] The bill's statement of intent explains that the TERC would

> hear appeals of individual assessment and property exemption disputes and hear appeals of the Property Tax Administrator on tax issues. This Commission would hear other taxation cases and appeals which currently are now heard by the state's district courts. The creation of an independent commission with taxation expertise will result in streamlined taxation appeals and equalization procedures.[23]

Rather than having valuation decisions lie with the myriad of district courts, a single TERC was intended to produce "fairer,"[24] more "consistent" appeal results.[25] According to the bill's sponsor, "[T]his panel will get to see the entire state as a whole on equalization across the entire state. That's what's so crucial, you won't get 50 different opinions as to what equalization

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[21] Neb. Rev. Stat. § 77-5007 (Cum. Supp. 2004).

[22] Floor Debate, L.B. 490, Revenue Committee, 94th Leg., 1st Sess. 5976 (May 3, 1995) (emphasis supplied).

[23] Introducer's Statement of Intent, L.B. 490, Revenue Committee, 94th Leg., 1st Sess. (Feb. 9, 1995).

[24] Floor Debate, L.B. 490, Revenue Committee, 94th Leg., 1st Sess. 5989 (May 3, 1995).

[25] *Id*. at 5977.

is. . . . And this is going to give better, better opinions."[26] The TERC was also intended to provide a less costly and speedier appellate process.[27]

The most recent amendment to § 77-202.04 reiterates the Legislature's original intent, insofar as it states that "[a]ppeals pursuant to this section *shall* be made to the [TERC]."[28] It is also noteworthy, in considering the intent of the original TERC Act, that due to a recent amendment,[29] the petition in error statute, Neb. Rev. Stat. § 25-1901 (Supp. 2007), now specifically states that "the district court shall not have jurisdiction over . . . (3) appeals within the jurisdiction of the [TERC]." According to its legislative history, § 25-1901 was amended in response to a board of equalization decision that had been appealed to a district court rather than to the TERC. According to the Revenue Committee, the amendment "simply clarifies" what the Legislature had intended ever since the establishment of the TERC: that "district courts do not have jurisdiction over valuation and issues within the purview of the TERC."[30]

With that explained, we consider the parties' arguments concerning the effect of these statutes. Based on the plain language of the statutes, the Intercessors argue that § 77-202.04(1) (Cum. Supp. 2006) limits standing for appeals from grants of exemptions to "[o]nly the county assessor," and that thus, the petitioners lack standing to seek review of the Intercessors' exemptions in this case. The Intercessors further argue that the TERC has exclusive jurisdiction over appeals of decisions of any county board of equalization granting or denying tax-exempt status for real or personal property and that thus, the district court would lack jurisdiction regardless of who was appealing.

But the petitioners argue that the statutory language regarding who may "appeal," and where this "appeal" may be lodged, does not affect a right to file a "petition in error." The petitioners

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[26] *Id*. at 5990.

[27] See *id*. at 5976.

[28] § 77-202.04(1) (Supp. 2007) (emphasis supplied).

[29] See 2007 Neb. Laws, L.B. 167 (effective Feb. 10, 2007).

[30] Committee Hearing, L.B. 167, 100th Leg., 1st Sess. 14 (Jan. 17, 2007).

view a "petition in error" as a very distinct right predating § 77-202.04 and the TERC, and they point out that neither of these statutes explicitly abolishes their "right" to a petition in error.

In support of this argument, petitioners rely on older cases in which this court has distinguished between a "petition in error" and an "appeal," referring to them as "'"independent proceeding[s]"'" that are "'distinctively different and dissimilar.'"[31] These cases, in fact, are generally limited to the narrower distinction between "review on petition in error," as described by §§ 25-1901 through 25-1908,[32] and "review on appeal," as described by §§ 25-1911 through 25-1937.[33] Our purpose in drawing the distinction between these two methods of review has largely been to distinguish the method of perfecting each[34] or to explain each method's peculiar rules of joinder of parties.[35] We do not read these cases as establishing a "right" to a petition in error that is independent of any statutory scheme.

The petitioners argue that a petition in error is significantly different from an "appeal," because a petition in error provides a much more circumscribed scope of review. They argue that it would not be inconsistent for § 77-202.04 and the TERC Act to leave this narrower form of relief intact for those taxpayers who have no means to perfect a broader, direct "appeal" under these provisions. But the petitioners' underlying premise is incorrect. The scope of review under a "petition in error" and under an "appeal" to the TERC under § 77-1510 (Cum. Supp. 2006), like many other "appeals,"[36] is the same. While sometimes worded

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[31] *From v. Sutton*, 156 Neb. 411, 416, 417, 56 N.W.2d 441, 444 (1953).

[32] See Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1995).

[33] See Neb. Rev. Stat. §§ 25-1911 to 25-1937 (Reissue 1995).

[34] See, e.g., *Harms v. County Board of Supervisors*, 173 Neb. 687, 114 N.W.2d 713 (1962); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960); *Consolidated Credit Corporation v. Berger*, 141 Neb. 598, 4 N.W.2d 571 (1942).

[35] See, e.g., *Clausen v. School Dist. No. 33*, 164 Neb. 78, 81 N.W.2d 822 (1957); *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418, 72 N.W. 592 (1897); *Polk v. Covell*, 43 Neb. 884, 62 N.W. 240 (1895).

[36] See, e.g., § 25-1911; Neb. Rev. Stat. § 25-2733 (Reissue 1995).

in slightly different ways, essentially, in both review on petition in error and in so-called "appeals," the reviewing court may reverse, vacate, or modify the lower judicial tribunal for error on the record.[37]

[8] While certain procedural issues sometimes require that we distinguish a petition in error from other statutory provisions for appellate review, even in our earliest cases, we have described the difference between an "appeal" and a "petition in error," as "exist[ing] in name, rather than in fact."[38] Accordingly, it is now common for our courts to refer to an "appeal by petition in error."[39] In *Hooper Telephone Co. v. Nebraska Telephone Co.*,[40] we stated that the word "appeal" is a word of "general application in the law. Ordinarily [it] refer[s] to the removal of proceedings from one court or tribunal to another for review."

[9,10] The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature; all subordinate rules are mere aids in reaching this fundamental determination.[41] Furthermore, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[42] Viewing §§ 77-202.04 and 77-5007 in pari materia

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[37] See §§ 25-1901, 25-1911, and 25-2733. See, also, *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001); *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999); *Clausen v. School Dist. No. 33, supra* note 35.

[38] *State, ex rel. McClosky, v. Doane*, 35 Neb. 707, 709, 53 N.W. 611, 612 (1892). See, also, *Western Cornice & Mfg. Works v. Leavenworth, supra* note 35.

[39] See, *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004); *Hooper v. City of Lincoln*, 183 Neb. 591, 163 N.W.2d 117 (1968); *O'Grady v. Volcheck*, 148 Neb. 431, 27 N.W.2d 689 (1947); *Loup River Public Power District v. County of Platte*, 144 Neb. 600, 14 N.W.2d 210 (1944); *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002); *County of Douglas v. Burts*, 2 Neb. App. 90, 507 N.W.2d 310 (1993).

[40] *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 255, 147 N.W. 674, 678 (1914).

[41] *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

[42] *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

and as a whole, we conclude that the Legislature intended to use the term "appeal" in its general ordinary sense. The 2007 amendment to § 25-1901[43] only emphasizes what was established by § 77-5007 when the TERC Act was passed—that, for decisions by a board of equalization,[44] including "[d]ecisions . . . granting or denying tax-exempt status for real or personal property,"[45] the "removal of [the] proceedings from one court or tribunal to another for review"[46] shall be made to the TERC, and not to any of the district courts of this state.

We do not find any preexisting "right to a petition in error." In fact, as already discussed, under common law, taxpayers do not have standing to seek direct review of the tax-exempt status of someone else's property. Moreover, a "petition in error" is simply a method of review, and it is not, as the petitioners suggest, more akin to a right of action. Because there is no preexisting common-law right to a petition in error under these circumstances, we are not, as the petitioners suggest, subject to the rule strictly construing against the abrogation of such a right.[47]

In any event, that is a rule of statutory construction, and the Legislature's intent here was plain. The Legislature's stated purpose in the TERC Act was to create an efficient mode of review by a single body which would provide a more consistent review of tax exemption and equalization decisions made by a board of equalization. The language of § 77-202.04 very specifically lists who may appeal from exemption decisions. The Legislature did not see fit to allow every indirectly affected taxpayer to appeal from the exemption status of someone else's property. Instead, the Legislature determined that giving standing to the county assessor to appeal the grant of an exemption was sufficient

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[43] See § 25-1901 (Supp. 2007).

[44] See, generally, § 77-5007.

[45] § 77-5007(2).

[46] *Hooper Telephone Co. v. Nebraska Telephone Co., supra* note 40, 96 Neb. at 255, 147 N.W. at 678.

[47] See, e.g., *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007).

to protect the public's general interest in what properties are included on the tax rolls.

*Ross v. The Governors of Knights of Ak-Sar-Ben*,[48] upon which the petitioners rely to support their right to file a petition in error, has been abrogated by the legislation creating the TERC. Furthermore, we find no support for the notion, expressed in dicta in *Ross*, that a taxpayer had a preexisting right to seek review by petition in error of the exemption of another's property, or that the term "appeal" found in § 77-202.04 was not used in its most common sense. *Ross* is unpersuasive in light of subsequent statutory enactments, and to the extent that it conflicts with this opinion, it is disapproved.

## CONCLUSION

We conclude that the district court lacked jurisdiction over the petition in error that is the subject of this appeal. 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.[49] However, when an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction.[50] We therefore vacate the order of the district court and dismiss the appeal.

VACATED AND DISMISSED.

WRIGHT, J., not participating.

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[48] *Ross v. The Governors of Knights of Ak-Sar-Ben*, 199 Neb. 513, 260 N.W.2d 202 (1977).

[49] *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

[50] See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

# The Goodyear Tire & Rubber Company, appellant, v. State of Nebraska et al., appellees.

748 N.W.2d 42

Filed May 2, 2008. No. S-06-1103.

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. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Statutes: Appeal and Error.** 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.
5. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
6. **Taxation: Proof.** The party claiming an exemption from taxation must establish entitlement to the exemption.
7. **Words and Phrases.** The word "or," when used properly, is disjunctive.

Appeal from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Affirmed.

John M. Boehm, of Butler, Galter, O'Brien & Boehm, and Quentin (Doug) Sigel, of Scott, Douglass & McConnico, L.L.P., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

## NATURE OF CASE

The Goodyear Tire & Rubber Company (Goodyear) appeals from the district court's order affirming the decision by the

Nebraska State Tax Commissioner (the Commissioner) to deny a portion of Goodyear's claim for a tax refund under the Employment and Investment Growth Act,[1] commonly referred to as "L.B. 775."[2] Goodyear sought a refund for components used to repair or replace parts of equipment utilized in the project covered by the L.B. 775 agreement entered into between Goodyear and the Nebraska Department of Revenue (the Department). The Commissioner's order states that the "parties have stipulated that the sole issue to be decided is 'whether the transactions listed on exhibits 9 and 10 are for the purchase of qualified property pursuant to *Neb. Rev. Stat.* §77-4105(3)(a)(i)(Reissue 2003).'" Pursuant to the stipulation, both the Commissioner and the district court reviewed this sole issue. The district court, in its de novo review, concurred with the Commissioner's interpretation of the term "qualified property." The court found that the "parts used to repair equipment after such equipment was placed in service at the project are not 'qualified property' as defined in Section 77-4103(13)." The district court also determined that the Commissioner was not required to adopt and promulgate rules or regulations with regard to the Commissioner's interpretation of L.B. 775.

## BACKGROUND

The facts of this case are not in dispute. The only dispute is the interpretation to be placed on the term "qualified property." On December 1, 1995, Goodyear submitted an application to the Department seeking incentives under L.B. 775 for its manufacturing plants in Nebraska. The application was approved by the Commissioner who, on behalf of the State of Nebraska, entered into an "Employment and Investment Growth Act Project Agreement" with Goodyear. This agreement provided that if Goodyear met required levels of investment by the time specified, Goodyear would be entitled to various incentives.

In September 2000, Goodyear and the Commissioner, on behalf of the State, entered into an amended "Employment and Investment Growth Act Project Amended Agreement" (the

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[1] Neb. Rev. Stat. §§ 77-4101 to 77-4113 (Reissue 2003).

[2] See 1987 Neb. Laws, L.B. 775 (effective May 28, 1987).

Amended Agreement), which replaced the earlier agreement. The Amended Agreement also provided that if Goodyear met the required levels of investment, Goodyear would be entitled to various incentives. Among those incentives was a refund of the following:

> (i) The sales or use tax paid by Goodyear on tangible property used as a part of the project and "placed in service" on and after December 1, 1995. For purposes of this Amended Agreement, "placed in service" means the day the qualified property is eligible for depreciation, amortization, or other recovery under the Internal Revenue Code of the United States. . . .
>
> (ii) The sales or use tax paid by Goodyear on any property, other than motor vehicles, based in this state and used in this and other states in connection with the project.

On August 25, 2005, Goodyear filed with the Department a claim for refund, pursuant to L.B. 775 for sales or use taxes paid in July 2002, in the amount of $44,601.34. On September 26, 2005, Goodyear filed a claim for refund, pursuant to L.B. 775 for sales and use taxes paid in August 2002, in the amount of $41,722.99. These claims were consolidated for purposes of an administrative hearing. The items listed in the claims are indexed by area of use and are characterized by Goodyear as "components." Prior to the administrative hearing, the parties stipulated that the "components" are repair or replacement parts used to repair or replace parts of property, otherwise referred to as "equipment," used in the project covered by the Amended Agreement. Paragraph 19 of the stipulation states:

> The transactions referenced on Exhibit[s] 9 and 10 that are identified by "component" or "components" on the "reason" field are the purchase of items of tangible property. These components are repair or replacement parts used to repair or replace parts of property used in the project that [Goodyear] depreciated [hereafter Equipment]. The items, and how and where they were used, are more specifically described on Exhibit 10. The above referenced items of Equipment were placed in service before and after the date of application, December 1, 1995. The parties further stipulate that all of the Equipment was placed in service

> before the above referenced components were added to the Equipment. The parties do not stipulate or identify which components were to repair or replace parts of Equipment placed in service before or after the date of application.

On February 14, 2006, the Commissioner entered an order denying Goodyear's claim with regard to items characterized by Goodyear as "components" because they are not "qualified property" under L.B. 775. The Commissioner stated that under § 77-4103(13),

> [r]efunds of tax are allowed only for "components" of tangible personal property of a type subject to depreciation that **will be** located and used at the project. Clearly, the words "will be" demonstrate that not only must the equipment upon which the component will be placed needs to be depreciable, but it also must be newly located and used at the project. Therefore, whether a "component" is "qualified" depends on the status of the equipment that is being modified or repaired. Here, the parties have stipulated that all of the various equipment for which the repair parts were purchased was placed in service both prior to and subsequent to Goodyear's application for a LB 775 agreement in December of 1995.

(Emphasis in original.)

The Commissioner noted that Goodyear's interpretation of § 77-4103(13) "would require that the newly purchased items be used at the project and used to replace or modify equipment that is subject to depreciation, regardless of when that equipment was originally acquired." The Commissioner concluded that Goodyear's reasoning defeats the stated purpose of L.B. 775, which is to encourage new investment and employment in Nebraska.

The Commissioner also addressed a contention by Goodyear that because the Department does not have any rules or regulations regarding the construction of § 77-4103(13), the Department should be prohibited from applying that statute in this case. The Commissioner stated that § 77-4111 gives the Commissioner discretion to decide if the adoption and promulgation of rules and regulations for carrying out the purposes of L.B. 775 is necessary. The Commissioner concluded that the lack of a specific

regulation interpreting § 77-4103(13) did not deprive Goodyear of a meaningful opportunity to participate in the hearing on its claim.

In accordance with the Administrative Procedure Act (APA), Goodyear appealed to the district court the Commissioner's denial of Goodyear's refund request for repair and replacement parts characterized by Goodyear as "components." Goodyear alleged that the cumulative amount the Commissioner erred in failing to refund is $14,310.10. On appeal, Goodyear asserted that the Commissioner's reasoning that the equipment upon which the components are placed must be newly located and used at the project site misreads and is in conflict with the language of § 77-4103(13). Goodyear further asserted that the Commissioner's failure to adopt and promulgate rules or regulations adopting the Commissioner's interpretation of L.B. 775 in the Commissioner's order bars the Department from applying it to Goodyear and deprives Goodyear of a meaningful opportunity to participate in a hearing on Goodyear's claim. The matter was submitted to the district court on stipulated facts.

The district court affirmed the Commissioner's decision, concluding that parts used to repair equipment after such equipment was placed in service at the project are not "qualified property" as it is defined in § 77-4103(13). The court further concluded that the Commissioner's failure to promulgate rules and regulations defining "qualified property" does not prohibit the construction adopted by the Commissioner. Goodyear now appeals.

## ASSIGNMENTS OF ERROR

Goodyear asserts, restated, that the district court erred in (1) concluding that components used to repair or replace parts of property used in a project covered by an L.B. 775 agreement are not qualified property, (2) ruling that Goodyear's interpretation of L.B. 775 is inconsistent with the purpose and intent of L.B. 775, and (3) concluding that the Commissioner's decision should not be set aside because of the Department's failure to adopt and promulgate rules regarding the Department's interpretation.

## STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated,

or modified by an appellate court for errors appearing on the record.[3] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

[3] The meaning of a statute 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.[5]

## ANALYSIS

### Qualified Property

In their first two assignments of error, Goodyear argues that the district court erred in affirming the Commissioner's finding that the repair and replacement parts for which Goodyear seeks a refund are not qualified property. Goodyear argues that the definition of qualified property has been misconstrued by the Commissioner and the district court. Goodyear argues that the Commissioner and the district court wrongly interpreted qualified property as including components only where the components are placed on equipment newly located at the project covered under the L.B. 775 agreement.

[4-6] 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.[6] With regard to tax exemption provisions, we have stated that tax exemption provisions are strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.[7] Because statutes conferring an exemption from taxation are

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[3] *Farmland Foods v. State*, 273 Neb. 262, 729 N.W.2d 73 (2007).

[4] *Id.*

[5] *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007).

[6] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[7] *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

strictly construed, the party claiming an exemption from taxation must establish entitlement to the exemption.[8]

Section 77-4105(3)(i) provides that when the required level of investment is reached under the L.B. 775 agreement, the taxpayer is entitled to a refund of all sales and use taxes paid for qualified property used as part of the project. Qualified property is defined under § 77-4103(13) as "any tangible property of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986, or the components of such property, that will be located and used at the project."

[7] We have stated that the word "or," when used properly, is disjunctive.[9] Qualified property, therefore, includes two types of property: (1) any tangible property subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986 or (2) components of such property. The question left for us to decide is what the phrase "of such property" entails.

The last portion of the first sentence of § 77-4103(13) states that tangible property is property that "will be located and used at the project." As we read the statute, this phrase limits the property that is qualified under the statute. Thus, tangible property that is subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986 is not qualified unless it will be used and located at the project. Because "of such property" refers to tangible property that is otherwise covered under the statute, components are not qualified unless the components are part of tangible property that will be used and located at the project.

The term "component" encompasses a wide variety of tangible property used in business and industry, from a light bulb to a diesel engine. Following the principle that tax exemptions are to be strictly construed, we read § 77-4103(13) to require that a component itself be "of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code" in order to constitute "qualified property." This is consistent with the Employment and Investment Growth Act's stated

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[8] See *id.*

[9] *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

policy of encouraging new business investment in Nebraska.[10] The record does not reflect that any of the repair and replacement "components" for which Goodyear claims sales and use tax refunds were themselves depreciable or subject to amortization or other recovery. Most appear to be items which would normally be treated as expenses. For this reason, we conclude that the refund claim was properly denied. We express no opinion as to whether a depreciable component incorporated into tangible property which preexisted an L.B. 775 project but is located and used at such project would constitute "qualified property" within the meaning of § 77-4103(13), as that issue is not presented in the facts of this case.

### Failure to Adopt and Promulgate Rules Regarding the Department's Interpretation

In its final assignment of error, Goodyear argues that the district court erred when it concluded that the Commissioner's decision should not be set aside because of the Department's failure to adopt and promulgate rules regarding the Department's interpretation of "qualified property." Section 77-4111 provides that the Commissioner "shall adopt and promulgate all rules and regulations necessary to carry out the purposes of the Employment and Investment Growth Act."

In *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*,[11] we addressed the question of whether the Department was required to promulgate rules and regulations under Neb. Rev. Stat. § 79-3809 (Reissue 1994). We concluded that the Department was required to do so. That statute, which has since been amended and recodified, provided in relevant part: "'Establishment of the adjusted valuation shall be based on assessment practices established by rule and regulation adopted and promulgated by the Department of Revenue.'"[12] We noted in that case that "shall," as a general rule, is considered mandatory and inconsistent with the idea of discretion. Thus, under the plain language of that

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[10] See § 77-4102(2).

[11] *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997).

[12] *Id.* at 392, 562 N.W.2d at 555.

statute, the Department was required to adopt and promulgate rules and regulations to regulate the valuation process. Because the Department had not adopted and promulgated rules and regulations governing the valuation process, we concluded that the adjusted valuations of the Department were not in conformity with the law.

In the present case, § 77-4111 requires the Commissioner to adopt and promulgate those rules and regulations, but only those rules that are necessary for carrying out the purposes of L.B. 775. The purpose of L.B. 775 is to "accomplish economic revitalization of Nebraska" and to "encourage new businesses to relocate to Nebraska, retain existing businesses and aid in their expansion, promote the creation and retention of new jobs in Nebraska, and attract and retain investment capital in the State of Nebraska."[13] We conclude that promulgating rules and regulations regarding interpretation of qualified property is not necessary for carrying out those purposes. We, therefore, determine that this assignment of error is without merit.

## CONCLUSION

For the reasons discussed above, we affirm the decision of the district court.

AFFIRMED.

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[13] § 77-4102.

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## CHRISTINE M. MONEY, APPELLEE, V. TYRRELL FLOWERS AND CONTINENTAL WESTERN GROUP, APPELLANTS.

748 N.W.2d 49

Filed May 2, 2008. No. S-07-681.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. In workers' compensation cases, an appellate court is obligated to make its own determinations regarding questions of law.
4. **Workers' Compensation.** A trial judge should base the compensation an employer pays on the worker's loss of earning power.
5. ____. The first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing.
6. ____. If a claimant relocates to a new community in good faith, the new community will serve as the hub community from which to assess the claimant's loss of earning power.
7. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for that litigation, all matters ruled upon, either expressly or by necessary implication.
8. **Actions: Res Judicata: Collateral Estoppel.** Unlike the doctrines of res judicata and collateral estoppel, which involve successive suits, the law-of-the-case doctrine involves successive stages of one continuing lawsuit.
9. **Actions: Appeal and Error.** On appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power.
10. **Appeal and Error.** Generally, absent extraordinary circumstances, a court should be reluctant to revisit its own prior decision or that of another court in a single case.
11. ____. The law-of-the-case doctrine does not apply in a later appeal of the same action if a higher court has since issued a contrary decision.
12. **Workers' Compensation.** After a trial judge determines a claimant's hub community, the trial judge may also consider whether surrounding communities are part of the relevant labor market.
13. ____. Whether a claimant should reasonably seek work in an area outside the hub community is a determination based on the totality of circumstances.
14. ____. In determining whether a surrounding community should be included in the relevant labor market, a trial judge should consider the following factors: (1) availability of transportation, (2) duration of the commute, (3) length of workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, (5) economic feasibility of a person in the claimant's position working in that location, and (6) whether others who live in the claimant's hub community regularly seek employment in the prospective area.
15. **Workers' Compensation: Expert Witnesses: Presumptions.** The opinions of a court-appointed vocational rehabilitation expert regarding vocational rehabilitation and loss of earning power have a rebuttable presumption of validity.
16. **Workers' Compensation: Expert Witnesses: Proof.** If an employer believes a vocational rehabilitation expert has incorrectly selected the relevant geographic areas, the employer has the burden to rebut the expert's opinion.

17. **Workers' Compensation.** Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.
18. **Workers' Compensation: Proof.** To recover workers' compensation benefits, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arose out of or occurred in the course of the employment and that the accident or occupational disease proximately caused an injury which resulted in compensable disability.
19. ____: ____. To recover workers' compensation benefits, an injured worker must prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
20. **Workers' Compensation: Expert Witnesses.** In assessing a claimant's disability, physical restrictions and impairment ratings are important, but once the claimant establishes the cause of disability, the trial judge is not limited to this evidence and may also rely on the claimant's testimony to determine the extent of the disability.
21. **Workers' Compensation: Words and Phrases.** Disability, in contrast to impairment, is an economic inquiry. It can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet because of the impairment.
22. ____: ____. Total disability does not mean a state of absolute helplessness. It means that because of an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for work for any other kind of work which a person of his or her mentality and attainments could do.
23. **Workers' Compensation.** Whether a plaintiff is totally and permanently disabled is a question of fact.
24. **Judgments: Appeal and Error.** When testing the trial judge's findings of fact, an appellate court considers the evidence in the light most favorable to the successful party and gives the successful party the benefit of every inference reasonably deducible from the evidence.
25. **Trial: Witnesses.** As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.

Appeal from the Workers' Compensation Court. Affirmed.

Dallas D. Jones and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

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

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

CONNOLLY, J.

The appellee, Christine M. Money, suffered an injury while working for Tyrrell Flowers in Lincoln, Nebraska. Afterward, she moved 75 miles away to Table Rock, Nebraska. This appeal presents two issues. First, in determining Money's loss of earning power, did the trial judge err by excluding Lincoln and finding that the relevant labor market was the Table Rock community? Second, did the trial judge err in finding that Money was totally and permanently disabled as an odd-lot worker? We conclude that the trial judge correctly decided both issues.

## I. EMPLOYER'S CONTENTIONS

Tyrrell Flowers and Continental Western Group (collectively Tyrrell) contend a court must consider two labor markets when a worker voluntarily moves from a large labor market to a small labor market *after* sustaining a compensable injury. That is, it contends the court must assess a worker's loss of earning power in relation to both the labor market where the worker was injured and the labor market to which the worker moved in good faith. Otherwise, Tyrrell argues that the worker will be able to manipulate his or her loss of earning power by moving to an area with fewer job opportunities. It further argues that the review panel erred in affirming the trial judge's finding in a subsequent proceeding that Money was an odd-lot worker in both the Lincoln and the Table Rock labor markets. It argues that Money failed to present any evidence of her ability to obtain employment in the Lincoln labor market.

## II. BACKGROUND

### 1. MONEY'S INJURIES AND PAIN AFTER SURGERY

Tyrrell Flowers employed Money to work in the greenhouse and make deliveries for $8 an hour. In May 2000, she tripped on a small ledge and fell. She suffered injuries to her left chest wall, left shoulder, and neck. After the accident, Money developed headaches and primarily left-sided neck, shoulder, and arm pain. Testing later showed she had a herniated disk in her neck at the C5-6 level. In June 2001, after conservative treatment failed, a neurosurgeon recommended spinal surgery. He explained, however, that surgery could produce less than complete relief

and that spinal fusion was "not so great for primary neck pain." Her surgery was postponed while Money attempted to quit smoking.

Sometime later in 2001, Money and her husband moved from Lincoln to Table Rock to live in a friend's house while the friend was absent. For the use of the house, they were obligated to take care of the property and pay the taxes and utilities. Table Rock is about 75 miles southeast of Lincoln. Money was living in Table Rock in April 2002, when she underwent surgery for a cervical diskectomy and fusion at the C5-6 level.

After the surgery, Money initially improved, but her headaches and her neck and shoulder pain returned. After more testing, the neurosurgeon concluded that she did not need further surgery and referred her to a pain clinic. The record shows she had trigger-point injections and epidural steroid injections, which provided some relief.

When Money reached her maximum medical improvement in January 2003, Dr. David S. Diamant evaluated her permanent functional impairment. Because Money continued to have significant complaints of pain and functional impairment despite conservative treatments and surgical intervention, Diamant concluded she had a 28-percent whole-body impairment rating. A physical therapist determined Money could perform work with a light-medium physical demand classification. But he concluded that the test was invalid because he believed that Money's efforts had failed several validity factors. Money, however, testified that she was unable to complete the physical tests in 1 day because of pain. After reviewing these test results, Diamant concluded that Money could at least work at the light-duty physical demand level.

In June 2003, a vocational rehabilitation counselor, Patricia G. Conway, prepared a loss of earning capacity analysis. Conway concluded that Money could not perform her preinjury jobs of nursing assistant or plant-care worker. She concluded, however, that Money qualified for unskilled and low-level skilled work activity and could return to full-time employment earning wages between $6.50 and $8.50 per hour. She determined that Money had a 25-percent loss of earning capacity under the light-medium physical demand restriction and a

32-percent loss of earning capacity under the light physical demand restriction.

Conway also prepared Money's vocational rehabilitation plan. For a time, Money lived in Missouri with a friend after her husband was incarcerated and the owner of the rent-free house died. But she returned to the area and lived with another friend to participate in her rehabilitation plan. The plan consisted solely of job placement activities within 15 to 40 miles of Money's residence. The plan's goal was employment paying $7.50 to $8.50 per hour. The plan began on August 21, 2003, and ended on November 17.

Conway provided Money with a resume, cover letters, and job leads. Conway stated in a report that the geographic area had a reasonable offering of low-skilled to semiskilled positions that fit Money's physical restrictions. Money's job search got off to a slow start after she strained her neck while trying to avoid a vehicular accident. Afterward, she reported to Conway that it caused her considerable pain to drive any distance. But by October 2003, Conway reported that Money had been diligent and aggressive about participating in her job search. In 2004, Money returned to Table Rock to live with her husband in a house his parents purchased for them; his parents also helped with utilities.

Money continued to have pain. Yet, another physician did not find any abnormalities in her neck that surgical intervention could help. He concluded that Money's residual pain originated in her soft tissues: muscles, tendons, and ligaments. In July 2004, a sewing factory hired Money to sew lawnmower bags, but it soon terminated her employment for absences related to her neck pain.

In March 2005, after reevaluating her, Diamant wrote that it was difficult to say whether Money could do light-duty work. Money still complained of constant low-level, and at times severe, pain and headaches. She had also reported intolerance to sitting more than 90 minutes. Yet, Diamant believed she could at least work in a sedentary-light physical demand capacity if she were to pursue such employment. The same month, her regular physician reported treating Money every 2 to 3 months during the preceding year for myofascial syndrome, or

pain originating in the muscles. He stated that Money would likely need to rely on trigger-point injections in the future.

At trial in April 2005, Money testified that since her maximum medical improvement date, she had continued to have muscle spasms in her neck and shoulders, causing her pain and headaches. She stated that doing simple chores around the house could cause her pain but that if her activities were very limited, she might have only 4 to 5 bad days in a 2-month period. At times, she experiences blurred vision, nausea, trouble walking, and elevated blood pressure.

### 2. Trial Judge's Findings in First Order

In its order, the trial judge stated that it was Tyrrell's position Money should be required to move back to Lincoln because she would have greater job opportunities. The judge found, however, that Money had not moved to Table Rock in bad faith or to reduce her employment opportunities. He concluded that her move for low-cost housing was, and continued to be, motivated by economic necessity. The judge further found that requiring Money to drive to Lincoln for a job that paid $6 to $8 per hour was not economically feasible. Accordingly, he concluded that the relevant labor market was in and around Table Rock.

Regarding Money's impairment, the trial judge found that the evidence showed Money had made a reasonable and good faith effort to find employment but had failed. He concluded that this evidence rebutted Conway's opinion regarding Money's loss of earning capacity. He further concluded that Money was "totally disabled and entitled to permanent total loss of earning power" because employers would not hire her.

### 3. Review Panel Reverses and Remands for Consideration of Both Labor Markets

Tyrrell appealed. The three-judge review panel agreed with Tyrrell that the trial judge erred in limiting Money's labor market to Table Rock even if she moved there in good faith. It reasoned that limiting the labor market to a claimant's new community would open the door to unscrupulous behavior. It remanded with instructions for the trial judge to reassess Money's permanent loss of earning power. It stated the trial judge should consider

any evidence regarding plaintiff's labor market both where she was injured and the locale to which she relocated afterward.

On remand, the trial judge stated that its "reassessment of [Money's] loss of earning power includes the labor market in and around Table Rock, Nebraska, and the labor market at the time of her injury." He again found Money totally disabled under the odd-lot doctrine in both labor markets. He found that Money had a formal education through the eighth grade and had lost factory jobs because she was not "quick enough." He noted that she had lost a waitress job because she could not remember lists or operate a cash register without mistakes. He further noted that she could not keep a checking account because the math was too difficult for her. The judge explicitly stated that because of her significant physical impairments, coupled with her intellectual deficiencies, she would be hired only by very sympathetic employers. Tyrrell again appealed.

#### 4. Review Panel Affirms in Tyrrell's Second Appeal

In Tyrrell's second appeal, the review panel rejected Tyrrell's argument that the record lacked evidence of Money's loss of earning capacity in the Lincoln labor market. It focused on Money's testimony about her prior employment in Lincoln and her inability to perform those jobs after her injury. It further concluded the trial judge was not clearly wrong in determining Money had physical and cognitive impairments that prevented her from returning to gainful employment except with a sympathetic employer.

## III. ASSIGNMENTS OF ERROR

Tyrrell assigns 14 errors, which are restated and condensed. Tyrrell assigns that the trial judge erred in finding that Money is entitled to permanent and total loss of earning power as an odd-lot worker who would only be hired by very sympathetic employers. It assigns that the review panel erred in affirming this finding. It also assigns that the trial judge erred in failing to require her to undergo additional vocational rehabilitation before finding her to be permanently and totally disabled.

Regarding the relevant labor market, Tyrrell assigns that the trial judge erred in (1) failing to include Lincoln in the relevant

labor market when assessing Money's loss of earning power, (2) concluding that Money had proved her loss of earning power when she did not present evidence of the Lincoln labor market and the record lacked such evidence, (3) ignoring the law of the case by finding that Money was an odd-lot worker in its second order when it did not make this explicit finding in its first order, (4) finding that Money was an odd-lot worker in its second order when this finding was inconsistent with other findings in the first order, and (5) failing to provide a reasoned decision under Workers' Comp. Ct. R. of Proc. 11 (2006). Finally, Tyrrell assigns that the review panel erred in ignoring the trial judge's errors in its second order.

## IV. STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), we may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2,3] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[2] In workers' compensation cases, we are obligated to make our own determinations regarding questions of law.[3]

## V. ANALYSIS

### 1. Correct Labor Market

Tyrrell contends that the review panel erred in affirming the trial judge's finding that Money was an odd-lot worker in both the Lincoln and the Table Rock labor markets. It argues that Money failed to prove loss of earning power, also referred to

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[1] *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

[2] See *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[3] See *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

as earning capacity,[4] because she failed to present any evidence of her ability to procure employment in the Lincoln labor market. What a court may consider in assessing disability involves statutory construction and thus is a question of law.[5]

[4,5] A trial judge should base the compensation an employer pays on the worker's loss of earning power.[6] One of the factors used to assess earning power is the worker's general ability to procure employment.[7] In our recent decision in *Giboo v. Certified Transmission Rebuilders*,[8] we stated that this factor depends partly upon the number and type of jobs available in a given market. So the factor could change if the worker moves from a metropolitan labor market to a rural community with fewer available jobs.[9] Also, we concluded that a labor market encompasses employment opportunities within a reasonable geographic radius around a "hub" community. Thus, in *Giboo*, we concluded that the first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing.[10]

Like Tyrrell, the employer in *Giboo* argued that the labor market must include both the community where the injury occurred and the community to which the claimant moved. It argued that unless the labor market includes both communities, claimants could manipulate their earning power loss by moving to an area with fewer available jobs. We rejected that argument. We

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[4] See, *Giboo v. Certified Transmission Rebuilders, ante* p. 369, 746 N.W.2d 362 (2008); *Olivotto, supra* note 2.

[5] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999).

[6] See, Neb. Rev. Stat. § 48-121 (Reissue 2004); *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

[7] See *Davis, supra* note 6.

[8] *Giboo, supra* note 4.

[9] See *id.*

[10] See *id.*, citing *Kelly Services v. Industrial Comm'n*, 210 Ariz. 16, 106 P.3d 1031 (Ariz. App. 2005), and *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994).

reasoned that requiring claimants to show that they had moved for legitimate reasons would screen out such claimants.

[6] We also recognized in *Giboo* that some courts additionally require claimants to show that they relocated because of economic necessity. But we declined to impose this burden. We believed it could potentially force claimants to choose between their statutory right to receive compensation and a legitimate desire to move for reasons that were not strictly economic. Thus, we held: If a claimant relocates to a new community in good faith, the new community will serve as the hub community from which to assess the claimant's loss of earning power.[11]

Our holding in *Giboo* conflicts with the review panel's determination that a court must assess loss of earning power based on both labor markets. We conclude that Money did not have to show her loss of earning power in both the Lincoln and the Table Rock communities.

Tyrrell, however, contends that when the review panel issued its decision in Money's first appeal, neither this court nor the Court of Appeals, in a relocation case, had addressed the appropriate labor market. Because Money did not appeal that decision, Tyrrell argues the review panel's first decision—that a trial judge must consider both labor markets—became the law of the case. It further argues that in the subsequent proceedings, neither the trial judge nor the review panel correctly assessed Money's loss of earning power based on both labor markets. We do not reach that issue because we conclude that the law-of-the-case doctrine does not apply in this circumstance.

### 2. Law-of-the-Case Doctrine

[7] Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for that litigation, all matters ruled upon, either expressly or by necessary implication.[12]

[8] Unlike the doctrines of res judicata and collateral estoppel, which involve successive suits, the law-of-the-case doctrine

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[11] See *Giboo, supra* note 4.

[12] See *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004).

involves successive stages of one continuing lawsuit.[13] The doctrine promotes judicial efficiency and protects parties' settled expectations by preventing parties from relitigating settled issues within a single action.[14] We have stated that "'[a]n issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage.'"[15] At the appellate level, however, the law-of-the-case doctrine "'is not applied with the same rigor as res judicata or collateral estoppel.'"[16]

[9] The doctrine applies with greater force when an appellate court remands a case to an inferior tribunal. In such a case, "'[t]he lower court is "without power" to take action inconsistent with the judgment of the appellate court.'"[17] But on appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power.[18]

[10] Generally, absent extraordinary circumstances, a court should be reluctant to revisit its own prior decision or that of another court in a single case.[19] So, in successive appeals of the same action, we have usually refused to reconsider substantially similar, if not identical, issues that we decided in a former appeal.[20] We have also declined to reconsider issues decided in a

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[13] See *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

[14] See, e.g., *Maxfield v. Cintas Corp., No. 2*, 487 F.3d 1132 (8th Cir. 2007).

[15] *In re Application of City of Lincoln, supra* note 13, 243 Neb. at 467, 500 N.W.2d at 190, quoting Milton D. Green, Basic Civil Procedure (2d ed. 1979). See, also, *United States v. U. S. Smelting Co.*, 339 U.S. 186, 70 S. Ct. 537, 94 L. Ed. 750 (1950), citing *Messenger v. Anderson*, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152 (1912) (Holmes, J.).

[16] *In re Application of City of Lincoln, supra* note 13, 243 Neb. at 468, 500 N.W.2d at 190, quoting Green, *supra* note 15.

[17] *State v. White*, 257 Neb. 943, 947, 601 N.W.2d 731, 734 (1999), quoting *People v. Russell*, 149 Mich. App. 110, 385 N.W.2d 613 (1985).

[18] See, *Arizona v. California*, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *Messenger, supra* note 15.

[19] See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).

[20] See, e.g., *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998).

former appeal to the Court of Appeals in the same action.[21] We recognize that the review panel of the Workers' Compensation Court sits as an appellate court when reviewing a trial judge's award.[22] But we conclude that this case presents an extraordinary circumstance—our intervening decision in *Giboo*.

We have recognized two extraordinary circumstances when the doctrine will not apply. The doctrine does not apply "'if considerations of substantial justice suggest a reexamination of the issue is warranted.'"[23] Also, the doctrine does not apply in subsequent proceedings when the petitioner presents materially and substantially different facts.[24] We have not previously recognized a third extraordinary circumstance. Other courts, however, have held that the doctrine does not apply to an appellate court in a second appeal of the same action when "controlling authority has [issued] a contrary decision of the law applicable to such issues" from the time the first appellate decision was issued.[25] We agree that the most obvious justification for departing from the doctrine is an intervening change in the law.[26]

[11] Accordingly, we now hold that the law-of-the-case doctrine does not apply in a later appeal of the same action if a higher court has since issued a contrary decision. The doctrine yields to this court's duty to oversee the development of consistent case law. This case presents such a circumstance. We conclude that our holding in *Giboo* is the controlling authority to determine the relevant labor market for assessing Money's

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[21] See, e.g., *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004).

[22] *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994), citing Neb. Rev. Stat. § 48-179 (Reissue 1993).

[23] *In re Application of City of Lincoln, supra* note 13, 243 Neb. at 468, 500 N.W.2d at 190, quoting Green, *supra* note 15.

[24] See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). See, also, *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960).

[25] *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967). Accord 18B Charles Alan Wright et al., Federal Practice and Procedure § 4478 (2d ed. 2002).

[26] See 18B Wright et al., *supra* note 25.

loss of earning power. Thus, we disapprove the review panel's first decision.

Our disapproval of the first decision, however, does not affect the final judgment. Following remand, the trial judge found that Money was totally disabled in both the Lincoln and the Table Rock labor markets. This finding, however, resulted in the same award of benefits that Money would have received if the review panel had correctly affirmed the trial judge's first order. The rules set forth in *Giboo* are the rules that the trial judge applied in the first proceeding. He correctly determined that the area around Table Rock was the relevant labor market and that Lincoln should not be included in the labor market to assess Money's loss of earning power.

### 3. Application of *Giboo* Supports Trial Judge's Conclusion That Area Around Table Rock Is the Relevant Labor Market

#### (a) Table Rock Is the Proper Hub Community

Under *Giboo*, the review panel incorrectly decided the relevant labor market. Thus, it did not address the trial judge's factual finding that Money had moved to Table Rock in good faith. Nonetheless, the record supports the trial judge's finding that Money's move for low-cost housing was, and continued to be, motivated by economic necessity.

After her injury, Money and her husband moved to Table Rock to live rent free in a friend's house. She also testified that her husband had not worked since sometime in 2004 because of neck surgery. Finally, they currently live in Table Rock in a house purchased by her husband's parents. We conclude that the trial judge was not clearly wrong in finding that Money had a good faith, economic motive for her move to Table Rock. Accordingly, Table Rock served as Money's hub community.

#### (b) Trial Judge Properly Excluded Lincoln as an Additional Area to Include in the Relevant Labor Market

[12-14] In *Giboo*, we also held that after the trial judge determines the claimant's hub community, the trial judge may also consider whether surrounding communities are part of the relevant labor market. And whether a claimant should reasonably

seek work in an area outside the hub community is a determination based on the totality of circumstances. We set out a nonexclusive list of factors that a trial judge should take into consideration: (1) availability of transportation, (2) duration of the commute, (3) length of workday the claimant is capable of working, (4) ability of the person to make the commute based on his or her physical condition, (5) economic feasibility of a person in the claimant's position working in that location, and (6) whether others who live in the claimant's hub community regularly seek employment in the prospective area.[27]

[15,16] We further stated that court-appointed vocational rehabilitation experts should apply the same factors to guide them in selecting the relevant geographic areas. The opinions of a court-appointed vocational rehabilitation expert regarding vocational rehabilitation and loss of earning power have a rebuttable presumption of validity.[28] So, if an employer believes a vocational rehabilitation expert has incorrectly selected the relevant geographic areas, the employer has the burden to rebut the expert's opinion. The employer could then show there are employment opportunities reasonably available to the claimant in the prospective area.[29]

In a report to Tyrrell, Conway stated that a reasonable offering of jobs existed within a 15- to 40-mile range of Money's residence. None of Conway's job leads included Lincoln. Tyrrell did not contest Conway's rehabilitation plan or request that Conway include job leads for Lincoln. And the trial judge specifically rejected Lincoln as an area where Money should reasonably seek employment. The trial judge found that Money could not afford to commute 75 miles to Lincoln for a job that would pay $8 per hour when it considered the costs of fuel, insurance, and maintenance for a vehicle. The trial judge could have considered other factors—notably, whether Money

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[27] See *Giboo, supra* note 4.

[28] Neb. Rev. Stat. § 48-162.01 (Supp. 1999); *Giboo, supra* note 4.

[29] *Giboo, supra* note 4.

physically could commute 150 miles daily.[30] On appeal, however, Tyrrell does not challenge the trial judge's cost analysis or argue that it was reasonable for Money to seek employment in Lincoln. Its position is that commuting costs are irrelevant because the trial judge should have, as a matter of law, included Lincoln in the relevant labor market. We have rejected this argument. Tyrrell has not challenged Conway's geographic area or the trial judge's factual findings. Thus, we conclude that the trial judge was not clearly wrong in finding that it was unreasonable for Money to seek employment in Lincoln.

### 4. Trial Judge Correctly Concluded That Money Was Entitled to Permanent Total Disability as an Odd-Lot Worker

[17] Under the odd-lot doctrine,

> "[t]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."[31]

In its first order, the trial judge found that Money had made reasonable and good faith efforts to find employment as part of her rehabilitation plan. Although Money had obtained her diploma through the GED program, the judge found she had cognitive limitations. He found that Money was permanently and totally disabled "because of her impairments and

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[30] See, e.g., *Hurley v. Stuart Fine Foods*, 687 So. 2d 310 (Fla. App. 1997); *Fredenburg v. Control Data Corp.*, 311 N.W.2d 860 (Minn. 1981); *Karpulk v. W.C.A.B. (Worth and Co.)*, 708 A.2d 513 (Pa. Commw. 1998).

[31] *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470-71, 461 N.W.2d 565, 574 (1990) (quoting treatise passage currently found at 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 83.02 (2007)). See, also, *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

restrictions and because employers just aren't going to hire her." In its second order following remand, the trial judge explicitly found that Money "would only be hired by very sympathetic employers" because of her significant physical impairments, reading and math deficiencies, and intellectual limitations.

Tyrrell does not specifically argue that the trial judge erred in finding Money permanently and totally disabled in the Table Rock labor market. The thrust of its argument is that the relevant labor market should include Lincoln, an argument we have rejected. Tyrrell, however, does argue that the trial judge erred in failing to require Money to undergo additional vocational rehabilitation. It argues that Money should have continued to search for employment before the trial judge concluded that she was permanently and totally disabled. It contends the trial judge should have required this because all the medical experts believed Money had some capacity to return to work. We interpret Tyrrell's argument to be that Money is not totally and permanently disabled because medical experts believed she could perform some work functions. But we have previously rejected such contentions when reviewing findings of disability under the odd-lot doctrine.

[18,19] To recover benefits, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arose out of or occurred in the course of the employment.[32] The claimant must also show by a preponderance of the evidence that the accident or occupational disease proximately caused an injury which resulted in compensable disability.[33] Finally, an injured worker must prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.[34]

[20-22] In assessing a claimant's disability, physical restrictions and impairment ratings are important. Yet, once the claimant establishes the cause of disability, the trial judge is not limited to this evidence. The trial judge may also rely on

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[32] See *Olivotto, supra* note 2. See, also, Neb. Rev. Stat. § 48-151(2) (Supp. 1999).

[33] See *id.*

[34] See *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

the claimant's testimony to determine the extent of the disability.[35] Disability, in contrast to impairment, is an economic inquiry. It can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet because of the impairment.[36] And total disability does not mean a state of absolute helplessness. It means that because of an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for work for any other kind of work which a person of his or her mentality and attainments could do.[37]

[23-25] Whether a plaintiff is totally and permanently disabled is a question of fact.[38] When testing the trial judge's findings of fact, we consider the evidence in the light most favorable to the successful party. And we give the successful party the benefit of every inference reasonably deducible from the evidence.[39] As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.[40]

The evidence shows that Money was 37 years old at the time of the accident. She completed the eighth grade and had limited cognitive abilities. In 1990, she received her diploma through the GED program and her nursing assistant certificate. Before her job with Tyrrell Flowers, her work history included experience as a nursing assistant, security guard, janitor, waitress, and factory worker. As noted, Conway concluded that she could no longer perform work functions related to plant care or nursing assistance. Money testified that she had not received any specialized education for her previous jobs and that she had lost some jobs because of her slowness or mistakes.

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[35] See, *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

[36] See *Frauendorfer, supra* note 35.

[37] See *id.*

[38] See, *id.*; *Schlup, supra* note 31.

[39] See *Olivotto, supra* note 2.

[40] See *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

As the trial judge noted, Money was fired from a waitress job because she could not remember lists and made mistakes on the cash register. She could not type and had not operated a cash register at Tyrrell Flowers or at any other job besides her waitress job. She had also lost factory jobs because she was not quick enough. In August 2004, a psychologist evaluated Money's intelligence using a "WAIS-III" intelligence test. Money scored 89 on her full-scale intelligence test, which was deemed valid. The psychologist assessed Money's overall functioning at a low-average to average intelligence level but concluded she could follow simple instructions under ordinary supervision.

Notably, Conway did not recommend retraining Money to perform sedentary or light-duty work as part of the vocational rehabilitation plan. And Tyrrell did not request job training. The rehabilitation plan was for job placement activities. From September to November 2003, Money reported making 68 employer contacts and submitting 27 resumes or applications. She testified that she applied for about 100 jobs between August 2003 and July 2004. During her job search, a prospective employer turned her down for a telephone sales position because of her poor reading skills. She also applied for sedentary positions as a dietary aide and grain elevator clerk, but she was not hired.

Money was able to convince only one employer to hire her for a low-skilled job at a sewing factory. She worked there full time for only 4 days before she had to leave to receive treatment for muscle spasms and severe headaches. After the first week, she attempted to continue working part time but lasted less than 2 weeks because of absences related to her neck problems.

Similarly, Money testified extensively about her limited ability to perform daily life activities and simple household tasks without pain. She also stated that she changed her activities at home frequently to avoid pain but that all her activities were at a physically low level. The evidence further shows that Money did not have transferable skills to obtain work within her physical abilities. The trial judge could properly rely on her testimony in determining that her physical abilities were limited after her injury. His findings of fact were not clearly wrong. As we have previously recognized:

> "A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood."[41]

In factually similar cases, we have affirmed the finding of total disability under the odd-lot doctrine.[42]

We conclude that Money's evidence of her significant physical impairments after the injury and her limited cognitive abilities was sufficient to support the trial judge's finding of permanent and total disability under the odd-lot doctrine.

## VI. CONCLUSION

We conclude that the workers' compensation trial judge correctly determined that the relevant labor market for assessing Money's loss of earning power was the area in and around Table Rock. It also correctly determined that Lincoln was not a surrounding community that should be included in that labor market. Although we had not yet issued our decision in *Giboo*,[43] the trial judge correctly applied the rules we set forth in *Giboo* to make these determinations. We further conclude that the three-judge review panel, in Money's first appeal, incorrectly determined that a claimant's loss of earning power must be based on both the community where the claimant was injured and the community to which she moved in good faith. Although Money did not appeal from the review panel's first decision, we

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[41] *Mata v. Western Valley Packing*, 236 Neb. 584, 589, 462 N.W.2d 869, 873 (1990) (quoting treatise passage currently found at 4 Larson & Larson, *supra* note 31, § 83.04).

[42] See, *Frauendorfer, supra* note 35; *Schlup, supra* note 31. See, also, *Luehring, supra* note 35; *Heironymus v. Jacobsen Transfer*, 215 Neb. 209, 337 N.W.2d 769 (1983).

[43] *Giboo, supra* note 4.

conclude that this decision is not the law of the case because it is contrary to our subsequent decision in *Giboo*.

We therefore disapprove the review panel's first decision. This disapproval, however, does not affect Money's award of benefits. After the trial judge again determined in the subsequent proceeding that Money was entitled to benefits for total disability, the review panel affirmed the award on different grounds. Because we conclude that the trial judge was not clearly wrong in finding that Money was totally and permanently disabled in the Table Rock labor market under the odd-lot doctrine of disability, we affirm.

AFFIRMED.

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BUILDERS SUPPLY CO., INC., APPELLANT, V.
BARBARA J. CZERWINSKI, APPELLEE.

748 N.W.2d 645

Filed May 9, 2008. No. S-06-1138.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just.
4. **Summary Judgment.** The primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.

6. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Contracts: Guaranty: Words and Phrases.** A guaranty is a contract and is a collateral undertaking by one or more persons to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
8. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
9. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
10. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
11. **Contracts: Guaranty.** Any ambiguity in a guaranty should arise in the first instance from the guaranty itself, and neither a court nor the parties will be permitted to create an ambiguity when none exists.
12. ____: ____. A guaranty is an independent contract that imposes responsibilities different from those imposed in an agreement to which it is collateral.
13. **Contracts: Guaranty: Debtors and Creditors: Notice: Words and Phrases.** An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his or her obligation or obligations, the guarantor will perform some act for the benefit of the creditor. An absolute guaranty of payment is enforceable at any time without demand and notice of default.
14. **Contracts: Guaranty: Subrogation: Waiver: Estoppel.** The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and, therefore, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right.
15. **Contracts: Guaranty: Waiver.** The defense that a guarantor is discharged by a creditor's impairment of collateral can be waived by an express provision in the guaranty agreement or by the guarantor's conduct.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Stephen H. Nelsen, James M. Bausch, and Tessa P. Hermanson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Appellant Builders Supply Co., Inc. (Builders), filed a complaint in the district court for Douglas County in which it alleged that appellee Barbara J. Czerwinski owed it $1,448,607.04 plus prejudgment and postjudgment interest and costs under a guaranty agreement (Guarantee) executed by Czerwinski and her late husband, John C. Czerwinski, Jr. (Jack). The Guarantee secured sums owed to Builders by Benchmark Homes, Inc. (Benchmark), under a separate credit agreement (Agreement). Czerwinski denied certain of Builders' allegations. Czerwinski's answer effectively gave notice of two defenses. First, Czerwinski claimed that as a result of Builders' release of certain collateral securing the Guarantee, her liability under the Guarantee had been completely discharged. Second, Czerwinski claimed that, if liable, her liability under the Guarantee was limited to $525,000.

Builders and Czerwinski filed cross-motions for summary judgment. Following an evidentiary hearing, the district court entered a judgment order in which it sustained Czerwinski's motion, overruled Builders' motion, and dismissed the case. Builders appeals.

We conclude that Builders established its entitlement to judgment and that Czerwinski did not establish her defenses and was not entitled to summary judgment. We therefore reverse the district court's order that sustained Czerwinski's motion for summary judgment and overruled Builders' motion for summary judgment and remand the cause with directions that judgment be entered in favor of Builders in the amount of $1,427,714.97 plus prejudgment and postjudgment interest and costs, and we further direct that proceedings be conducted on remand to determine interest and costs.

## STATEMENT OF FACTS

Jack and Czerwinski were officers in Benchmark, a company that was in the business of constructing homes. On December 13, 1989, Builders, a building supply company, entered into an Agreement with Benchmark by which Builders agreed to continue to sell building supplies to Benchmark on an open account.

Czerwinski is not a signatory to the Agreement. The Agreement acknowledged an outstanding indebtedness of Benchmark to Builders and set forth the manner in which that indebtedness would be paid. The Agreement also provided for future indebtedness and stated, inter alia, that the amount of credit to be extended to Benchmark would be $525,000.

Also on December 13, 1989, Jack and Czerwinski executed a separate Guarantee in favor of Builders. The purpose of the Guarantee was to provide for the repayment to Builders of amounts advanced by Builders to Benchmark in the event of Benchmark's default. The Guarantee provided, in pertinent part, as follows:

> Czerwinski [and Jack] absolutely and unconditionally guarantee . . . prompt repayment when due of all amounts advanced in the past . . . and of all amounts advanced in the future by Builders to Benchmark for use in Benchmark's conduct of its business. If Benchmark defaults in the payment of such indebtedness, Czerwinski [and Jack] will pay to Builders . . . the amount then due.

The Guarantee did not include or refer to the $525,000 credit figure contained in the Agreement. The Guarantee did not restrict Builders' ability to release the collateral and did not require that notice be given to the guarantors of the release of collateral. The Guarantee permitted Builders to release any one of the guarantors and provided that the liability of Czerwinski and Jack under the Guarantee was joint and several.

The Guarantee was secured in part by deeds of trust on certain properties, including an office building owned by Jack. Although she was not listed as an owner of the office building, Czerwinski signed the office building deed of trust. The deeds of trust stated generally that they were given to secure Benchmark's account indebtedness to Builders.

Sometime prior to March 26, 1991, Benchmark satisfied the original indebtedness set forth in the Agreement. On March 26, at Jack's request, Builders released its deed of trust on the office building. Subsequent thereto, Jack and Czerwinski executed deeds of trust on the office building in favor of creditors other than Builders. In this regard, the record contains evidence of deeds of trust dated between 1999 and 2005, which by their

terms were secured by the office building. Czerwinski admitted that she signed certain of these deeds of trust. Specifically, the evidence shows that in January 1999, Czerwinski signed a deed of trust in the amount of $100,000 in favor of Nebraska State Bank granting such entity a lien on the office building. The evidence further shows that in May 2000, Czerwinski signed a deed of trust in the amount of $600,000 in favor of Transnation Title Insurance Company granting such entity a lien on the office building. The evidence indicates that this $600,000 encumbrance was present on the office building when it was sold in 2006.

Beginning in 2002, Builders began extending large amounts of credit to Benchmark. Specifically, the evidence shows that from November 1, 2005, through March 9, 2006, Builders extended credit on an open account basis to Benchmark such that after credits for returned materials and supplies, Benchmark owed a total of $1,427,714.97 as of June 16, 2006.

Jack died on February 21, 2006. In approximately April 2006, Benchmark filed bankruptcy. On July 20, the office building was sold, resulting in net sale proceeds of approximately $849,000. The record generally indicates that the sale proceeds, net of the expenses of sale and real estate taxes, were paid to satisfy various lienholders on the office building whose encumbrances had been filed subsequent to Builders' release of its deed of trust in 1991.

On March 13, 2006, Builders filed a complaint against Czerwinski in which it alleged that it had advanced certain sums to Benchmark and that Benchmark was in default in the repayment of its account. Builders further alleged that Czerwinski had entered into the Guarantee to secure the repayment of those funds and that as a result, Czerwinski, as guarantor, owed Builders the principal sum of $1,448,607.04 plus prejudgment and postjudgment interest and costs.

On June 2, 2006, Czerwinski filed an answer, which she amended on August 11. In her amended answer, Czerwinski denied allegations in the complaint that she was indebted to Builders under the Guarantee. Czerwinski's answer effectively raised certain defenses. Initially, Czerwinski alleged that she should be discharged from any liability on the Guarantee

because Builders had released its lien on the office building, thereby impairing the collateral used to secure the Guarantee. She also alleged that the Guarantee was subject to a credit limit of $525,000 found in the separate Agreement and that as a result, the maximum sum for which she could be liable as a guarantor was $525,000.

On July 6, 2006, Builders filed a motion for summary judgment. On September 18, Czerwinski filed a motion for summary judgment based on the defenses raised in her answer. The cross-motions for summary judgment came on for hearing on September 29. In support of its motion, Builders introduced the Guarantee, as well as several affidavits and documentary evidence, to establish that Benchmark owed it a total of $1,427,714.97, for which Czerwinski was liable under the Guarantee. Builders also introduced evidence that showed that subsequent to its release of its lien on the office building, several deeds of trust on the office building in favor of creditors other than Builders had been executed and that Czerwinski had signed certain of these deeds of trust. In support of her motion, Czerwinski introduced into evidence several affidavits, two of which were her own. In both of her affidavits, Czerwinski stated, inter alia, that "[a]t no time did Builders . . . advise me that [it] had agreed with [Jack] to release the liens on the [office building] given as collateral for the Guarantee that is the subject of this proceeding."

In a judgment order filed October 10, 2006, the district court sustained Czerwinski's motion, overruled Builders' motion, and dismissed Builders' complaint with prejudice. In its order, the district court concluded that the Agreement, the Guarantee, and the deeds of trust should be construed together and further concluded that the documents so construed demonstrated that Czerwinski "was never obligated [to Builders] for more than $525,000.00 under the Guarantee." The district court found that the deed of trust on the office building had been released at Jack's request and that Czerwinski "was never advised of this action by [Builders]." However, the district court did not make a finding that Czerwinski was unaware of the release and made no finding with respect to Czerwinski's participation in the subsequent encumbering of the office building. The district

court concluded that Czerwinski, as guarantor, was entitled to be subrogated to the collateral given to secure Benchmark's indebtedness to Builders and that "[b]y releasing the collateral, [Builders] deprived [Czerwinski] of her right of subrogation, and [Czerwinski] is released from any liability under the Guarantee as a matter of law." As noted, the district court sustained Czerwinski's motion for summary judgment, overruled Builders' motion for summary judgment, and dismissed Builders' complaint with prejudice.

Builders appeals.

## ASSIGNMENTS OF ERROR

On appeal, Builders assigns three errors that can be restated as claiming that the district court erred in sustaining Czerwinski's motion for summary judgment, overruling Builders' motion for summary judgment, and dismissing Builders' complaint with prejudice.

## STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lynch v. State Farm Mut. Auto. Ins. Co., ante* p. 136, 745 N.W.2d 291 (2008). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

### Builders Established Its Entitlement to Judgment

Initially, we note that the instant case was before the district court on cross-motions for summary judgment. Builders offered the Guarantee and other evidence, and Czerwinski offered evidence designed to establish defenses that would relieve or reduce her obligations under the Guarantee. The district court granted Czerwinski's motion for summary judgment, denied Builders' motion for summary judgment, and dismissed the

complaint. As explained below, we conclude that Builders established its entitlement to judgment and that Czerwinski did not establish her defenses. We reverse the district court's order and direct that judgment be entered in favor of Builders in the amount of $1,427,714.97 plus prejudgment and postjudgment interest and costs, and we further direct that proceedings be conducted on remand to determine interest and costs.

[3,4] When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just. See *State Farm Mut. Ins. Co. v. Cheeper's Rent-a-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000). This court has stated that the primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. See *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[5,6] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

The record in the instant case reflects that Builders offered into evidence copies of the Guarantee and other documents, including evidence of the amount of the debt owed by Benchmark to Builders. By its terms, the Guarantee was absolute and unconditional. It did not limit the amount guaranteed and did not expire after a period of time. It did not contain restrictions relating to the release of the collateral and did not require notice of release. As alleged in its complaint, Builders demonstrated its

entitlement to judgment based on the Guarantee and the amount owed by Czerwinski to which it was entitled. The burden then shifted to Czerwinski to show that Builders was not entitled to judgment as a matter of law. Czerwinski offered evidence by which she sought to establish defenses such that her obligation under the Guarantee was not enforceable or, if enforceable, was for an amount less than the debt of $1,427,714.97 that had been established by the evidence. Although the district court found merit in the defenses, as elaborated below, we conclude as a matter of law that Czerwinski failed to establish her defenses and that therefore, the district court erred in entering judgment in favor of Czerwinski and against Builders and in dismissing Builders' complaint. Given the ultimate inferences from the evidence, Builders was entitled to judgment.

### The District Court Erred in Determining Czerwinski Was Never Liable for More Than $525,000 Under the Guarantee

Integral to our resolution of this appeal is a determination of the amount of debt to which Czerwinski was exposed under the Guarantee. For completeness, we note that given the posture and evidence in this case, we need not and do not comment on the potential contribution, if any, to which Czerwinski may be entitled relative to her indebtedness to Builders. On appeal, Builders claims that the district court erred when it determined that Czerwinski "was never obligated for more than $525,000.00 under the Guarantee." We agree with Builders that the district court erred in this determination.

Builders notes that the Guarantee provides as follows:

> Czerwinski [and Jack] absolutely and unconditionally guarantee . . . prompt repayment when due of all amounts advanced in the past . . . and of all amounts advanced in the future by Builders to Benchmark for use in Benchmark's conduct of its business. If Benchmark defaults in the payment of such indebtedness, Czerwinski [and Jack] will pay to Builders . . . the amount then due.

Builders claims that neither this nor any other language in the Guarantee, nor, to the extent applicable, any other document, limits Czerwinski's liability under the Guarantee and that as a

result, Czerwinski is liable to Builders for all sums advanced by Builders to Benchmark under the Agreement.

Czerwinski claims that notwithstanding the "absolute[] and unconditional[]" language contained in the Guarantee, she does not owe money to Builders in general and that in particular, she does not owe the full amount that Builders advanced to Benchmark. Czerwinski asserts that the Agreement, the Guarantee, and the deeds of trust were made as part of one transaction and should be construed together for purposes of interpretation. Czerwinski relies on cases similar to *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005), in which we stated that when documents are related and part of one transaction, their substance will be read together. Construing the documents together, Czerwinski asserts and the district court agreed that the Guarantee is subject to the language in the Agreement that stated that "[t]he maximum amount of credit to be extended to Benchmark shall be . . . $525,000.00." Czerwinski claims that the district court was correct when it determined that $525,000 was the maximum sum for which she was ever exposed as guarantor under the Guarantee.

We conclude as a matter of law that the Guarantee is unambiguous and that its meaning is to be determined by the language of the Guarantee itself. The Guarantee contains no limits on Czerwinski's liability to Builders, and the district court erred as a matter of law in limiting Czerwinski's potential liability under the Guarantee at $525,000.

[7-9] We begin our analysis by noting the rules regarding the interpretation of guaranty agreements. A guaranty is a contract and is a collateral undertaking by one or more persons to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. See *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). A guaranty is interpreted using the same general rules as are used for other contracts. *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 110, 738 N.W.2d 805 (2007). We have stated that "Nebraska adheres to the rule of strict construction of guaranty contracts. . . . 'When the meaning of the contract [guaranty] is ascertained, or its terms are clearly defined, the liability of the

guarantor is controlled absolutely by such meaning and limited to the precise terms.'" *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 293, 417 N.W.2d 162, 163 (1987) (quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922) (syllabus of court)). The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

Czerwinski urges us to construe the Guarantee with the Agreement and thereby limit the terms of the Guarantee. When, as here, the Guarantee is unambiguous, we do not vary its terms by construing it with another instrument. In this regard, we have stated:

> The statement that contemporaneous instruments may be treated and interpreted as one means only that this will be done when it will effectuate the intention and if the provisions of the two instruments if put together will not be incompatible. The court may not do violence to a complete, unambiguous contract by consolidating it with another writing if the effect of doing so would be to avoid an essential part of the contract. If contracts or writings are in effect independent they should not be construed together even though the same parties and the same subject matter may be concerned.

*Gerdes v. Omaha Home for Boys*, 166 Neb. 574, 585-86, 89 N.W.2d 849, 856 (1958).

[10,11] Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). See, also, *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006). Any ambiguity in a guaranty should arise in the first instance from the guaranty itself, and neither a court nor the parties will be permitted to create an ambiguity when none exists. See *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989) (stating that fact that parties to guaranty suggest opposing interpretations to document does not by itself compel conclusion that guaranty is ambiguous).

The language of the Guarantee is unambiguous. Czerwinski, as a coguarantor, "absolutely and unconditionally guarantee[d] prompt repayment when due of all amounts advanced." No other language in the Guarantee amounts to a meaningful limitation on this provision of the Guarantee. No language in the Guarantee limits Czerwinski's liability, and Czerwinski did not contract with Builders in the Guarantee to a limit on Builders' credit to Benchmark.

[12] We recognize that the Agreement contains language relative to the $525,000 upon which Czerwinski relies. However, a guaranty is an independent contract that imposes responsibilities different from those imposed in an agreement to which it is collateral. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). It is the guaranty agreement that contains the express condition on the guarantor's liability and that defines the obligations and rights of both guarantor and guarantee. *Id.* The language relied upon by Czerwinski in the Agreement relative to the $525,000 merely described Builders' obligation to extend credit to Benchmark to a specific amount.

Other courts have observed, and we agree, that in the absence of a limit in a guaranty, the presence of a credit limit in a separate credit agreement does not create a limit in the corresponding guaranty. See, e.g., *Fertig v. Bartles*, 78 F. 866 (D.N.J. 1897) (stating that clause in separate contract limiting credit amount to be extended to borrower did not restrict guarantor's liability because clause was not inserted for guarantor's benefit, and there was no similar clause in contract with guarantor limiting liability); *Clark v. Walker-Kurth Lumber Co.*, 689 S.W.2d 275, 279 (Tex. App. 1985) (stating that when "the contract between the creditor and principal debtor limits the obligation of the former to extend credit to the latter up to a specified amount, such limitation does not condition the contract by which the guarantor agrees to guaranty the payment of all credit extended to the debtor"); *Bay Oil Co. v. Vilas*, 237 Wis. 603, 605, 296 N.W. 595, 597 (1941) (stating that credit limit in contract between creditor and principal "was not for the benefit of the . . . guarantor but for that of the creditor, and it does not modify or condition the separate contract of guaranty which contains no

specific limitation or condition"). The fact that the Agreement in this case refers to $525,000 does not restrict the liability of the guarantors to that amount in view of the breadth of the language of the Guarantee itself. See *Missouri Farmers Ass'n, Inc. v. Coleman*, 676 S.W.2d 855 (Mo. App. 1984). Furthermore, the liability of the guarantor is not discharged by the extension of more credit than the amount specified in the separate credit agreement. *Clark v. Walker-Kurth Lumber Co., supra*.

The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determination made by the court below. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007). Czerwinski executed a Guarantee in which, as a matter of law, we conclude that she unambiguously guaranteed the payment of "all amounts advanced" by Builders to Benchmark. We conclude that the district court erred as a matter of law when it determined by reference to the Agreement that Czerwinski was never liable for more than $525,000 under the Guarantee. We reverse that portion of the district court's order.

### The District Court Erred as a Matter of Law When It Concluded That Czerwinski Was Released From Liability Under the Guarantee and Sustained Czerwinski's Motion for Summary Judgment

Having concluded that Builders established its entitlement to judgment and that the district court erred when it determined that any liability Czerwinski faced under the Guarantee was limited to $525,000, we next consider the correctness of the district court's ruling accepting Czerwinski's defense and granting summary judgment in favor of Czerwinski based on the court's determination that Czerwinski was released from liability under the Guarantee as a result of Builders' release of its deed of trust on the office building.

On appeal, Builders claims that the district court erred when it concluded that "[b]y releasing the collateral, [Builders] deprived [Czerwinski] of her right of subrogation, and [Czerwinski was] released from any liability under the Guarantee as a matter of law." We agree with Builders that this conclusion was error. The ultimate inference from the facts established Builders' allegations

and failed to establish Czerwinski's impairment of collateral defense. As explained below, although Builders released the deed of trust on the office building as collateral in 1991, the release did not violate an obligation under the Guarantee, and based on the evidence, Czerwinski is estopped from succeeding on a claim of impairment of collateral because, by Czerwinski's use of the office building as collateral to secure other indebtedness starting in 1999, Czerwinski was not deprived by Builders of preventing the loss protected by the Guarantee. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). Accordingly, giving Builders as the party against whom Czerwinski's summary judgment was entered the benefit of all reasonable inferences deducible from the evidence, see *Lynch v. State Farm Mut. Auto. Ins. Co., ante* p. 136, 745 N.W.2d 291 (2008), we conclude the district court erred as a matter of law when it granted Czerwinski's motion for summary judgment, and we reverse that portion of the district court's order.

[13] As noted, under the terms of the Guarantee, Czerwinski "absolutely and unconditionally guarantee[d]" all sums advanced by Builders to Benchmark under the Agreement. Pursuant to this language, Czerwinski's obligation under the Guarantee was absolute.

> An absolute guaranty is a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act for the benefit of the creditor. . . . An absolute guaranty of payment is enforceable at any time without demand and notice of default.

*Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 755, 448 N.W.2d 123, 128 (1989). See *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 600, 146 N.W. 993, 996 (1914) (stating that under absolute guaranty, "'guarantor makes an absolute promise that a particular thing shall be done, and thereby assumes an active, absolute duty to see that it is done, and must, at his peril, perform the promise'"). We further note that the Guarantee does not prohibit Builders from releasing the collateral, and because the language of the Guarantee does not require that the guarantors be notified by Builders of any such

release, we do not read a notice requirement into the Guarantee. See *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. at 755, 448 N.W.2d at 128 (stating that if "[t]here is no provision in the guaranty requiring [the creditor] to give notice to [the guarantor] of its transactions [involving the guaranteed debt] [s]uch a notice requirement cannot be read into the contract"). Finally, we note that the Guarantee does permit the release of any one of the guarantors.

Czerwinski acknowledges both the terms of the Guarantee and the absolute nature of those terms. However, Czerwinski claims as a defense that as a guarantor, she had a right to be subrogated to the collateral given to secure the Guarantee and that by virtue of Builders' release of its deed of trust on the office building, her right to be subrogated to that collateral for the satisfaction of the guaranteed debt was impaired. In argument, she claims that she was unaware of the release of the deed of trust on the office building, although her affidavit in evidence states merely that Builders did not notify her of the release. Czerwinski claims that the release of the debt on the office building impaired her resort to the office building to satisfy Benchmark's debt to Builders and that as a result of such release, she should be discharged from all liability under the Guarantee.

For the sake of completeness, we note that Czerwinski's arguments assume that if she were successful in establishing her discharge defense, she would be discharged from all, not merely some, liability under the Guarantee. Because the record does not support the defense, we need not resolve the extent to which a successful defense could release Czerwinski from her obligations under the Guarantee. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 174, 266 N.W.2d 736, 742 (1978) (stating generally that "a guarantor is not liable on his own contract where the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty"). But cf. *First State Bank v. Peterson*, 205 Neb. 814, 816-17, 290 N.W.2d 634, 635 (1980) (stating that "[i]t is a general rule of suretyship that a surety is discharged only pro tanto by any wrongful loss or release of security").

[14] Nebraska jurisprudence supports the general legal proposition to which Czerwinski alludes that despite the absolute nature of a guaranty, a creditor can act or fail to act in such a manner as to impair collateral securing a guaranty and that such impairment of collateral, in the absence of certain other factors, can be a defense to the guaranty's enforceability. This court has noted that regardless of whether a guaranty is absolute or conditional,

> [t]he general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and, therefore, *in the absence of assent, waiver, or estoppel,* he is generally released by an act of the creditor which deprives him of such right.

*Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 298, 237 N.W.2d 645, 649 (1976) (emphasis supplied). See *Myers v. Bank of Niobrara*, 215 Neb. 29, 336 N.W.2d 608 (1983) (citing *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., supra*, and concluding under the facts that guarantors waived right to object to creditor's release of collateral and that therefore, creditor's release of collateral did not discharge guarantors).

[15] As noted above, this court has recognized that the defense that a guarantor is discharged by a creditor's impairment of collateral is not available if the guarantor waived the defense, assented to the creditor's acts, or is otherwise estopped from succeeding on the defense. See *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., supra*. The defense can be waived by an express provision in the guaranty agreement or by the guarantor's conduct. See *Myers v. Bank of Niobrara, supra* (enforcing express waiver provision in guaranty agreement). See *Minnesota Fed. S. & L. v. Central Enterprises*, 311 Minn. 46, 247 N.W.2d 46 (1976) (discussing express waiver in guaranty and waiver by guarantor's conduct).

In considering Czerwinski's defense, we understand that Builders does not claim that Czerwinski assented to the initial release of the deed of trust on the office building that ultimately led to the loss of security. Further, we do not believe that Builders is claiming that Czerwinski waived her defense

by conduct. However, Builders does claim that the discharge defense is unavailable because Czerwinski expressly waived it in the Guarantee or that in the alternative, by virtue of her subsequent acts, Czerwinski is estopped from succeeding on the defense. Builders thus argues that notwithstanding the release of the deed of trust on the office building, Czerwinski is nevertheless liable under the Guarantee and that the district court erred in determining Czerwinski's liability under the Guarantee had been discharged.

With respect to waiver, Builders relies on §§ 3 and 8 of the Guarantee in support of its argument that Czerwinski expressly waived the impairment collateral defense. Section 3 of the Guarantee on which Builders relies provides in part that "Builders may alter, compromise, accelerate, extend or change the time or manner of payment of any indebtedness, increase or reduce the rate of interest thereon, or add or release any one or more other guarantors." Although it is of interest that this language expressly permits Builders the latitude to release a coguarantor, nothing in this language either expressly permits or precludes Builders from the release of collateral securing the Guaranty, and we do not find § 3 dispositive of our analysis.

Section 8 of the Guarantee on which Builders further relies provides, inter alia, as follows:

> Czerwinski waives any and all defenses, claims, and discharges of Builders, or any other obligor, pertaining to the indebtedness guaranteed herein, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the undersigned will not assert, plead, or enforce against Builders any defense of waiver, release, discharge in bankruptcy, statute of limitations, res judicata, statute of frauds, anti-deficiency statute, fraud, incapacity, minority, usury, illegality, or unenforceability which may be available to Benchmark or any other person liable in respect of any indebtedness or any setoff available against Builders to Benchmark or any such other person, whether or not on account of a related transaction.

Examining the language of § 8, we again disagree with Builders' assertion that by virtue of the provisions in the Guarantee, Czerwinski expressly waived her discharge defense.

According to the language of § 8, Czerwinski waived any defenses that *Builders* might possess, not defenses that she or even Benchmark might possess. While the reference to "Builders" may be inadvertent, we do not rely on § 8 for the proposition urged by Builders.

With respect to estoppel, Builders claims that by certain of her acts, Czerwinski is estopped from succeeding on her discharge defense and is therefore liable under the Guarantee. In this regard, Builders notes that subsequent to its release of its lien on the office building in 1991, Czerwinski signed deeds of trust starting in 1999 encumbering the office building, and that it is these subsequent encumbrances that directly led to the loss of the office building as security. Builders claims that the liens Czerwinski placed on the office building demonstrate that Czerwinski was aware the office building was no longer encumbered in favor of Builders and was available to serve as collateral elsewhere and that Czerwinski's own acts deprived her of "the means of preventing the loss protected by the guaranty." See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 174, 266 N.W.2d 736, 742 (1978).

In support of its estoppel argument, Builders relies upon evidence in the summary judgment record, including Czerwinski's responses to Builders' requests for admissions. In her responses, Czerwinski admitted that in 1999, she signed a deed of trust on the office building in favor of Nebraska State Bank in the amount of $100,000. Czerwinski also admitted that in 2000, she signed a deed of trust in favor of Transnation Title Insurance Co. in the amount of $600,000. In the title insurance on the office building effective June 22, 2006, a defect is noted as to this $600,000 indicating that this deed of trust is in default. Builders argues that Czerwinski's participation in placing subsequent liens on the office building as early as 1999 demonstrates Czerwinski's early knowledge of the release and that Czerwinski's acts, rather than those of Builders, impaired the collateral. Builders contends that the $600,000 encumbrance placed on the office building in 2000 to which Czerwinski consented suggests not only that Czerwinski knew of the availability of the office building to secure debt, but also that this $600,000 was in fact a significant encumbrance when the office building sold in 2006.

Builders therefore claims that Czerwinski should be estopped from succeeding on her claim that she should be discharged from her obligation under the Guarantee by virtue of Builders' release of its deed of trust in 1991.

In response, Czerwinski claims in her brief that she was unaware of Builders' release of the deed of trust on the office building. In support of her argument, Czerwinski appears to rely on statements in her affidavits in which she stated that "[a]t no time did Builders . . . advise me that [it] had agreed with [Jack] to release the liens on the [office building] given as collateral for the Guarantee that is the subject of this proceeding."

Czerwinski's response to Builders' estoppel argument is incomplete and unpersuasive, and the inferences from the evidence do not support her defense. As we have noted, the Guarantee did not restrict Builders' ability to release its collateral and did not require that Builders give notice to the guarantors if it did release the collateral. In the absence of such a provision, Builders was not required to give Czerwinski notice of its release of the deed of trust on the office building. See *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989). Furthermore, the evidence in her affidavits that Builders failed to "advise" her of the release of its collateral does not necessarily support her claim that she was unaware of the fact that the deed of trust on the office building had been released. To the contrary, the record indicates that she signed deeds of trust on the office building in 1999 and 2000 for $100,000 and $600,000 respectively, suggesting that she was aware of the availability of the office building to serve as collateral in a substantial amount. The $600,000 encumbrance remained into 2006, the inference from which is that through her actions, Czerwinski impaired the office building collateral rather than Builders.

This case was before the district court on cross-motions for summary judgment. Once Builders established that it was entitled to judgment as a matter of law, the burden shifted to Czerwinski to establish her entitlement to summary judgment which was based on her defense of impairment of collateral. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006). Upon appeal, when reviewing a summary

judgment, this 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. *Lynch v. State Farm Mut. Auto. Ins. Co., ante* p. 136, 745 N.W.2d 291 (2008).

As we have discussed, Czerwinski failed to carry her burden of establishing her defense and, to the contrary, the inferences from the evidence favor Builders. Thus, Czerwinski is estopped from succeeding on her defense of discharge based on impairment of collateral and she failed to establish her entitlement to judgment. Accordingly, we conclude that the district court erred as a matter of law in granting Czerwinski's motion for summary judgment and we reverse that portion of the district court's order.

## CONCLUSION

In this appeal following proceedings on cross-motions for summary judgment, we conclude that Builders established its entitlement to judgment and that Czerwinski did not establish her defenses and was not entitled to summary judgment. We therefore reverse the district court's order that sustained Czerwinski's motion for summary judgment and overruled Builders' motion for summary judgment and remand the cause with directions that judgment be entered in favor of Builders in the amount of $1,427,714.97 plus prejudgment and post-judgment interest and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT and MCCORMACK, JJ., not participating.

# AON CONSULTING, INC., APPELLANT AND CROSS-APPELLEE, v. MIDLANDS FINANCIAL BENEFITS, INC., APPELLEE AND CROSS-APPELLANT.

# AON CONSULTING, INC., APPELLEE AND CROSS-APPELLANT, v. WILLIAM PEARSON, APPELLANT AND CROSS-APPELLEE.

748 N.W.2d 626

Filed May 9, 2008. Nos. S-06-1256, S-07-034.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
4. **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.
5. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
6. ____: ____. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
7. **Restrictive Covenants: Employer and Employee.** In determining whether a covenant not to compete is valid, a court considers whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee.
8. ____: ____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
9. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** To distinguish between ordinary competition and unfair competition, courts focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.

10. **Restrictive Covenants: Employer and Employee: Goodwill.** Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair and the employer has a legitimate need for protection against the employee's competition.
11. **Contracts.** Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other.
12. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
13. ____: ____. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
14. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
15. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
16. **Expert Witnesses.** Not every attack on expert testimony amounts to a claim 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).
17. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
18. **Damages: Proof.** There is no precise formula for determining lost profits, and the only requirement in Nebraska is that the calculation be supported by some financial data which would permit an estimate of the actual loss to be made with reasonable certitude and exactness.
19. **Corporations.** An officer must comply with all applicable fiduciary duties when dealing with the corporation and its shareholders.
20. ____. Nominal corporate officers, with no management authority, generally do not owe fiduciary duties to the corporation.
21. ____. An officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law.
22. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
23. **Torts: Employer and Employee.** Factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which

the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.

24. **Actions: Intent.** In order to be actionable, interference with a business relationship must be both intentional and unjustified.

Appeals from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Richard J. Gilloon and Bradley B. Mallberg, of Erickson & Sederstrom, P.C., for appellant Aon Consulting, Inc.

Mark A. Fahleson, of Rembolt Ludtke, L.L.P., for appellee Midlands Financial Benefits, Inc.

Frederick S. Cassman and Frank F. Pospishil, of Abrahams, Kaslow & Cassman, for appellant William Pearson.

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

STEPHAN, J.

While employed by Alexander & Alexander Services Inc. (A&A) in 1981, William Pearson signed an agreement which restricted his ability to solicit business from certain customers of the firm for 2 years after leaving its employment. Aon Consulting, Inc. (Aon), merged with A&A in 1997, and Pearson remained as an officer and employee of Aon until 2001, when he resigned and joined a competitor, Midlands Financial Benefits, Inc. (Midlands). In his new employment, Pearson solicited business from Aon customers with whom he had personal business relationships while employed by Aon. Aon sued Pearson for breach of contract and was awarded a money judgment from which Pearson appeals. Aon cross-appeals from the dismissal of its breach of fiduciary duty claim against Pearson. In a separate case, Aon sued Midlands for intentional interference with a business relationship and appeals from a directed verdict of dismissal. We affirm the judgments of the district court in both cases.

## I. BACKGROUND

### 1. Facts

Both cases arise from the same factual circumstances. In 1981, Pearson began working for A&A as an account executive selling and servicing group health insurance plans. Several months later, he signed a nonsolicitation agreement. The agreement provided in relevant part:

> [I]f your employment with A&A should terminate for any reason, you will not, directly or indirectly, for a period of two (2) years after the date of such termination of your employment, in any capacity whatsoever (either as an employee, officer, director, stockholder, proprietor, partner, joint venturer, consultant or otherwise), solicit, sell to, divert, serve, accept or receive insurance agency, brokerage or consulting business . . . from any customer or active prospect of A&A which you personally, alone or in combination with others, handled, serviced or solicited at any time during the two (2) year period immediately preceeding termination of your employment.
>
> . . . .
>
> In the event of your termination (except for death, permanent or total disability or retirement), A&A agrees that it will pay you a sum equivalent to (a) one (1) month's salary computed as of the date of such termination if such termination takes place within one year from the date hereof or (b) two (2) month's salary computed as of the date of such termination if such termination takes place after one year from the date hereof.

In 1990, Pearson became the manager of A&A's Lincoln, Nebraska, office and was given the title of vice president. In 1994, he became the manager of the Omaha, Nebraska, office as well. In 1996, in anticipation of the merger, A&A requested that Pearson sign a new nonsolicitation agreement that expressly stated it was assignable without his consent. Pearson declined to sign this agreement.

In 1997, Aon merged with A&A. Pearson continued to work for the company in the same capacity and performed the same duties. In March 2001, Aon relieved Pearson of his managerial

and supervisory duties, although he remained designated as a vice president. Aon corporate minutes show that he was officially designated a vice president by Aon's board of directors. The record indicates that over 200 Aon employees were designated as "Vice Presidents" and that approximately 125 more were "Senior Vice Presidents."

Pearson became dissatisfied with his employment at Aon, and in the summer of 2001, he sought legal advice regarding the validity of the nonsolicitation agreement. His attorney advised him that the agreement was not enforceable because he was no longer employed by A&A, but, rather, by Aon, and more than 2 years had elapsed since he was last employed by A&A. In June or July 2001, Pearson contacted and met with a co-owner of Midlands, a Lincoln firm engaged in the business of financial planning and employee benefits programs. They discussed the possibility of Pearson's becoming employed by Midlands. Pearson and his Aon coworker Cathy Dorenbach met with the co-owners of Midlands again in July and September to discuss employment opportunities at Midlands. During one of these meetings, Pearson showed Midlands the nonsolicitation agreement and informed Midlands that his attorney had opined that it was unenforceable. Midlands' co-owners testified that they did not recruit Pearson, nor did they expect him to solicit former Aon customers during his employment at Midlands. There is evidence that the sales goals which Midlands sets for its employees could have been met by Pearson without solicitation of Aon customers.

Dorenbach testified that she and Pearson began discussing their mutual unhappiness at Aon during the summer of 2001. On September 28, 2001, both Pearson and Dorenbach resigned from Aon and joined Midlands. Prior to resigning, both informed Aon customers with whom they worked that they would soon be leaving Aon. In some instances, they indicated that they would be employed by Midlands. Either just prior to or immediately after leaving, Pearson and Dorenbach helped customers prepare broker of record letters changing those customers' affiliations from Aon to Midlands. Dorenbach testified that she and Pearson independently made the decision to leave Aon, but that after the decision was made, they coordinated the

time and date of their leaving. Dorenbach testified that Pearson was aware of her plans to leave Aon and was aware that she was contacting Aon customers and telling them of her plans prior to leaving. Pearson admitted that despite this knowledge, he did not inform anyone at Aon of Dorenbach's plans.

As employees of Midlands, both Pearson and Dorenbach were paid a commission of 50 percent of all revenues generated. Ultimately, 12 customers Pearson had served at Aon transferred their business to him at Midlands. Approximately 25 other Aon customers served by Dorenbach also transferred their business to her at Midlands. By January 2002, Midlands' management was aware that most of Pearson's business was being generated from former Aon customers.

### 2. Case No. S-07-034: Aon v. Pearson

Aon sued Pearson in the district court for Douglas County, alleging, inter alia, that he had breached the nonsolicitation agreement and breached his fiduciary duty. Pearson answered, denying Aon's material allegations and specifically alleging that the nonsolicitation agreement was not enforceable by Aon. On cross-motions for summary judgment, the district court determined that the nonsolicitation agreement was valid and enforceable as an asset of A&A which became an asset of Aon following the merger. The court entered summary judgment for Aon on the issue of liability with respect to claims involving breach of the agreement. The court entered summary judgment in favor of Pearson with respect to Aon's claim alleging breach of fiduciary duty. The matter proceeded to a bench trial on the issue of damages, and the court entered judgment in favor of Aon in the amount of $123,063. After both parties' motions for new trial and motions to alter or amend the judgment were overruled, Pearson appealed, and Aon cross-appealed. That matter is before us as case No. S-07-034.

### 3. Case No. S-06-1256: Aon v. Midlands

Aon filed an action in the same court against Midlands, alleging that by hiring Pearson with knowledge of the nonsolicitation agreement, it "unjustifiably and intentionally acted to interfere with, and to assist Pearson to breach" the agreement.

In its answer, Midlands asserted a general denial and, in an affirmative defense, alleged that it had relied on Pearson's representation that "he had received a legal opinion that such Non-Solicitation Agreement was no longer valid or enforceable." Pursuant to a stipulation of the parties, the court consolidated the case with Aon's action against Pearson for both discovery and trial. At the consolidated trial, the court granted Midlands' motion for a directed verdict at the close of Aon's evidence and dismissed the action. Aon appealed, and Midlands cross-appealed. We moved this appeal and case No. S-07-034 to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

Although the two appeals were argued separately, we address and resolve both in this opinion.

## II. ASSIGNMENTS OF ERROR

In case No. S-07-034, Pearson assigns, restated and consolidated, that the trial court erred in (1) finding that the nonsolicitation agreement was enforceable by Aon, (2) admitting the opinion of Aon's expert witness on lost profits, (3) calculating Aon's net lost profits, and (4) failing to allow it to amend its answer to conform to the evidence.

On cross-appeal in case No. S-07-034, Aon assigns that the trial court erred in (1) overruling its motion for summary judgment on the claim that Pearson breached his fiduciary duty as an officer of Aon, (2) dismissing its action against Pearson for breach of his fiduciary duty, (3) limiting its evidence of damages to the 2-year period identified in the nonsolicitation agreement, and (4) calculating damages by counting certain expenses twice and using the wrong ratio of expenses to revenue to calculate net lost profits.

In case No. S-06-1256, Aon assigns that the district court erred in (1) sustaining Midlands' motion for directed verdict and (2) sustaining Midlands' objection to Aon's evidence of damages beyond the 2-year period of the nonsolicitation agreement.

On cross-appeal in case No. S-06-1256, Midlands assigns that the trial court erred in (1) finding the nonsolicitation agreement

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

was enforceable under Nebraska law and (2) finding that Aon had standing to enforce the nonsolicitation agreement.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[4] 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.[5]

[5,6] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[6] The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the

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[2] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007); *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007).

[3] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

[4] *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005); *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

[5] *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007); *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[6] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007); *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

evidence.[7] If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.[8]

## IV. ANALYSIS

### 1. Enforceability of Nonsolicitation Agreement

A legal issue common to both cases is whether the 1981 nonsolicitation agreement between Pearson and A&A was enforceable by Aon following Pearson's resignation in 2001. To resolve this question, we must determine (1) whether, as the district court held, the agreement became an asset of Aon by virtue of the merger with A&A and, if so, (2) whether the agreement was reasonable with respect to the nature and scope of the restrictions it imposed upon Pearson.

#### (a) Effect of Merger

Pearson and Midlands argue that A&A's rights under the nonsolicitation agreement were not assignable and that therefore, Aon had no right to enforce the agreement. Aon argues, and the district court held, that it acquired the right to enforce the agreement by operation of law as a result of the 1997 merger. The record includes documents pertaining to the merger which were received without objection. The "Agreement and Plan of Merger" expressly states that it is to be governed by the law of the State of Maryland, specifically the "General Corporation Law of the State of Maryland." The receipt of this evidence placed Pearson on notice that Maryland law governed the merger, and we therefore take judicial notice of the law of that state.[9]

The merger agreement specifically provides that the "[m]erger shall have the effects set forth in Section 3-114 of the [Maryland statutes]." Under that statute, the assets of each party to the merger "transfer to, vest in, and devolve on the successor

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[7] *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

[8] *Id.*

[9] See Neb. Rev. Stat. §§ 25-12,101 to 25-12,107 (Reissue 1995).

without further act or deed."[10] "Assets" in this context are defined as "any tangible, intangible, real, or personal property or other assets, including goodwill and franchises."[11] Although no reported Maryland decision has applied these statutes to the question presented here, other state courts applying similar statutory language have concluded that a covenant not to compete is an asset which is transferred to and vests in the surviving entity of a merger by operation of law.[12] In *UARCO Inc. v. Lam*,[13] the applicable Hawaii statute provided that after a statutory merger, the surviving corporation possessed "'all of the rights, privileges, immunities, and franchises.'" The court held that under this statute, a successor corporation could enforce a noncompetition agreement entered into by the corporation acquired by merger. The court reasoned that although such agreements were not assignable under Hawaii law, the enforcement right of the successor corporation passed by operation of law.

Similarly, in *Corporate Exp. Office Products v. Phillips*,[14] the applicable statute provided that after a merger, "'[t]he title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment.'" Based on this language, the court concluded:

> [T]he surviving corporation in a merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary. This is because in a merger, the two corporations in essence unite into a single corporate existence.[15]

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[10] See Md. Code Ann., Corps. & Assns. § 3-114(e) (LexisNexis 2007).

[11] See Md. Code Ann., Corps. & Assns. § 1-101(d) (LexisNexis 2007).

[12] *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw. 1998); *Corporate Exp. Office Products v. Phillips*, 847 So. 2d 406 (Fla. 2003); *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311 (Mo. App. 1986).

[13] *UARCO Inc. v. Lam, supra* note 12, 18 F. Supp. 2d at 1122.

[14] *Corporate Exp. Office Products v. Phillips, supra* note 12, 847 So. 2d at 413.

[15] *Id.* at 414.

Likewise, in *Alexander & Alexander, Inc. v. Koelz*,[16] the court reasoned that after a statutory merger, the surviving corporation succeeded to all the rights and liabilities of the preceding corporation under the applicable statutes, and thus the survivor could enforce a noncompetition agreement.

Pearson urges that we follow the reasoning of *Smith, Bell & Hauck v. Cullins*.[17] In that case, the Supreme Court of Vermont held that the purchaser of the assets of an insurance agency could not enforce an agreement not to compete between the former owner and an employee. A Vermont statute provided that in the event of a transfer of assets by sale, merger, or consolidation of different corporate entities, the acquiring corporation "shall possess all the rights, privileges and benefits of the original corporation properly exercisable under the laws of [Vermont]."[18] The court reasoned that because the agreement was personal to the original parties, it was incapable of effective assignment and therefore not "properly exercisable" by the new owner under Vermont law. We are not persuaded by this reasoning, primarily because the Vermont statute differs substantially from the Maryland statute which governs the effect of the corporate merger by which Aon acquired A&A.

We agree with those cases which hold, under statutes similar to Maryland's, that a covenant not to compete is an asset of a corporation which passes by operation of law to a successor corporation as the result of a merger, regardless of whether the agreement would otherwise be assignable. Accordingly, by virtue of the merger, Aon succeeded to A&A's right to enforce its nonsolicitation agreement with Pearson.

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[16] *Alexander & Alexander, Inc. v. Koelz, supra* note 12. See, also, *Equifax Services, Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990) (holding that after merger, surviving corporation "automatically succeeds to the rights of the merged corporations to enforce employees' covenants not to compete").

[17] *Smith, Bell & Hauck v. Cullins*, 123 Vt. 96, 183 A.2d 528 (1962).

[18] *Id.* at 100, 183 A.2d at 531, citing Vt. Stat. Ann. tit. 11, §§ 161 and 165 (1958).

(b) Scope and Reasonableness of Nonsolicitation Agreement

[7] Approaching the issue of enforceability from a different perspective, Midlands argues that the nonsolicitation agreement was unenforceable under Nebraska law because it imposes broader restrictions than our law permits. In determining whether a covenant not to compete is valid, a court considers whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee.[19]

[8-10] An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.[20] To distinguish between "ordinary competition" and "unfair competition," we have focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.[21] Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair and the employer has a legitimate need for protection against the employee's competition.[22]

The nonsolicitation agreement signed by Pearson did not prevent him from engaging in "ordinary competition" with Aon after leaving its employment. It only prevented him from business contacts with those customers with whom he had personal business dealings during the last 2 years of his employment with Aon. The agreement was properly focused on the legitimate purpose of protecting Aon's goodwill with its customers.

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[19] *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).

[20] *Professional Bus. Servs. v. Rosno*, 256 Neb. 217, 589 N.W.2d 826 (1999); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

[21] See, *id.*; *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

[22] *Id.*

We conclude that the nonsolicitation agreement was reasonable in the sense that it is not injurious to the public, not greater than reasonably necessary to protect Aon's legitimate interest in retaining the goodwill of its customers with whom Pearson dealt personally, and not unduly harsh and oppressive on Pearson. Accordingly, we conclude that the agreement was enforceable under Nebraska law.

(c) Consideration

Midlands also argues that the nonsolicitation agreement was invalid for lack of consideration. It notes that Pearson was already employed by A&A when he signed the agreement and that he did not receive any bonus or additional compensation for doing so. Midlands argues that Pearson's continued employment after signing the agreement did not constitute adequate consideration.

[11] We need not address this specific argument, because we conclude that the nonsolicitation agreement recites other consideration. Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other.[23] In the nonsolicitation agreement, A&A undertook to pay severance compensation in the event that Pearson left its employment for reasons other than death, disability, or retirement. This undertaking constituted a benefit to Pearson and a detriment to A&A which would not otherwise have existed in their employment relationship. The fact that Pearson claims not to have received a severance payment following termination does not alter the fact that A&A's agreement to make such payment constituted valid consideration for the nonsolicitation agreement.

(d) Summary

For the reasons discussed, we conclude that the nonsolicitation agreement between Pearson and A&A was valid under Nebraska law and that the right to enforce the agreement passed to Aon by operation of law when it acquired A&A by merger. It is undisputed that almost immediately upon leaving Aon's

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[23] *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

employment, Pearson became employed by Midlands and solicited business from Aon customers with whom he had personal business dealings within the last 2 years of his employment with Aon. Accordingly, the district court did not err in granting partial summary judgment in favor of Aon as to Pearson's liability for breach of the nonsolicitation agreement.

### 2. Damages

Both Pearson and Aon assign error with respect to aspects of the district court's calculation of damages. Because the issues are interrelated, we address them together.

#### (a) General Principles

[12-14] Certain general principles apply to Aon's claimed loss of profits resulting from Pearson's breach of the nonsolicitation agreement. In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.[24] One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.[25] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.[26]

#### (b) Damages Limited to 2-Year Period

Aon assigns error to the district court's determination that evidence regarding damages allegedly incurred more than 2 years after Pearson's breach of the nonsolicitation agreement would be speculative and irrelevant and, therefore, inadmissible. In response to this ruling, Aon made an offer of proof

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[24] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

[25] *Nebraska Nutrients v. Shepherd*, *supra* note 24; *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000).

[26] *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002); *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

establishing that Aon has retained 95 percent of its customers each year since 2001 and that the losses caused by Pearson's breach could be expected to occur at least through the year 2005. The district court again ruled that evidence of damages beyond the 2-year period was speculative and inadmissible. It sustained Pearson's objection to an offer of evidence showing Aon's claimed lost profits in the years 2004 to 2006.

[15] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[27] Pearson would have been free to solicit business from Aon customers after the 2-year restricted period, and there is evidence in the record that customers can change brokers whenever they choose to do so, without prior notice. We conclude that the district court did not abuse its discretion in holding that evidence of lost profits beyond the 2-year period was speculative and, therefore, irrelevant and inadmissible.

(c) Testimony of Dennis R. Hein

Dennis R. Hein is a certified public accountant who testified as an expert witness on behalf of Aon. Pearson assigns error by the district court in overruling his motion in limine and receiving, over Pearson's foundational objections, Hein's opinions with regard to lost profits.

Hein testified that he reviewed Aon's financial documents for the years 2000 to 2002. He attempted to determine what revenues were taken away by Pearson during 2002 and 2003 and what effect expenses had on those revenues. In calculating expenses, he focused on those that he opined would vary directly with the production of business, including items such as entertainment, lodging, travel, public relations, postage, office supplies, and printing. He found that Aon's average expense ratio for these variable items in the years 2000 to 2002 was 3.72 percent of its revenues. To be conservative, he rounded this figure up to 6 percent.

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[27] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002).

To calculate the revenue lost when the Aon customers followed Pearson to Midlands, Hein looked at Aon's average growth rate of 4.76 percent in the years 2000 to 2002. He rounded that number down to 4 percent, and then multiplied the total revenues generated to Aon in 2001 by the customers Pearson took to Midlands by that percentage. After determining this sum, he subtracted 6 percent to represent the additional expenses Aon would have incurred in generating the revenue. His calculation resulted in a net lost profit to Aon in 2002 of $199,683. Hein conducted a similar analysis for 2003 and determined that the 2003 lost profits were $207,671. Hein's opinions with respect to lost profits were based upon a reasonable degree of professional certainty as a certified public accountant.

On cross-examination, Hein testified that in performing his calculations, he considered all of Aon's actual expenses. He essentially stated that Aon's fixed costs would have remained the same with respect to the additional revenue, because Aon had employees capable of handling the increased revenue volume. Thus, Hein reasoned that the only additional expenses Aon would have incurred in generating the income were those that he identified as accounting for 6 percent of the revenue generated.

[16,17] Pearson argues that the trial court failed to properly perform its "gatekeeper" function and that Hein's methodology was suspect because he failed to include all relevant expenses. We held in *City of Lincoln v. Realty Trust Group*[28] that not every attack on expert testimony amounts to a claim under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[29] and *Schafersman v. Agland Coop*.[30] Pearson's motion in limine and objections during trial did not raise a *Daubert/Schafersman* issue. What Pearson really is asserting is an attack on the factual basis of the opinion, a criticism that goes to its weight, not its admissibility. The admission of expert testimony is ordinarily within

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[28] *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005).

[29] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[30] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.[31] We conclude that the district court did not err in receiving Hein's opinions regarding damages over Pearson's objections.

(d) Calculation of Damage Award

Both Pearson and Aon assign error to the district court's determination that Aon sustained damages in the amount of $123,063. Additional portions of the record bear on our review of this issue.

To rebut Hein's testimony, Pearson offered the expert testimony of David C. Riley, also a certified public accountant. Riley disagreed with Hein's methodology and opined that the proper method of calculating damages was to consider Aon's percentage increase in expenses during the years 2000 to 2002. According to Riley, Hein did not follow generally accepted principles of accounting and failed to properly calculate Aon's lost profits. Riley calculated that in the years 2001 to 2003, Aon had an average net profit percent of 6.57 percent. When he applied that percentage to the revenues lost by Aon, he determined that Aon's lost profits "attributable to" Pearson were $28,457.

Pearson testified at trial that no more than 80 percent of the revenue he generated for Midlands in 2002 and 2003 came from former Aon customers. He had earlier testified in his deposition that approximately 75 percent of the revenue came from Aon customers. Evidence was received, without objection, detailing the amount of compensation Pearson received from Midlands in the years 2001 to 2003. An exhibit was received without objection which purported to show the revenue generated by Pearson for Midlands with respect to the customers Pearson had formerly serviced at Aon.

In its order of judgment, the district court found that the "best evidence" of revenues actually lost to Aon due to Pearson's actions was Pearson's "testimony relative to his commissions while at Midlands." The court therefore "reject[ed] opinions of the experts of the parties as to projected lost revenues and/or

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[31] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

profits." However, the court expressly accepted Hein's opinion that Aon would have incurred additional expenses servicing the customers and that those expenses would equal 6 percent of the gross revenues generated by Pearson. The court also specifically found that as of January 1, 2002, Aon had sufficient personnel to service the customers that Pearson took to Midlands.

The district court then calculated lost profits in a manner that differed from either method used by the parties' experts. The court first determined the actual revenues lost to Aon. It reached this sum by multiplying Pearson's actual compensation for the years 2002 and 2003 by 2, based on the undisputed evidence that Pearson was paid 50 percent of all revenues he generated. Then, the court multiplied this sum by 80 percent, based on Pearson's testimony that approximately 80 percent of the revenue he generated at Midlands came from former Aon customers.

The court then multiplied the revenues lost by 6 percent to determine what additional expenses would have been incurred in generating those revenues. Once these numbers were determined, the court (1) added the additional revenues into the actual operating revenues for Aon for the year in question, (2) added the additional expenses into the actual expenses incurred by Aon for the year in question, and (3) determined what the profit/expense ratio was for the year in question. After determining this ratio, the court applied it to the additional revenues generated by Pearson and arrived at a lost profit figure of $53,958 for 2002 and a figure of $92,141 for 2003. Because the nonsolicitation agreement would have expired in September 2003, the court reduced the 2003 amount by 25 percent and concluded that Aon's total lost profits were $123,063.

Both Aon and Pearson assert that the trial court erred in its calculations. Pearson argues that Hein's 6-percent variable expense estimate was not based on the evidence, and Aon contends that the court erred in accessing the 6-percent variable twice. We conclude that neither is correct. There is evidence in the record to support Hein's conclusion that Aon would only have incurred an additional 6 percent in "variable" expenses in generating the additional revenue. Hein gave a reasoned basis for his calculations, and the district court explicitly found that

Aon had personnel in place to service the additional revenue so that no allocation needed to be made for items such as salary and benefits. Based upon our review of the record, we find no merit in Pearson's argument that the district court improperly calculated expenses in arriving at its finding of lost net profits.

[18] There is no precise formula for determining lost profits, and the only requirement in Nebraska is that the calculation be supported by some financial data which would permit an estimate of the actual loss to be made with reasonable certitude and exactness.[32] We conclude that the record is sufficient to support the method of calculating damages utilized by the district court.

### 3. Breach of Fiduciary Duty Claim

In its cross-appeal in case No. S-07-034, Aon assigns and argues that the district court erred in granting summary judgment in favor of Pearson on Aon's claim that Pearson breached his fiduciary duty as an officer of Aon and in dismissing that claim. Aon contends that Pearson breached fiduciary duties of good faith and loyalty because he failed to alert Aon to Dorenbach's plans to leave her employment with Aon and solicit some of its customers on behalf of Midlands. In Aon's second amended petition, it alleged that Pearson planned both his and Dorenbach's departure from Aon "in such a manner so as to solicit and divert customers of [Aon] prior to their termination from employment." The record is clear that these alleged breaches could not have occurred any earlier than June 2001, as that is the date that Pearson and Dorenbach first discussed leaving their positions at Aon. The district court did not disclose its reasons for granting Pearson's motion for summary judgment on this issue.

[19-21] Aon's brief relies exclusively on Nebraska law. In Nebraska, an officer must comply with all applicable fiduciary duties when dealing with the corporation and its shareholders.[33] Nominal corporate officers, with no management authority,

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[32] See *Home Pride Foods v. Johnson, supra* note 26.

[33] See, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

generally do not owe fiduciary duties to the corporation.[34] However, "an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law."[35]

Pearson became a vice president of A&A in 1990 and assumed management duties at that time, which included management of the company's Lincoln office and later the Omaha office as well. His duties included supervising sales personnel, developing budgets, and hiring and firing employees. After the merger of A&A and Aon in 1997, Pearson was designated as a vice president of Aon by the company's board of directors. He initially performed the same management duties for Aon. In March 2001, Aon relieved Pearson of all managerial duties, but he retained the title of vice president.

The alleged breaches of Pearson's fiduciary duty all occurred after March 2001. Thus, assuming that he owed fiduciary duties to Aon at the time he exercised managerial discretion, the issue before us is whether his fiduciary obligation continued when his managerial duties ceased. Restated, the question is, Was Pearson a fiduciary when he retained the title of a corporate officer but no longer exercised discretionary management authority?

There is little legal authority on this issue. One court has adopted the general rule that once a fiduciary duty exists, it does not cease when managerial duties cease, noting "[e]ven when an officer loses power or authority, that officer still owes a fiduciary duty to the corporation. To divest himself or herself of the duty, the officer must resign the office."[36] We find this rule unpersuasive for two reasons. First, the authority cited in

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[34] 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 837.50 (perm. ed., rev. vol. 2002 & Cum. Supp. 2007). See Neb. Rev. Stat. § 21-2099 (Reissue 1997). See, also, *GAB v. Lindsey & Newsom Claim Services*, 83 Cal. App. 4th 409, 99 Cal. Rptr. 2d 665 (2000), *disapproved on other grounds, Reeves v. Hanlon*, 33 Cal. 4th 1140, 95 P.3d 513, 17 Cal. Rptr. 3d 289 (2004).

[35] *GAB v. Lindsey & Newsom Claim Services, supra* note 34, 83 Cal. App. 4th at 420-21, 99 Cal. Rptr. 2d at 672. See, § 21-2099; 3 Fletcher, *supra* note 34.

[36] *GAB v. Lindsey & Newsom Claim Services, supra* note 34, 83 Cal. App. 4th at 421, 99 Cal. Rptr. 2d at 673.

support of this rule does not involve corporate officers and is distinguishable from the instant case.[37] Second, the stated rationale for the rule is the agency principle of apparent authority, a principle that is not at issue in the instant case.[38]

We are more persuaded by decisions from other jurisdictions holding that the existence of a fiduciary duty of an officer in a closely held corporation "depends on the ability to exercise the status which creates it."[39] These courts conclude that when a corporate officer loses managerial responsibilities, the corresponding fiduciary duty ceases to exist.[40] Although Aon is not a closely held corporation, we find that this rule is applicable to the facts of the instant case and is consistent with § 21-2099. Pearson exercised low-level, local management authority in a large corporation. This authority was taken away from him in March 2001, and at that point, he was simply one of hundreds of Aon vice presidents. At the time of Pearson's alleged breach, he had no involvement in the management and operation of the corporation beyond his own production. We conclude that Pearson owed no fiduciary duty to Aon at the time the alleged breach of the duty occurred, and thus the district court properly granted summary judgment in his favor on this claim.

### 4. Tortious Interference With Business Relationship

[22] In case No. S-06-1256, Aon contends that the district court erred in directing a verdict in favor of Midlands on Aon's claim that Midlands tortiously interfered with its contract with Pearson. To succeed on a claim for tortious interference with a

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[37] *Rader v. Thrasher*, 57 Cal. 2d 244, 368 P.2d 360, 18 Cal. Rptr. 736 (1962) (referencing duties owed by attorney to client after client expresses disapproval of attorney's actions); *Vai v. Bank of America*, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961) (holding spouses owe reciprocal fiduciary duties with respect to undivided community property); *Sime v. Malouf*, 95 Cal. App. 2d 82, 212 P.2d 946 (1949) (holding cojoint venturers owed each other fiduciary duties).

[38] See *GAB v. Lindsey & Newsom Claim Services, supra* note 34.

[39] *J Bar H, Inc. v. Johnson*, 822 P.2d 849, 861 (Wyo. 1991) (emphasis omitted). See *Voss Engineering v. Voss Industries*, 134 Ill. App. 3d 632, 481 N.E.2d 63, 89 Ill. Dec. 711 (1985).

[40] *Id.*

business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[41]

We have concluded that the nonsolicitation agreement between Aon and Pearson was valid and enforceable, and there is no dispute that representatives of Midlands were made aware of the agreement prior to hiring Pearson in September 2001. By January 2002 at the latest, Midlands knew that Pearson was soliciting business on its behalf from customers he had served while employed by Aon. The key issue is whether the district court erred in determining that there was no evidence to support a finding that Midlands' hiring and continued employment of Pearson with such knowledge constituted an "unjustified intentional act of interference."

[23] Factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.[42]

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

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[41] See *Macke v. Pierce*, 266 Neb. 9, 661 N.W.2d 313 (2003), citing *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000).

[42] *Macke v. Pierce, supra* note 41.

arriving at a judgment; but it does not exhaust the list of possible factors."[43]

[24] In this case, it is clear that Pearson contacted Midlands about employment and that Midlands neither solicited nor recruited Pearson. Pearson informed Midlands of the nonsolicitation agreement, but at the same time, he told Midlands that his attorney had given him an opinion that the agreement was unenforceable. It is undisputed that Midlands did not expect or require Pearson to solicit customers he had served while employed by Aon and that he likely could have met the Midlands' production expectations without doing so. From this record, the most that can be said is that Midlands hired an experienced individual who sought employment and relied in good faith upon his representation that, according to his attorney, his nonsolicitation agreement with a prior employer was unenforceable. In order to be actionable, interference with a business relationship must be both intentional and unjustified.[44] Based upon our review of the record, we conclude that the district court did not err in determining that Aon presented no evidence to support a reasonable inference that Midlands intentionally and unjustifiably interfered with its contractual relationship with Pearson.

## V. CONCLUSION

For the reasons discussed, we affirm the judgment of dismissal in case No. S-06-1256. In case No. S-07-034, we affirm the award of damages in favor of Aon and affirm the partial summary judgment in favor of Pearson.

AFFIRMED.

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[43] *Huff v. Swartz, supra* note 41, 258 Neb. at 829, 606 N.W.2d at 468, quoting Restatement (Second) of Torts § 767, comment *b.* (1979).

[44] See *Huff v. Swartz, supra* note 41.

# First National Bank of Unadilla, Countryside Bank, appellant, v. Jack D. Betts, appellee.

748 N.W.2d 76

Filed May 9, 2008. No. S-07-023.

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. ____: ____. When a district court reverses a county court's judgment and enters findings, a higher appellate court still reviews the county court's judgment for errors appearing on the record.
3. **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.
4. ____: ____. 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.
5. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.
6. **Contracts: Guaranty: Appeal and Error.** To determine the obligations of a guarantor, an appellate court relies on general principles of contract and guaranty law.
7. **Contracts: Guaranty: Intent.** Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given.
8. **Guaranty: Liability.** When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
9. **Contracts: Guaranty: Liability.** The liability of a guarantor is not to be enlarged beyond the strict terms of the contract.
10. **Contracts: Guaranty.** A guaranty, as any other contract, must be interpreted by reference to the entire document, with meaning and effect given to every part of the guaranty whenever possible.

Appeal from the District Court for Nemaha County, Daniel E. Bryan, Jr., Judge, on appeal thereto from the County Court for Nemaha County, Curtis L. Maschman, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

David Watermeier, of Morrow, Poppe, Otte & Watermeier, P.C., L.L.O., for appellant.

Angelo M. Ligouri, of Ligouri Law Office, for appellee.

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

WRIGHT, J.

## NATURE OF CASE

The First National Bank of Unadilla, Countryside Bank (Bank), sought a judgment against Jack D. Betts, based on a guaranty Jack signed for a loan made to his son, Brad M. Betts. The Nemaha County Court entered judgment in favor of the Bank. Jack appealed to the district court for Nemaha County, which reversed the judgment of the county court. The Bank appeals.

## SCOPE OF REVIEW

[1,2] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006). When a district court reverses a county court's judgment and enters findings, a higher appellate court still reviews the county court's judgment for errors appearing on the record. *Thomas Lakes Owners Assn. v. Riley*, 9 Neb. App. 359, 612 N.W.2d 529 (2000).

[3,4] 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. *Stover, supra*. 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. *Id*.

## FACTS

Brad received a loan for $6,200 from the Bank in November 1995. At the time, Brad did not own real estate or have adequate assets to secure the loan, and Jack signed a guaranty for it. On April 27, 1996, Brad renewed the loan in the amount of $7,668.63, and Jack signed a guaranty for the renewal of the loan. Brad renewed the loan for a second time on July 21, 1998, in the amount of $11,951.71. The loan, referred to as "Note #8026," indicated that the security for the loan was a 1988

Dodge pickup and a 1988 Ford Mustang. The guaranty Jack signed for Note #8026 is the subject of this action.

On May 8, 2000, Brad and his wife, Elizabeth R. Betts, took out a loan from the Bank in the amount of $3,900. The loan, referred to as "Note #9200," was not a renewal and was not guaranteed by Jack. Brad and Elizabeth were employed, and their combined annual income was $52,880.

On May 15, 2000, Brad and Elizabeth were issued "Note #9224" in the amount of $19,418.26. The note was a renewal of Notes #8026 and #9200 and was secured by a deed of trust in a house in Lincoln, Nebraska. The note included $5,636.74 owed on Note #8026, $6,751.51 of new funds, $3,911.75 owed on Note #9200, and $3,118.26 for credit disability and joint credit life insurance.

Brad testified that the Bank's vice president, Bruce Hassler, had told him a guaranty from Jack was not needed for Note #9224 because there was enough equity in the house and because Brad and Elizabeth were both employed. Hassler prepared a financial statement which indicated Brad and Elizabeth had a net worth of $23,568. Brad testified that Hassler suggested that Note #8026 from July 1998 and Note #9200 from May 8, 2000, be combined because there was sufficient equity in the home and the parties were employed. The deed of trust and second mortgage on the house were the collateral used by the Bank for Note #9224. Brad stated that Hassler said Brad and Elizabeth could demonstrate creditworthiness based on their income and equity.

On December 17, 2003, the Bank received notification that Brad and Elizabeth's house in Lincoln was to be offered at a trustee's sale. After the Bank received no funds from the sale of the house, it sought to collect from Jack based on the guaranty he signed for Note #8026 in 1998. The Bank alleged that Jack owed $11,951.71 plus interest from and after August 8, 2002, the last date the Bank received a payment from Brad. The Bank claimed that Brad and Elizabeth's failure to make payments constituted a breach of Notes #8026 and #9224 and the personal guaranty.

In his answer, Jack asserted that the obligation under Note #8026 was terminated by Note #9224 and that Note

#9224 was based on Brad and Elizabeth's assets, income, and creditworthiness.

At trial in the county court, Hassler testified that Jack had previously signed guaranties for Brad which had been required because the collateral of the two vehicles given by Brad was not of sufficient value to cover the loans. Hassler stated that Note #8026 renewed a prior note and included credit for $2,445.96 paid on a prior loan. Note #9200 was a bridge loan and was not an addition to or an extension of Note #8026. He said Note #9224 renewed Notes #8026 and #9200 and included additional funds of $6,751.51. Hassler said Note #9224 was intended to pay for home improvements to Brad and Elizabeth's house in Lincoln.

Hassler testified that at the time Note #9224 was executed, neither Brad nor Elizabeth met the Bank's standard of creditworthiness. Hassler claimed the Bank required that the 1998 guaranty on Note #8026 executed by Jack remain in place because Brad had been slow to pay on prior notes and there was not enough collateral when the Bank was "in second position on the house" due to an existing mortgage. Hassler said Brad and Elizabeth never met the Bank's standard of creditworthiness to authorize a new loan without a guaranty. Hassler testified that by March 2000, Brad had "corrected his overdrawn account." Hassler said that to determine whether to grant Note #9224, he prepared and relied on a financial statement based on information provided by Brad and Elizabeth. The Bank understood that Brad planned to make improvements to the house which would place the Bank in a better position. Hassler said that of the $19,000 loaned to Brad and Elizabeth, Jack had guaranteed $12,000, so the Bank was at risk for $7,000.

Jack testified that he guaranteed three loans between Brad and the Bank—in November 1995, April 1996, and July 1998. He did not know the terms and conditions of the July 1998 loan before he executed the personal guaranty. On previous occasions, the Bank had always asked him to sign a new guaranty to go along with a new note, but when Notes #9200 and #9224 were issued in May 2000, no one from the Bank contacted him. He said it was the Bank's prior practice to notify him when Brad renewed a loan. He was not informed that

the Bank intended to extend the guaranty on Note #8026 to Notes #9200 and #9224, and he took no action to revoke the 1998 guaranty.

The county court found that the guaranty for Note #8026 was an absolute unconditional continuing guaranty, which continued unless revoked or until full payment was made and all of Brad and Elizabeth's indebtedness was discharged. The court found that Brad and Elizabeth did not meet the Bank's standard of creditworthiness when they executed Note #9224.

In entering judgment for the Bank, the county court found that the guaranty executed by Jack on Note #8026 was extended by Note #9224. The court found that a default on Note #9224 occurred on December 17, 2003, when a notice of trustee's sale was issued. The court held that Jack had not taken any action to revoke the 1998 guaranty and that he was therefore still liable on the guaranty.

The county court concluded that the Bank was entitled to judgment on the limit of the guaranty in the principal sum of $11,951.71 plus interest at the rate specified in Note #9224 of 10½ percent from and after the last payment date of August 8, 2002, for a total of $5,081.61 as of August 25, 2006. Judgment was entered for the Bank in the total sum of $17,033.32 with interest to accrue on the principal until paid in full.

Jack appealed to the district court. The court found that the guaranty signed by Jack was not ambiguous or vague and that it was an absolute and unconditional guaranty to the Bank of the full and prompt payment when due of Note #8026, dated July 21, 1998, and any extensions, renewals, or replacements of it. However, contrary to the county court's finding, the district court found that the guaranty continued only until there was full payment and discharge of the indebtedness evidenced in Note #8026, its extensions, renewals, or replacements.

The district court concluded that under the terms of the guaranty, the indebtedness guaranteed by Jack did not include any obligations entered into between Brad and Elizabeth and the Bank after Brad and Elizabeth met the Bank's standard of creditworthiness. This standard was based upon Brad and Elizabeth's own assets and income. The court opined that the indebtedness guaranteed by Jack would not extend to Note

#9224 if Brad and Elizabeth met the Bank's standard of creditworthiness when Note #9224 was issued, even though it was a renewal of Note #8026.

The district court found that the Bank failed to prove that Brad and Elizabeth did not meet the Bank's standard of creditworthiness and that it was clear error for the county court to so find. The district court concluded that this failure required a finding that the indebtedness created by Note #9224 was not subject to Jack's guaranty. It reversed the decision of the county court, entered judgment for Jack and against the Bank, and remanded the case to the county court for further proceedings.

## ASSIGNMENTS OF ERROR

The Bank assigns as error: The district court erred and abused its discretion (1) in finding that the Bank failed to provide sufficient evidence to show that Brad did not qualify for the May 15, 2000, note on his own creditworthiness and (2) in holding that Jack was no longer liable under the terms of the guaranty because the Bank failed to sufficiently define its standard of creditworthiness.

## ANALYSIS

The issue in this case is framed by the terms of the written guaranty signed by Jack on July 21, 1998. Jack guaranteed to the Bank the payment of Note #8026 and any extensions, renewals, or replacements referred to as "indebtedness." The guaranty provided that the term "indebtedness" shall not include "any obligations entered into between Borrower and Lender after the date" of the guaranty, including any extensions, renewals, or replacements of such obligations "for which Borrower meets the Lender's standard of creditworthiness based on Borrower's own assets and income without the addition of a guaranty." The guaranty stated:

> No act or thing need occur to establish the liability of the [guarantor], and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the [guarantor] or modify, reduce, limit or release the liability of the [guarantor].
>
> . . . .

> . . . The liability of the [guarantor] shall be limited to a principal amount of $11,951.71 . . . plus accrued interest thereon . . . .

As framed by the terms of the guaranty, the issue is whether Brad and Elizabeth were creditworthy at the time they signed Note #9224. If Brad and Elizabeth were creditworthy, we must consider whether Note #9224 absolved Jack of any of the liability described in the guaranty.

[5-10] A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005). To determine the obligations of the guarantor, this court relies on general principles of contract and guaranty law. *Id*. Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given. *Id.* When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms. *Eagle Run Square II v. Lamar's Donuts Internat.*, 15 Neb. App. 972, 740 N.W.2d 43 (2007), citing *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). The liability of the guarantor is not to be enlarged beyond the strict terms of the contract. *Eagle Run Square II, supra*, citing *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988). A guaranty, as any other contract, must be interpreted by reference to the entire document, with meaning and effect given to every part of the guaranty whenever possible. *Knox, supra*.

### Brad and Elizabeth Met Standard of Creditworthiness

The guaranty provided that the standard of creditworthiness was to be based on Brad's "own assets and income without the addition of a guaranty." There was no further definition of creditworthiness. The Bank's own financial statement showed that Brad and Elizabeth had sufficient net worth to cover the debt owed to the Bank. The Bank also took a deed of trust on the home owned by Brad and Elizabeth.

Based on the financial statement prepared by the Bank, Brad and Elizabeth's net worth exceeded the amount of the new loan. The financial statement showed that Brad and Elizabeth had a

net worth of $23,568. His annual income was $30,000, and hers was $22,880. According to the financial statement, the home had a fair market value of $77,000 subject to a first mortgage of $63,500. The new note, #9224, included $9,550 of previous debt which was included on the liability side of the financial statement. In effect, the Bank was lending Brad and Elizabeth approximately $10,000 in new money.

We conclude that the county court was clearly wrong in finding that Brad and Elizabeth did not meet the Bank's standard of creditworthiness. The guaranty limited its creditworthiness requirement to the assets and income of the borrower, and there is no evidence to support the conclusion that Brad was not creditworthy. The couple's net worth exceeded the amount of the new loan, and about one-half of the existing debt was already listed on the liability side of the financial statement.

On appeal, the Bank argues that its determination of creditworthiness is a subjective standard which the Bank can employ. It asserts that "late payments and encumbrances are necessary factors in determining a borrower's assets and income." Brief for appellant at 14. However, the guaranty itself did not provide that the Bank could subjectively determine a borrower's creditworthiness. The guaranty specifically stated that the standard of creditworthiness was based on the borrower's own assets and income without the addition of a guaranty.

Based on this language, if the assets and income of the borrowers, Brad and Elizabeth, demonstrated creditworthiness, no guaranty would be needed. The Bank prepared a financial statement for Brad and Elizabeth that showed their net worth to be more than the amount of the note. In addition, the note included prior loan amounts that were also listed as liabilities in the financial statement. Thus, Brad and Elizabeth demonstrated their creditworthiness.

### Liability of Jack as Guarantor

Having determined that Brad and Elizabeth were creditworthy at the time they signed Note #9224, we proceed to consider whether the note released Jack from all liability.

When Note #9224 was signed, $5,636.74 remained on Note #8026, which was subject to Jack's guaranty. If Brad and Elizabeth were not creditworthy when Note #9224 was executed, Jack's liability on the guaranty would have increased to the guaranty's limit of $11,951.71 principal, plus all interest that accrued thereon. The county court determined that Jack's liability had been increased to $11,951.71 by Note #9224, and it entered judgment accordingly.

The question is whether Note #9224, which included $5,636.74 of existing indebtedness covered by the guaranty, extinguished Jack's liability because all new indebtedness was based upon Brad and Elizabeth's creditworthiness. The guaranty provided that if Brad entered into subsequent obligations for which he was creditworthy, then such obligations were not included as indebtedness of the guaranty.

We conclude that Note #9224 did not relieve Jack of liability for the $5,636.74 which existed under the guaranty at the time Note #9224 was executed. Any new indebtedness would not be Jack's responsibility under the guaranty because Brad and Elizabeth were creditworthy. The guaranty was not subject to any subsequent indebtedness for which Brad met the Bank's standard of creditworthiness.

However, the guaranty also provided that no act except full payment and discharge of all indebtedness shall release Jack's liability under the guaranty. At the time Note #9224 was executed, existing indebtedness of $5,636.74 had not been paid. Thus, although no new indebtedness was subject to the guaranty, Note #9224 did not discharge the existing liability.

If we were to conclude that Note #9224 eliminated all liability under the guaranty, as the district court so determined, we would have to ignore the provision of the guaranty stating that no act except full payment and discharge of all indebtedness shall release the liability of the guarantor. The indebtedness of $5,636.74 has not been paid, and Jack remains liable for this amount plus accrued interest on such principal amount. Note #9224 did not increase the amount of the existing indebtedness, but $5,636.74 is still subject to the

guaranty, and as to this part of the debt, the Bank may look to Jack for payment.

## CONCLUSION

The judgment of the district court is affirmed in part and in part reversed, and the cause is remanded with directions to enter judgment in favor of the Bank and against Jack in the amount of $5,636.74 plus interest from August 8, 2002.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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# GOOD SAMARITAN COFFEE COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. LARUE DISTRIBUTING, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS LARUE COFFEE, ET AL., APPELLANTS.

748 N.W.2d 367

Filed May 9, 2008. No. S-07-300.

1. **Arbitration and Award.** Whether a stay of proceedings should be granted and arbitration required 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. **Arbitration and Award: Waiver: Appeal and Error.** The legal determination of waiver of arbitration is reviewed de novo, and the factual findings underlying that ruling are reviewed for clear error.
4. **Federal Acts: Arbitration and Award: Contracts.** The Federal Arbitration Act applies to contracts evidencing a transaction involving commerce.
5. **Federal Acts: Arbitration and Award: Intent: Words and Phrases.** The phrase "evidencing a transaction" in the Federal Arbitration Act has been construed to include transactions involving interstate commerce even where the parties did not contemplate an interstate commerce connection.
6. **Arbitration and Award: Waiver: Presumptions: Intent.** A waiver defense raised in the context of prior litigation- related activity is presumed to be decided by a court, rather than an arbitrator. And shifting of this issue to an arbitrator is only proper where there is clear and unmistakable evidence of such an intent in the parties' arbitration agreement.
7. **Arbitration and Award: Waiver.** There is a liberal federal policy favoring arbitration; nevertheless, the right to arbitration may be waived.
8. ____: ____. A party seeking arbitration may be found to have waived its right to arbitration if it (1) knew of an existing right to arbitration, (2) acted inconsistently with that right, and (3) prejudiced the other party by these inconsistent acts.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

John C. Nimmer and Michael T. Levy for appellants.

Mark A. Weber and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

GERRARD, J.

Good Samaritan Coffee Company (Good Samaritan) filed a complaint against the defendants, alleging breach of contract and tortious interference with a business relationship. The contract at issue contained an arbitration clause. More than 3 years after Good Samaritan filed its original complaint, the defendants filed a motion to stay the case and compel arbitration. The district court denied the defendants' motion, finding that the defendants had waived their right to arbitration by actively litigating the present case. The primary issue presented in this appeal is whether the question of waiver based on litigation activity should be decided by a court or an arbitrator. Because the district court correctly determined that this particular waiver question should be decided by a court rather than an arbitrator, we affirm.

## FACTS

Good Samaritan is located in Omaha and Fremont, Nebraska, and is involved in the distribution of "green" or unprocessed coffee beans. Good Samaritan entered into several "'Green Coffee Contracts'" with LaRue Distributing, Inc., doing business as LaRue Coffee, wherein Good Samaritan agreed to provide coffee beans to LaRue Distributing.

The record reflects that in order for Good Samaritan to meet the requirements of these contracts, it must "purchase . . . green, raw, unprocessed coffee beans from sources outside of the continental United States" and have the beans shipped to Nebraska. Once Good Samaritan receives the beans, the beans are "roasted, blended[,] processed[,] and packaged and sold to

LaRue Coffee," which in turn sells the products to various customers in other states.

Each of the "'Green Coffee Contracts'" contained a provision incorporating the terms and conditions of a separate contract entitled "Green Coffee Association Contract Terms and Conditions." This latter contract contains a section relating to the arbitration of disputes. The section provides in relevant part:

> All controversies relating to, in connection with, or arising out of this contract . . . shall be settled by arbitration in accordance with the "Rules of Arbitration" of the Green Coffee Association . . . . Arbitration is the sole remedy hereunder, and it shall be held in accordance with the law of New York State, and judgment of any award may be entered in the courts of that State, or in any other court of competent jurisdiction.

With regard to "Time Limits for Arbitration," the contract provides that "[a]ll **technical arbitrations** must be filed within one (1) year of the date that the controversy arose."

In a letter dated May 28, 2002, LaRue Distributing terminated its relationship with Good Samaritan. On December 16, 2003, Good Samaritan filed a complaint against LaRue Distributing; Midwest Custom Roasting, Inc.; and Verlyn L'Heureux and Mark Wunderlich, individuals who are principals in LaRue Distributing and Midwest Custom Roasting (collectively LaRue). In its complaint, Good Samaritan alleged breach of contract and tortious interference with a business relationship. On April 7, 2004, Good Samaritan filed an amended complaint, attaching the terms-and-conditions contract.

LaRue filed an answer and counterclaim on May 10, 2004, and filed an amended answer and counterclaim on March 6, 2006. LaRue did not assert the right to compel arbitration as an affirmative defense in either of its answers. In its counterclaim, LaRue sought a judgment against Good Samaritan for $19,000 that Good Samaritan allegedly owed LaRue. On January 5, 2007, nearly 3 years after Good Samaritan filed its original complaint, LaRue filed a motion to stay trial and compel arbitration.

At the hearing on LaRue's motion to stay trial and compel arbitration, counsel for LaRue asked the court "to take judicial

notice of the pleadings in this matter" and of the exhibits attached to the pleadings. In response, the judge stated that

> the [c]ourt will also note that at a motion for partial summary judgment [hearing,] the [c]ourt took judicial notice of the [c]ourt file at that time, including the pleadings; and therefore, to the extent . . . a record is being made, the [c]ourt will again take judicial notice of the [c]ourt file.

Following the hearing, the district court entered an order denying LaRue's motion to stay trial and compel arbitration.

In so doing, the court found that a court, rather than an arbitrator, had authority to determine whether a party has waived its right to arbitration. The court then determined that under the facts of this case, LaRue had waived its right to arbitration. The court noted that since the time Good Samaritan filed its complaint, LaRue had exchanged pleadings, filed a counterclaim, engaged in years of discovery, and filed and received a ruling on its own motion for partial summary judgment. The court explained that LaRue's conduct in this case evidenced LaRue's "intent to litigate this matter before the [c]ourt in lieu of arbitration." LaRue appealed.

## ASSIGNMENT OF ERROR

LaRue's sole assignment of error is that the district court erred in denying its motion to stay trial and compel arbitration.

## STANDARD OF REVIEW

[1,2] Whether a stay of proceedings should be granted and arbitration required is a question of law.[1] When reviewing questions of law, this court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[2]

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[1] *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[2] *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007).

[3] The legal determination of waiver of arbitration is reviewed de novo, and the factual findings underlying that ruling are reviewed for clear error.[3]

## ANALYSIS

*Federal Arbitration Act Applies to Contracts at Issue.*

[4] We must first address whether the Federal Arbitration Act[4] (FAA) applies to this case. The FAA created a body of federal substantive law that applies to certain arbitration agreements.[5] The FAA applies to a contract "evidencing a transaction involving commerce."[6] "Commerce" as defined in the FAA includes "commerce among the several States."[7] The U.S. Supreme Court has given the FAA an expansive scope by broadly construing the phrase "'a contract *evidencing a transaction* involving commerce.'"[8]

[5] The Court has held that the phrase "'involving commerce'" requires a broad interpretation in order to give effect to the FAA's basic purpose, which is to put arbitration provisions on the same footing as a contract's other terms.[9] The Court has further explained that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full."[10] The statutory phrase "'evidencing a transaction'" has been construed by the Court to include transactions involving interstate commerce even where the parties did not contemplate an interstate commerce connection.[11]

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[3] See, *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085 (8th Cir. 2007); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102 (2d Cir. 2002).

[4] 9 U.S.C. § 1 et seq. (2000).

[5] See *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

[6] 9 U.S.C. § 2.

[7] 9 U.S.C. § 1.

[8] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

[9] *Id.*

[10] *Id.*

[11] *Id.*

Given this broad interpretation of the phrase "involving commerce" in 9 U.S.C. § 2, it is clear that the contracts at issue in this case come within the scope of the FAA. The undisputed evidence in the record reflects that in order for Good Samaritan to meet its contractual obligations to LaRue, Good Samaritan had to purchase coffee beans from sources outside of the continental United States. And once the coffee beans were purchased, the beans were shipped to Good Samaritan in Nebraska, where Good Samaritan processed and sold the beans to LaRue. Thus, the FAA applies and questions relating to LaRue's motion to compel arbitration implicate federal law.

*Court Shall Decide Issue of Waiver Based on Litigation-Related Conduct.*

Next, we address whether a court or an arbitrator should decide if a party has waived its right to arbitrate when the waiver allegation is based on that party's litigation-related activity. The U.S. Supreme Court, in *Howsam v. Dean Witter Reynolds, Inc.,*[12] has set forth the rules that govern the allocation of functions between a court and an arbitrator. In that case, the Court held that the question whether an arbitration claim was barred by a 6-year limitations period embedded in the arbitration rules under which the parties had agreed to arbitrate was an issue for the arbitrator and not for the court.[13] The Court acknowledged that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i. e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"[14]

The Court began its analysis by discussing the role of judges in resolving issues related to arbitration. The Court stated that "'question[s] of arbitrability,'" which are presumptively for the court to decide, are limited to gateway disputes that the

> contracting parties would likely have expected a court to have decided . . . , where they are not likely to have thought

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[12] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

[13] *Id.*

[14] *Id.* at 83.

> that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[15]

The Court noted that at least two types of question were presumptively for a court to decide: first, "whether the parties are bound by a given arbitration clause," and second, "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[16]

On the other hand, "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide."[17] "So, too," the Court continued, "the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'"[18] The Court stated that these are the types of question that "parties would likely expect that an arbitrator would decide."[19]

The Court concluded that the applicability of the 6-year limitations rule was a matter "presumptively for the arbitrator, not for the judge."[20] The Court noted that the time limit rule in *Howsam* "closely resembles the gateway questions that th[e] Court has found not to be 'questions of arbitrability.'"[21] The Court explained that the arbitrators were "comparatively more expert about the meaning of their own rule" and were "comparatively better able to interpret and to apply" the rule and that therefore, it was "reasonable to infer that the parties intended the agreement to reflect that understanding."[22] Moreover, the

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[15] *Id.* at 83-84.

[16] *Id.* at 84.

[17] *Id.* (emphasis in original).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 85.

[21] *Id.* See, e.g., *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

[22] *Howsam v. Dean Witter Reynolds, Inc., supra* note 12, 537 U.S. at 85.

Court reasoned that a goal of arbitration and judicial systems alike is "to secure a fair and expeditious resolution of the underlying controversy."[23] And a law assuming an expectation that aligns decisionmakers with comparative expertise will further this goal.[24]

In the present case, LaRue contends, relying on the Court's statements relating to waiver in *Howsam*, that Good Samaritan's waiver defense should be resolved by an arbitrator and not a court. Viewed in isolation, the Court's statement in *Howsam* that "the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability'" does provide general support for LaRue's position here.[25] However, since the Court's decision in *Howsam*, several courts have squarely addressed the issue now raised by LaRue in the present case. And these courts have persuasively concluded that when this language from *Howsam* is properly considered within the context of the entire opinion, it is clear that the Court was referring only to waiver, delay, or like defenses arising from noncompliance with contractual conditions precedent to arbitration, such as the particular time limit rule at issue in *Howsam*, and not to claims of waiver based on active litigation in courts, as is the situation in the present case.[26]

In finding that the question of waiver based on litigation conduct is a decision presumptively for a judge rather than an arbitrator, courts have noted that this type of determination has historically been made by the courts. For example, both the First and Third Circuit Courts of Appeal have explained that questions of waiver based on litigation conduct have long been decided by the courts. The First Circuit observed, in *Marie v. Allied Home Mortgage Corp.*,[27] that the "overwhelming weight

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 84.

[26] See, *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (1st Cir. 2005); *Parler v. KFC Corp.*, 529 F. Supp. 2d 1009 (D. Minn. 2008); *Ocwen Loan Servicing, LLC v. Washington*, 939 So. 2d 6 (Ala. 2006).

[27] *Marie v. Allied Home Mortgage Corp., supra* note 26, 402 F.3d at 12.

of pre-*Howsam* authority . . . held that waiver due to litigation conduct was generally for the court and not for the arbitrator" to decide. And in *Ehleiter v. Grapetree Shores, Inc.*,[28] the Third Circuit similarly concluded that "the Supreme Court did not intend its pronouncements in *Howsam* . . . to upset the 'traditional rule' that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigating the case in court."

The statutory language of the FAA provides further support for the holding that waiver based on litigation conduct be decided by a court, rather than an arbitrator. In the present case, LaRue filed a motion to stay trial and compel arbitration pursuant to 9 U.S.C. § 3. Under 9 U.S.C. § 3, a court is only permitted to stay a court action pending arbitration if "the applicant for the stay is not in default in proceeding with such arbitration." And in this context, courts have generally interpreted the term "default" to include waiver.[29] Thus, in cases where a stay is requested, the plain language of 9 U.S.C. § 3 appears to place a statutory command on courts to decide the issue of waiver themselves.[30]

Several other reasons persuade us to find that a court, as opposed to an arbitrator, should decide waiver issues due to litigation-related activities. As already noted, the Supreme Court in *Howsam* stressed the importance of considering the "comparative expertise" of a decisionmaker when evaluating whether a court or arbitrator should be making the determination.[31] When considering the "comparative expertise" of courts and arbitrators, it becomes clear that a court, not an arbitrator, is better suited to address questions of waiver based on litigation-related activity.

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[28] *Ehleiter v. Grapetree Shores, Inc., supra* note 26, 482 F.3d at 217-18.

[29] See, e.g., *Marie v. Allied Home Mortgage Corp., supra* note 26; *Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309 (11th Cir. 2002); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1976).

[30] See, *Ehleiter v. Grapetree Shores, Inc., supra* note 26; *Marie v. Allied Home Mortgage Corp., supra* note 26.

[31] *Howsam v. Dean Witter Reynolds, Inc., supra* note 12, 537 U.S. at 85.

At the time the question of litigation-related waiver arises, the trial judge has already been directly involved in the course of the legal proceedings to that point and is better positioned to determine whether such conduct amounts to a waiver under applicable law.[32] And more fundamentally, given that "the inquiry into whether a party has waived its right to arbitrate by litigating the case in court 'heavily implicates "*judicial* procedures,"'" a "court should remain free to 'control the course of proceedings before it and to correct abuses of those proceedings,' rather than being required to defer to the findings [of] an arbitrator with no previous involvement in the case."[33] Furthermore, because the question of litigation-related waiver necessarily involves matters occurring in the judicial forum, it is reasonable to believe that the contracting parties would expect a court to decide whether one party's actions before that court waived the right to arbitrate.[34]

Finally, requiring that waiver claims due to litigation-related activity be sent to the arbitrator would be exceptionally inefficient.[35] If such claims were presented to the arbitrator, and the arbitrator determined that the defendant had waived its right to arbitrate, then the cases would inevitably return to the court from which they began, without any progress' having been made toward resolution of the underlying claims. Allowing courts to decide litigation-related waiver claims furthers a primary purpose of the FAA, which is to permit speedy resolution of disputes.[36]

[6] Given the considerations of, among other things, comparative expertise and judicial economy, we hold that a waiver defense raised in the context of prior litigation-related activity is presumed to be decided by a court, rather than an arbitrator. And shifting of this issue to an arbitrator is only proper

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[32] See *Ehleiter v. Grapetree Shores, Inc., supra* note 26. See, also, *Marie v. Allied Home Mortgage Corp., supra* note 26.

[33] *Ehleiter v. Grapetree Shores, Inc., supra* note 26, 482 F.3d at 218.

[34] See *id.*

[35] *Marie v. Allied Home Mortgage Corp., supra* note 26.

[36] See, e.g., *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

where there is "'clea[r] and unmistakabl[e] evidence'" of such an intent in the parties' arbitration agreement.[37] The arbitration agreement at issue in this case fails to meet this standard. LaRue does not contend, nor does our review of the language in the arbitration agreement reveal, a clear and unmistakable intent to have an arbitrator decide the issue of waiver based on litigation-related conduct. Accordingly, the question whether LaRue waived its right to arbitrate due to its participation in the present litigation was properly for the district court.

*LaRue Waived Its Right to Arbitrate.*

Having determined that it is for a court to decide whether LaRue waived its right to arbitration based on its active participation in the present litigation, we next address whether the district court erred in finding that LaRue waived its right to arbitrate. The legal determination of waiver of arbitration is reviewed de novo, and the factual findings underlying that ruling are reviewed for clear error.[38]

[7,8] There is a liberal federal policy favoring arbitration, grounded in the FAA, which provides that contract provisions directing arbitration shall be enforceable in all but limited circumstances.[39] Despite this strong federal policy favoring arbitration, the right to arbitration may be waived.[40] A party seeking arbitration may be found to have waived its right to arbitration if it "'(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts.'"[41] Each of these factors strongly weighs in favor of a finding that LaRue has waived its right to arbitration in this case.

LaRue does not contend, nor is there any evidence in the record to suggest, that LaRue was unaware of its right to

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[37] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

[38] See, *Lewallen v. Green Tree Servicing, L.L.C., supra* note 3; *Thyssen, Inc. v. Calypso Shipping Corp., S.A., supra* note 3.

[39] See *Moses H. Cone Hospital v. Mercury Constr. Corp., supra* note 21.

[40] *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156 (5th Cir. 1986).

[41] *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003).

arbitrate this dispute; indeed, LaRue now seeks to invoke that right. Nor is there any evidentiary basis explaining why LaRue failed to assert its right to arbitrate when it filed its answer in 2004 and amended answer in 2006. Accordingly, absent any evidence to the contrary, we cannot say that LaRue was unaware of its right to arbitrate. LaRue argues, however, that there is insufficient evidence in the record to indicate that it acted inconsistently with its right to arbitrate and no evidence that Good Samaritan was prejudiced.

A party, however, acts inconsistently with its right to arbitrate if the party "'"[s]ubstantially invoke[s] the litigation machinery" before asserting its arbitration right' by failing to request a stay and fully adjudicating its rights."[42] A party is considered to have substantially invoked the litigation machinery when, for example, "it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner."[43] The district court, in finding that LaRue acted inconsistently with its right to arbitrate, observed that over the course of this litigation, LaRue served three sets of written discovery on Good Samaritan, exchanged pleadings, filed a counterclaim, and filed and received an unfavorable ruling on a motion for partial summary judgment.

LaRue does not deny that it engaged in the discovery process as set forth in the district court's order or that it filed and received an unfavorable judgment on its motion for partial summary judgment. LaRue contends, however, that the record on appeal does not contain any evidence relating to the parties' discovery activities or certain pretrial motions and that therefore, the evidence is insufficient to support Good Samaritan's allegation of waiver.

LaRue is partially correct that the record on appeal does not include evidence addressing the parties' discovery activities. But, contrary to LaRue's assertion, the record does show from the judge's own comments that a motion for partial summary judgment was filed by LaRue and overruled by the court. Notwithstanding the lack of evidence relating to the parties'

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[42] *Id.*

[43] *Lewallen v. Green Tree Servicing, L.L.C., supra* note 3, 487 F.3d at 1090.

discovery activities, there is nonetheless sufficient evidence in the record to find that LaRue acted inconsistently with its right to arbitrate.

Over 3 years passed between the time Good Samaritan filed its initial complaint and the time LaRue, at last, raised its motion to stay trial and compel arbitration. During this 3-year period, the record indicates that LaRue actively participated in the litigation. LaRue filed a counterclaim against Good Samaritan seeking to recover funds that Good Samaritan allegedly owed LaRue. Moreover, LaRue acted inconsistently with its right to arbitrate by filing a motion for partial summary judgment, requiring Good Samaritan to defend its claims on the merits and requesting resolution of the matter in a judicial forum. And it was not until after the court ruled against LaRue on its motion for partial summary judgment that LaRue ultimately filed its motion to compel arbitration. This conduct by LaRue evidences a clear intent to assent to the judicial resolution of the dispute and is entirely inconsistent with its right to arbitrate.

The record also supports a finding that Good Samaritan was prejudiced by LaRue's inconsistent acts.

> Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or [prejudice] can be found when a party too long postpones . . . invocation of [its] contractual right to arbitration, and thereby causes [its] adversary to incur unnecessary delay or expense.[44]

Here, as already noted, LaRue did not file its motion to compel arbitration until after it had received an unfavorable ruling on its motion for partial summary judgment. Moreover, LaRue's conduct had the inevitable effect of causing Good Samaritan to expend substantial time and resources in connection with this case.

And to allow LaRue to now invoke its right to arbitration after such an extensive delay would undercut the very rationale—speed and efficiency—that supports the strong presumption in favor of arbitration in the first place.[45] The evidence

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[44] *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991).

[45] See *id.*

in this record demonstrates the prejudice necessary to support the district court's ruling that LaRue has waived its right to arbitration.

LaRue claims, however, that Good Samaritan was not prejudiced in this case because Good Samaritan allegedly did not have a right to initiate litigation in the first place. LaRue's argument is based on the language in the contract discussing the time limits for initiating an arbitration claim. This provision provides, in relevant part, that "[a]ll **technical arbitrations** must be filed within one (1) year of the date that the controversy arose." LaRue claims that because Good Samaritan filed its complaint more than 1 year after "the controversy arose," Good Samaritan would not be prejudiced by referring this matter to an arbitrator, because Good Samaritan failed to comply with this time limit and, therefore, did not have the right to initiate litigation in the first place.

LaRue's argument, however, assumes an incorrect premise. In order for LaRue's argument to be valid, the assumption must be made that LaRue has not waived its right to arbitration. However, as discussed above, LaRue has waived its right to arbitrate Good Samaritan's claims. Therefore, the contractual provision requiring that technical arbitrations be filed within 1 year is irrelevant to our analysis.

We conclude that LaRue has waived its right to arbitrate Good Samaritan's claim because LaRue knew of its right to arbitrate and acted inconsistently with that right and because as a result, Good Samaritan was prejudiced.

## CONCLUSION

The question whether a party has waived its right to arbitrate due to litigation-related activity is an issue presumptively for a court to decide and not an arbitrator. The district court did not err in determining that LaRue waived its right to arbitrate by actively participating in the underlying proceedings before the court.

AFFIRMED.

# SAM L. MOYER, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

747 N.W.2d 924

Filed May 9, 2008. No. S-07-884.

1. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction of the Department of Motor Vehicles is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.
2. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Affidavits: Words and Phrases.** Sworn reports in administrative license revocation proceedings are, by definition, affidavits.
3. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
4. **Affidavits: Proof: Public Officers and Employees.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
5. ____: ____: ____. An affidavit does not require a notary to confirm the truth of the facts stated in the affidavit; rather, the certificate, also known as a jurat, confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.
6. **Affidavits: Oaths and Affirmations: Police Officers and Sheriffs: Proof.** Oaths to affidavits ordinarily are not required to be administered with any particular ceremony, but the affiant must perform some corporal act before the officer whereby the affiant consciously takes upon himself or herself the obligation of an oath. The signature of the officer is a corporal act which is generally sufficient to meet the requirement of execution under oath.

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

Jon Bruning, Attorney General, and Kevin J. Edwards for appellant.

Arthur S. Wetzel, of Anderson, Vipperman, Kovanda & Wetzel, for appellee.

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

HEAVICAN, C.J.

## INTRODUCTION

The sole question presented by this appeal is whether the Nebraska Department of Motor Vehicles (DMV) had jurisdiction to revoke the driver's license of Sam L. Moyer when the arresting officer was not placed under oath prior to signing the sworn report initiating the administrative license revocation process.

## FACTS

The underlying facts of this case are not in dispute. On February 9, 2007, Deputy Sheriff Thea Edmunds responded to a motor vehicle accident in Hamilton County, Nebraska. Upon arriving at the scene, Edmunds encountered Moyer. Edmunds detected the odor of alcohol on Moyer and requested that he take a preliminary breath test. Moyer refused. Moyer was then arrested for driving under the influence and was transported to the Hamilton County sheriff's office, where he was asked to take a breath test. Moyer again refused.

After Moyer refused to submit to the breath test, Edmunds filled out a sworn report pursuant to Neb. Rev. Stat. § 60-498.01 (Reissue 2004). Edmunds completed the form, which provided in relevant part:

> The undersigned officer(s) hereby swear(s) that the above-named individual was arrested pursuant to Neb. Rev. Stat. § 60-6,197, and the reasons for the arrest are: I responded to an accident where . . . Moyer was the driver. A strong odor of alcohol came from his person. Moyer refused PBT as well as chem. test of his breath from the DataMaster.

Edmunds checked the box on the report which indicated that Moyer had "[**r**]**efused** to submit to the test." The report also contains Edmunds' signature, as well as a notation stating that the signature was "acknowledged" before a notary public. This report was then forwarded to the DMV.

Moyer requested an administrative hearing, which was held on March 5, 2007. At that hearing, Edmunds testified regarding the events surrounding Moyer's arrest. The following exchange was had between Edmunds and Moyer's counsel regarding Edmunds' signature on the sworn report:

> [Moyer's counsel:] When you signed that copy, did [the notary public] place you under oath? . . .
>
> . . . .
>
> [Edmunds:] No.
>
> Q Now, when you signed that document, you didn't — you weren't acknowledging an oath either, were you? You were simply signing that in the presence of the notary, is that correct?
>
> A I guess . . . . I guess we take that for granted. I don't know, but all she is stating is that that is my signature.
>
> Q Right. And there was nothing about your signing of that that indicated that you were going to take an oath. It's simply that you were signing it in her presence, is that correct?
>
> A I believe so.

Following the hearing, Moyer's driver's license was revoked. Moyer appealed the revocation to the district court, which reversed the revocation and ordered the DMV to reinstate Moyer's license. The district court reasoned that "the sworn report was never sworn because the notary public did not put the arresting officer under oath." As such, the district court concluded that the sworn report did not confer jurisdiction on the DMV to revoke Moyer's license. The district court ordered the DMV to reinstate Moyer's license. The DMV appeals.

## ASSIGNMENT OF ERROR

On appeal, the DMV contends that the district court erred in finding that the report detailing Moyer's arrest was not sworn under § 60-498.01 and was therefore insufficient to confer jurisdiction on the DMV to revoke Moyer's license.

## STANDARD OF REVIEW

[1] Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the DMV is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.[1]

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[1] See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

## ANAYLSIS

*DMV's Argument on Appeal.*

On appeal, the DMV contends that the district court erred in concluding that Edmunds needed to be placed under oath before signing the sworn report. The question presented by this assignment of error is whether a sworn report complied with § 60-498.01 and vested the DMV with jurisdiction when the arresting officer's signature was "acknowledged" rather than "sworn."

[2-6] This court has previously noted that sworn reports in administrative license revocation proceedings are, by definition, affidavits.[2] An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.[3] An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.[4] An affidavit does not, however, require a notary to confirm the truth of the facts stated in the affidavit; rather, the certificate, also known as a jurat, confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.[5] Oaths to affidavits ordinarily are not required to be administered with any particular ceremony, but the affiant must perform some corporal act before the officer whereby the affiant consciously takes upon himself or herself the obligation of an oath.[6] The signature of the officer is a corporal act which is generally sufficient to meet the requirement of execution under oath.[7]

In this case, Edmunds signed the report and the report was notarized. Edmunds testified that she signed the report in the

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[2] *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[3] *Id.*

[4] *Id.*

[5] See *id.*

[6] See, *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

[7] See *Moore, supra* note 6.

presence of the notary. No other action was required by either Edmunds or the notary. The notary was not required to confirm the truth of the statements; the very fact that Edmunds signed the report in the presence of a notary and that her signature was in fact notarized was sufficient as an oath or affirmation.

Moyer argues that Edmunds' testimony indicates that at the time Edmunds signed the report, "she did not have any conscious notion that she was 'swearing' to the contents of the document or that she was taking an oath of any sort."[8] We disagree with Moyer's characterization of Edmunds' testimony. Moreover, we note that the report itself states that "[t]he undersigned officer(s) hereby swear(s) . . . ." Such is a clear and objective indication that Edmunds was aware at the time she signed the report that she was swearing to the contents of the report.

We have previously addressed the converse argument to the one presented by this case. In *In re Interest of Fedalina G.*,[9] the State argued that a "poverty affidavit was defective because the acknowledgment recited that the affidavit was 'subscribed and sworn' to before the notary, and not 'acknowledged.'" This court rejected that argument, concluding that an affidavit was a written declaration made under oath and that the notary's certificate "confirms that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit."[10]

We therefore conclude that the district court erred by finding that because the report stated the notary acknowledged Edmunds' signature rather than swearing and subscribing that signature, the DMV lacked jurisdiction to revoke Moyer's license.

*Moyer's Purported Cross-Appeal.*

In his brief, Moyer argues that "Edmunds' report did not contain sufficient reasoning to justify Edmunds' request that Moyer submit to a test of his blood-alcohol level."[11] However,

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[8] Brief for appellee at 8.

[9] *In re Interest of Fedalina G.*, 272 Neb. 314, 319, 721 N.W.2d 638, 643 (2006).

[10] *Id.*

[11] Brief for appellee at 13.

we decline to reach that argument, as Moyer failed to properly assert a cross-appeal in this case. Contrary to Neb. Ct. R. of Prac. 9D(4) (rev. 2006), Moyer's brief fails to note any cross-appeal on the cover of his brief, nor is his argument set forth in a separate division of the brief. Moreover, his brief includes no assignments of error.

## CONCLUSION

We conclude that the district court erred in finding that the DMV lacked jurisdiction to revoke Moyer's license. We therefore reverse the order of the district court and remand the cause with directions to reinstate the administrative revocation of Moyer's driver's license.

REVERSED.

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MARY ELIZABETH WAGNER, APPELLEE, V.
JAMES BRIAN WAGNER, APPELLANT.

749 N.W.2d 137

Filed May 16, 2008. No. S-06-427.

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. **Courts: Appeal and Error.** Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Nebraska Court of Appeals.
3. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
4. **Courts: Records.** Trial courts, and the clerks of those courts, should not file stamp any court-issued document that is not meant to take legal effect.
5. **Judgments: Final Orders: Records.** Court-issued findings that direct a party to prepare a final order memorializing those findings, and to submit that order to an opposing party for approval before submitting it to the court, are not a final determination of the rights of the parties and do not become a final order or judgment if file stamped.
6. ____: ____: ____. There must first be a final determination of the rights of the parties before there is a judgment to be either rendered or entered.
7. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Hall County, JAMES D. LIVINGSTON, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Kevin A. Brostrom and Stacie A. Goding, of Lauritsen, Brownell, Brostrom, Stehlik, Myers & Daugherty, P.C., L.L.O., for appellee.

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

GERRARD, J.

The question presented in this appeal is whether the trial court's file-stamped letter memorandum to the parties, directing the plaintiff to prepare a final decree, was itself a final judgment.[1] The Nebraska Court of Appeals determined that it was, and dismissed an appeal taken after the entry of the final decree, reasoning that the notice of appeal was untimely.[2]

This case illustrates why trial courts should take care to ensure that regardless of how a final judgment is prepared, only the signed final order is filed with the clerk of the court.[3] The clerk should not file stamp any document prepared by the trial court that is not a court order intended to have legal effect. But a filing that does not finally dispose of a case does not become a final, appealable order just because it is file stamped, and the trial court's order in this case was clearly not meant to be a final determination of the rights and liabilities of the parties. Therefore, we conclude that the letter in this case was not a final, appealable order, and reverse the decision of the Court of Appeals.

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[1] See Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2006).

[2] See *Wagner v. Wagner*, 16 Neb. App. 328, 743 N.W.2d 782 (2008), citing Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

[3] See *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

## PROCEDURAL HISTORY

This case began with Mary Wagner's petition to dissolve her marriage to James Wagner. The parties reached an agreement on child custody and support, and other miscellaneous issues, but the case proceeded to trial on the valuation and division of the marital estate, alimony, and attorney fees. Trial was held on August 22 and December 7, 2005.

A letter from the trial judge dated January 10, 2006, was sent to the parties, and file stamped on January 11. The letter stated that "[b]y this letter I am rendering decision on the trial of this matter." The letter directed Mary's counsel to draft a decree incorporating the judge's findings, submit it to James' counsel for approval, and then submit it to the court. The letter incorporated the previous stipulation of the parties as to child custody, and made several specific findings with respect to the valuation and division of the marital estate. The letter also awarded alimony and attorney fees. But the letter did not make any jurisdictional findings with respect to the dissolution of the marriage,[4] nor did it make the required finding that the marriage was irretrievably broken.[5] And the letter did not, in point of fact, order the marriage dissolved.

Instead, as directed by the court, a decree of dissolution was prepared by Mary's counsel, and approved as to form by James' counsel. That decree, which included the necessary jurisdictional findings and actually dissolved the marriage, was rendered by the trial court on February 7, 2006. James filed a timely motion for new trial and to alter or amend the judgment. On March 14, the court overruled the motion for new trial, but amended the judgment to expressly provide that the alimony award would terminate on the death of either party. On April 12, James filed his notice of appeal.

The Court of Appeals dismissed James' appeal.[6] The Court of Appeals found that the trial court's letter was "a written, signed document which set forth the court's determination of all issues

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[4] See Neb. Rev. Stat. § 42-349 (Reissue 2004).

[5] See Neb. Rev. Stat. § 42-361 (Reissue 2004).

[6] See *Wagner, supra* note 2.

presented for resolution. In that document, the court specifically indicated that it was 'rendering decision on the trial of this matter.'"[7] The Court of Appeals determined that the letter operated to render judgment, "because it was a written, signed notation of the relief granted or denied," and had been entered when it was file stamped by the clerk of the court.[8] Thus, the Court of Appeals determined that the letter was a final judgment. And neither a timely notice of appeal, nor a timely tolling motion, had been filed with respect to the letter. Therefore, the Court of Appeals concluded that James' appeal was untimely, and dismissed the appeal.[9]

James filed a petition for further review, which we granted. The appeal was submitted without oral argument, pursuant to Neb. Ct. R. of Prac. 11B(1) (rev. 2006).

## ASSIGNMENT OF ERROR

James assigns, restated, that the Court of Appeals erred in dismissing his appeal for lack of jurisdiction.

## STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[10] And regarding a question of law, we reach a conclusion independent of the determination reached by the Court of Appeals.[11]

## ANALYSIS

Section 25-1301(1) defines a judgment as "the final determination of the rights of the parties in an action." And an order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be

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[7] *Id*. at 334, 743 N.W.2d at 786.

[8] See, *id*. at 335, 743 N.W.2d at 786; § 25-1301(3).

[9] See *id*.

[10] *State ex rel. Bruning v. R.J. Reynolds Tobacco Co., ante* p. 310, 746 N.W.2d 672 (2008).

[11] *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

properly denominated a judgment.[12] Section 25-1301(3) also explains how a final judgment or order is rendered by a court: "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." And "[f]or purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry."

The problem in this case is that the trial court's letter memorandum was signed and file stamped, which is all that § 25-1301 requires for the court to render a judgment. Thus, the question presented is whether the trial court's file-stamped letter memorandum was a final judgment. We have recently decided two cases addressing similar issues, and a review of those cases is essential to our analysis of the instant case.

In *Hosack v. Hosack*,[13] the district court entered a file-stamped journal entry in which the court dissolved the parties' marriage, divided the marital estate, and awarded alimony. The journal entry provided that a decree was to be prepared by counsel, provided to opposing counsel for review, and "'presented to the Court for signature no later than November 15, 2002.'"[14] The decree was prepared and entered, and an appeal was taken. The Court of Appeals summarily dismissed the appeal, finding it was untimely because it was not taken within 30 days of the file-stamped journal entry, which the Court of Appeals determined to be a final, appealable order.[15]

On further review, we reversed, finding that the journal entry "left certain matters unresolved."[16] We noted that in the journal entry, "counsel was directed to advise the district court by written motion if the court had failed to rule on any material issue presented."[17] And we noted that "[t]he journal entry

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[12] See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[13] *Hosack, supra* note 3.

[14] *Id.* at 936, 678 N.W.2d at 750.

[15] *Hosack v. Hosack*, 11 Neb. App. lxxiii (No. A-02-1405, May 30, 2003).

[16] *Hosack, supra* note 3, 267 Neb. at 939, 678 N.W.2d at 752.

[17] *Id.*

contemplated that the decree was to be prepared for opposing counsel's review . . . ."[18] Therefore, we concluded that "the journal entry was not the final determination of the rights of the parties in this action."[19]

We also took the opportunity to expressly disapprove of the practice of a trial court's filing of a journal entry which describes an order that is to be entered at a subsequent date, explaining that confusion "'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.'"[20] We expressly directed that "[o]nly the signed final order should be filed with the clerk of the court."[21]

Then, in *City of Ashland v. Ashland Salvage*,[22] we again faced a file-stamped journal entry followed by a subsequent order. But the situation was distinguishable from *Hosack*, in that the plaintiff in *City of Ashland* sought both declaratory and injunctive relief. The journal entry disposed of the entire merits of the case, but directed the plaintiff to prepare an "'Order of Permanent Injunction'" that the court entered later.[23] Because, unlike *Hosack*, the journal entry in *City of Ashland* disposed of all claims, it was a final, appealable order. And because the notice of appeal in *City of Ashland* had been taken from the journal entry and not the subsequent permanent injunction, we concluded we had jurisdiction over the appeal.[24]

In the present case, as set forth in more detail above, the trial court sent a letter to counsel, setting forth the court's determination of several of the issues presented for resolution. The letter was, however, file stamped by the clerk of the court. The

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[18] *Id.*

[19] *Id.* at 939-40, 678 N.W.2d at 752.

[20] *Id.* at 940, 678 N.W.2d at 752, quoting *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986).

[21] *Id.* at 940, 678 N.W.2d at 753.

[22] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

[23] *Id.* at 366, 711 N.W.2d at 866.

[24] *Id.*

letter directed counsel for one of the parties to prepare another document and present it to opposing counsel for approval as to form. The Court of Appeals concluded that the letter was a final, appealable order, and dismissed the appeal.[25]

The Court of Appeals, however, erred in two respects. First, the letter had not disposed of all the issues presented by the pleadings. Most pertinently, the letter had not found that the marriage was irretrievably broken, or dissolved the marriage. Section 42-361(1) requires, even if the issue is uncontested, that "the court, after hearing, shall make a finding whether the marriage is irretrievably broken." In this case, the trial court's letter had not addressed the most fundamental issue presented by the case: whether the marriage should be dissolved. It could not have been rendered as a final judgment within the meaning of § 25-1301.

[3] But just as important is the fact that, as in *Hosack*,[26] the trial court's letter was written only in contemplation of a decree to be entered later. In this regard, our decision in *Dawes v. Wittrock Sandblasting & Painting*[27] is instructive. In *Dawes*, the problem was that the trial judge's final order had failed to expressly discuss certain matters presented by the pleadings. We noted the well-established proposition that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.[28] But we found the situation in *Dawes* distinguishable, because the issues not discussed were not reserved for later determination.

Instead, in *Dawes*, no issues were reserved for further determination, and it was "apparent, from an examination of the

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[25] See *Wagner, supra* note 2.

[26] *Hosack, supra* note 3.

[27] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

[28] See, *id.*; *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002).

award and the procedural posture of the case," that the order was intended to serve as a final adjudication of the rights and liabilities of the parties.[29] "As a practical matter, the substantial effect of the judgment was to dispose of the entire case, end the litigation, and leave nothing for the court to do."[30] Therefore, we found that the judge had rendered a final, appealable order.[31]

Those principles are applicable here, but they lead to the opposite conclusion. Here, the court's direction to counsel to prepare a final decree, and submit that decree for approval to opposing counsel and then the court, clearly indicates that the letter was not intended to be the court's final adjudication of the rights and liabilities of the parties. As in *Hosack*,[32] the court's preliminary findings contemplated that the decree was to be prepared for opposing counsel's review and were not the final determination of the rights of the parties. And *City of Ashland*[33] is distinguishable, because in that case, the trial court's journal entry was a complete adjudication of all the issues presented, and the subsequent injunction was merely an order to enforce the terms of the previously entered final judgment. Such orders, entered in an action after judgment, are not uncommon in Nebraska law, and do not affect the status of the final judgment they are intended to enforce.[34]

[4] Because of the potential for confusion, trial courts should be very careful if they decide to inform the parties of their findings before entering a final judgment. In particular, trial courts, and the clerks of those courts, should not file stamp any court-issued document that is not meant to take legal effect. Instead, "the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method

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[29] *Dawes, supra* note 27, 266 Neb. at 536, 667 N.W.2d at 180.

[30] *Id.* at 537, 667 N.W.2d at 180-81.

[31] *Id.*

[32] *Hosack, supra* note 3.

[33] *City of Ashland, supra* note 22.

[34] See, e.g., *Blaine v. Blaine, ante* p. 87, 744 N.W.2d 444 (2008); *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002); § 25-1902. Compare *Koziol v. Koziol*, 10 Neb. App. 675, 636 N.W.2d 890 (2001).

of communication" without file stamping any document.[35] And only the signed final order should be filed with the clerk of the court.[36]

Although we have said these things before, the problem keeps recurring. It is absolutely essential that trial court judges consider this problem, discuss it with their court clerks, and review their procedures for communicating with the parties and preparing and entering final orders, so that it *does not happen again*. The courts of this state should not be procedural minefields for unwitting litigants.

[5,6] Nonetheless, we also hold that court-issued findings that direct a party to prepare a final order memorializing those findings, and to submit that order to an opposing party for approval before submitting it to the court, are not a final determination of the rights of the parties and do not become a final order or judgment if file stamped. To the extent that the Court of Appeals' majority opinion in *Peterson v. Peterson*[37] provides otherwise, it is disapproved. Instead, we agree with the dissenting opinion in *Peterson*, that "there [must] first be a *final* determination of the rights of the parties before there is a judgment to be either rendered or entered" and that in circumstances such as these, the court's preliminary findings "are not the final determination of the rights of the parties and the final determination will be made only after counsel prepares a decree in conformance with the findings, submits the same to opposing counsel for approval, and then to the court for rendition and entry."[38]

[7] Therefore, we conclude that James' assignment of error has merit, and the Court of Appeals erred in dismissing his appeal. Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[39] But

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[35] See *Hosack, supra* note 3, 267 Neb. at 940, 678 N.W.2d at 752-53. Accord *City of Ashland, supra* note 22.

[36] *Id.*

[37] *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

[38] *Id.* at 787-88, 714 N.W.2d at 800 (Irwin, Judge, dissenting) (emphasis in original).

[39] See *Hosack, supra* note 3.

due to its jurisdictional conclusion, the Court of Appeals did not reach any of James' assignments of error, and we conclude that under these circumstances, it is appropriate for the Court of Appeals to consider James' arguments in the first instance.[40]

## CONCLUSION

Based on the foregoing reasoning, we reverse the decision of the Court of Appeals, and remand the cause to the Court of Appeals for consideration of the merits of James' appeal.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[40] See *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

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# LEXINGTON INSURANCE COMPANY ET AL., APPELLANTS, V. ENTREX COMMUNICATION SERVICES, INC. ET AL., APPELLEES.

749 N.W.2d 124

Filed May 16, 2008. No. S-06-1452.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** The meaning of a contract is a question of law.
4. **Contracts: Public Policy.** The determination of whether a contract violates public policy 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 conclusions reached by the trial court.
6. **Contracts: Subrogation: Waiver: Negligence.** A contractual waiver of subrogation is enforceable against gross negligence claims.
7. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.

8. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
9. **Contracts.** A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.
10. ____. When there is a question about the meaning of the contract's language, the contract will be construed against the party preparing it.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, and Jeffrey R. Learned, Charles R. Tuffley, and Alyssa J. Endelman, of Grotefeld & Denenberg, L.L.C., for appellants.

William R. Johnson and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden for appellee Entrex Communication Services, Inc.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellee Communication Structures & Services, Inc.

Dean Suing, of Katskee, Henatch & Suing, for appellee Dudutis Erection & Maintenance, Inc.

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

CONNOLLY, J.

Hearst-Argyle Properties, Inc., and the Hearst Corporation (collectively Hearst) owned a television broadcast tower in Omaha, Nebraska. In February 2003, Hearst contracted with Entrex Communication Services, Inc. (Entrex), to upgrade the antenna on the tower. After the tower collapsed in July 2003, Hearst sued Entrex. Hearst alleged that Entrex's gross negligence caused the collapse. Entrex moved for summary judgment. Entrex claimed that a waiver of subrogation in the parties' agreement barred Hearst's claims to the extent insurance proceeds covered the damages. The district court granted the motion and dismissed Hearst's claims for damages that had been compensated by insurance. Hearst's insurer appeals.

This appeal presents two issues. The first is whether enforcing a waiver of subrogation provision to bar a gross negligence claim violates public policy. The second is whether the waiver of subrogation is limited to damages to "the Work" (as defined in the agreement), or whether it also applies to damages to "non-Work" property. We conclude that the waiver of subrogation is effective against claims for gross negligence. We further conclude that the waiver applies to damages to both the Work and the non-Work property. We affirm.

## I. BACKGROUND

### 1. Factual Background

The facts are not in dispute. Hearst owns and operates a television station in Omaha. In February 2003, Hearst contracted with Entrex to modify a 1,234-foot television broadcast tower by removing the analog antenna and replacing it with a digital antenna. Entrex subcontracted with Communication Structures & Services, Inc., which hired Dudutis Erection & Maintenance, Inc., to assist (hereinafter collectively Entrex).

The parties' contract required Hearst to obtain property insurance to cover "the Project" (as defined in the agreement). Instead of obtaining a specific property insurance policy to cover the Project, Hearst relied upon existing "all-risk" property insurance policies. These policies were issued by Lexington Insurance Company; Allied World Assurance Company, Ltd.; CNA Insurance Company; Everest Reinsurance (Bermuda) Limited; and Firemen's Fund Insurance Company (collectively Lexington). These all-risk policies collectively provided Hearst with $25 million in coverage.

The tower collapsed in July 2003, allegedly causing over $6 million in damages to the antenna, tower, transmission building, and personal property in the transmission building. Lexington compensated Hearst for its losses, less a $250,000 deductible. Hearst sued Entrex, alleging that the tower collapse occurred because of Entrex's gross negligence.

Entrex moved for partial summary judgment. It argued that a waiver of subrogation clause in the parties' agreement barred Hearst's claims against Entrex to the extent insurance proceeds were available to cover the damages. Hearst responded with

two arguments: (1) The waiver of subrogation was unenforceable because Hearst had alleged gross negligence and enforcing a waiver of subrogation against a claim for gross negligence would violate public policy and (2) the waiver barred only claims for damage to the Work (as defined in the agreement), and thus, Entrex's motion should be denied as to damage claims involving non-Work property.

Regarding Hearst's first argument, the court concluded that enforcing a waiver of subrogation to bar a claim for gross negligence did not violate public policy. In deciding the second argument, the court concluded that Hearst had waived all claims covered by its all-risk insurance policies, including damages to the Work and non-Work property. The district court granted Entrex's motion and dismissed Hearst's claims for damages covered by insurance.

Hearst appealed, but the Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction. It determined that although the court's order disposed of all subrogation claims by Lexington, Hearst's claims for uninsured losses remained pending. Thereafter, Lexington was substituted as the named plaintiff in this lawsuit and Hearst's claims were dismissed without prejudice and refiled under a different case number. The court then entered a final order (consistent with its earlier order), granting Entrex's motion for summary judgment on Lexington's claims. Lexington appeals.

### 2. Relevant Contract Provisions

The contract between Hearst and Entrex was an American Institute of Architects (AIA) standard form of agreement, document A101-1997. The agreement incorporated another AIA standard form of general conditions of the contract for construction, document A201-1997.

Pivotal to our analysis are two words used in the parties' agreement—"Work" and "Project." Subparagraph 1.1.3 of the agreement defined "Work" as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations." Simply put, the Work

is the construction and services to be provided by the contractor to fulfill the contractor's obligations under the contract. Subparagraph 1.1.3 also explains that the Work may constitute the whole or a part of the "Project."

Subparagraph 1.1.4 of the agreement defines the "Project" as "the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors." Stated more simply, the Project incorporates all the construction to be done, whether it be by the contractor, the owner, or other contractors. Here, the only construction being done was that by Entrex, so the terms "Work" and "Project" are interchangeable.

(a) Entrex's Obligations Under the Agreement

Article 11 of the agreement allocated insurance responsibilities among the parties. Subparagraph 11.1.1 of that article required Entrex, as the contractor, to obtain liability insurance covering claims for damages to non-Work property:

> The Contractor shall purchase . . . and maintain . . . such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable . . . .
>
> . . . .
>
> .5 claims for damages, *other than to the Work itself*, because of injury to or destruction of tangible property, including loss of use resulting therefrom[.]

(Emphasis supplied.)

(b) Hearst's Obligations Under the Agreement

Subparagraph 11.4.1 of the agreement required Hearst to obtain property insurance covering the Project:

> Unless otherwise provided, the Owner shall purchase and maintain . . . property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, *comprising total value for the entire Project at the site* on a replacement cost basis without optional deductibles. . . . This insurance shall include

> interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

(Emphasis supplied.)

(c) Waiver of Subrogation

The agreement's critical provision is set out in subparagraph 11.4.7. It contains a waiver of subrogation, which forms the basis of this appeal, and states in relevant part:

> The Owner and Contractor waive all rights against . . . each other and any of their subcontractors . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.

## II. ASSIGNMENTS OF ERROR

Lexington assigns, restated, that the district court erred in holding that (1) the contractual waiver of subrogation barred gross negligence claims and (2) the waiver barred claims for damage to non-Work property.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3-5] The meaning of a contract is a question of law.[3] The determination of whether a contract violates public policy is a

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[1] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[2] *Id.*

[3] *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[5]

## IV. ANALYSIS

### 1. Enforcing the Waiver of Subrogation to Bar Lexington's Gross Negligence Claims Does Not Violate Public Policy

Lexington contends that the district court erred in deciding that the waiver of subrogation in subparagraph 11.4.7 bars Lexington's gross negligence claims. According to Lexington, public policy precludes parties from contractually disclaiming or limiting their liability for gross negligence.

Other jurisdictions are split on whether to enforce contractual waivers of subrogation against claims for gross negligence. Some courts have held that even though traditional exculpatory provisions may not be effective against claims for gross negligence, waivers of subrogation are effective to bar gross negligence claims.[6] But other courts have decided that because a traditional exculpatory clause is generally ineffective against a gross negligence claim, a waiver of subrogation will similarly be ineffective.[7]

Two leading cases in which courts have enforced waivers of subrogation to bar gross negligence claims are *St Paul Fire and Marine v. Universal Builders*[8] and *Reliance Nat. Indem. v. Knowles Ind. Ser.*[9] The *St Paul Fire and Marine* and *Reliance Nat. Indem.* courts reasoned, in part, that policy considerations

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[4] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[5] *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

[6] See, e.g., *St Paul Fire and Marine v. Universal Builders*, 317 F. Supp. 2d 336 (S.D.N.Y. 2004), *affirmed as modified* 409 F.3d 73 (2d Cir. 2005); *Reliance Nat. Indem. v. Knowles Ind. Ser.*, 868 A.2d 220 (Me. 2005); *Behr v. Hook*, 173 Vt. 122, 787 A.2d 499 (2001).

[7] See, e.g., *Butler Mfg. Co., Inc. v. Americold Corp.*, 841 F. Supp. 1107 (D. Kan. 1993); *Colonial Properties Realty v. Lowder Const.*, 256 Ga. App. 106, 567 S.E.2d 389 (2002).

[8] *St Paul Fire and Marine, supra* note 6.

[9] *Reliance Nat. Indem., supra* note 6.

associated with traditional exculpatory provisions are not implicated with waivers of subrogation:

> The rule [that gross negligence generally renders exculpatory provisions void] exists . . . to ensure that "a party injured by another's gross negligence will be able to recover its losses." . . . In cases involving waivers of subrogation, however, there is no risk that an injured party will be left uncompensated, and it is irrelevant to the injured party whether it is compensated by the grossly negligent party or an insurer.[10]

In sum, because a waiver of subrogation clause does not leave a party uncompensated, these courts hold that the clause is effective even when the plaintiff alleges gross negligence.

Lexington argues we should give these cases little deference. It claims the decisions "erroneously focused on whether the injured party was compensated for damages . . . rather than on holding the grossly negligent defendant financially responsible for its misconduct."[11] Lexington relies on our decision in *New Light Co. v. Wells Fargo Alarm Servs.*[12] In *New Light Co.*, a fire in the plaintiff's restaurant caused extensive damage to the building and its contents. The plaintiff alleged that the defendant was grossly negligent in designing, installing, and maintaining a fire alarm system in the building. The plaintiff further argued that public policy prevented the defendant from relying on a contractual exculpatory clause or limitation-of-damages provision to insulate itself from liability for its gross negligence. In *New Light Co.*, we held that allowing the defendant to use a contractual agreement to insulate itself from damages caused by its own gross negligence would violate public policy.

Relying on *New Light Co.*, Lexington argues that the reason exculpatory clauses may be unenforceable against gross negligence claims is not to ensure compensation for the injured party, but, rather, to hold grossly negligent parties financially

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[10] *Id.* at 226 (citation omitted). See, also, *St Paul Fire and Marine, supra* note 6.

[11] Brief for appellants at 21-22.

[12] *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).

responsible for their conduct. Lexington contends that Nebraska public policy requires that grossly negligent parties be held financially responsible for their conduct because otherwise they "would have no incentive to act more appropriately in the future."[13] Lexington acknowledges that *New Light Co.* addressed a contractual exculpatory clause and a limitation-of-damages provision, rather than a waiver of subrogation clause. But Lexington claims that allowing a party to use a waiver of subrogation to avoid gross negligence liability would similarly eliminate the financial incentive for that party to "'clean up its act.'"[14] Therefore, Lexington argues that the *New Light Co.* rationale and the underlying Nebraska public policy apply to contractual waivers of subrogation just as they did to the exculpatory clause and limitation-of-damages provision in that case.

Admittedly, language in *New Light Co.* can be read as suggesting that our policy concern was protecting the public by providing incentive for parties to refrain from grossly negligent conduct. We decline, however, to extend our discussion in *New Light Co.* to this case involving a contractual waiver of subrogation. We recognize that a waiver of subrogation shares similarities with traditional exculpatory clauses or limitation-of-damages provisions. But, we also find that significant differences exist between waivers of subrogation and the exculpatory clause and limitation-of-damages provision we dealt with in *New Light Co*.

First, as the *Reliance Nat. Indem.* and *St Paul Fire and Marine* courts observed, the danger with exculpatory clauses is that a party injured by another's gross negligence will be unable to recover its losses. But such danger is not present in cases involving waivers of subrogation because the waiver only applies to losses covered by insurance, so "there is no risk that an injured party will be left uncompensated."[15]

Also, waivers of subrogation serve other important policy goals not met by exculpatory clauses. As the *Reliance Nat.*

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[13] Brief for appellants at 16.

[14] *Id.* at 18.

[15] *Reliance Nat. Indem., supra* note 6, 868 A.2d at 226.

*Indem.* court explained, "'waivers of subrogation are encouraged by the law and serve important social goals: encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity.'"[16] Other courts have observed that a waiver of subrogation is particularly useful in a construction contract: "'[I]t avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's property insurance.'"[17] Traditional exculpatory clauses and limitation-of-damages provisions do not serve this same important policy goal. Because of these differences, we decline to extend *New Light Co.* to the present case.

[6] We, like other jurisdictions, recognize the important policy goal that waivers of subrogation serve in avoiding disruption of construction projects and reducing litigation among parties to complicated construction contracts. Concluding that waivers of subrogation cannot be enforced against gross negligence claims would undermine this underlying policy by encouraging costly litigation to contest whether a party's conduct was grossly negligent. Therefore, we conclude that "public policy favors enforcement of waivers of subrogation even in the face of claims of gross negligence."[18]

Because the waiver of subrogation clause in subparagraph 11.4.7 is effective to bar Lexington's gross negligence claims, we next determine the scope of the waiver.

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[16] *Id.* at 225-26.

[17] *Haemonetics Corp. v. Brophy & Phillips Co.*, 23 Mass. App. 254, 258, 501 N.E.2d 524, 526 (1986), quoting *Tokio Marine & Fire v. Employers Ins. of Wausau*, 786 F.2d 101 (2d Cir. 1986). See, also, *St Paul Fire and Marine, supra* note 6; *Reliance Nat. Indem., supra* note 6; *Behr, supra* note 6.

[18] *Reliance Nat. Indem., supra* note 6, 868 A.2d at 227.

### 2. The Waiver of Subrogation Applies to Insured Damages, Which Here Include Both the Work and the Non-Work Property

Lexington next contends that the district court erred in holding that the waiver of subrogation in subparagraph 11.4.7 barred Lexington's claims for damage to non-Work property. Again, the parties' agreement essentially defines "Work" as the construction and services provided by the contractor to fulfill the contractor's obligations under the contract. The record reflects that of the over $6.2 million in claimed damages, about only $470,000 represented damages to the Work, while the remainder represented damages to non-Work property. We understand from Lexington's counsel at oral argument that the antenna was the Work property, while the tower and transmission building represented the non-Work property.

The waiver of subrogation in subparagraph 11.4.7 states in relevant part, "The Owner [Hearst] and Contractor [Entrex] waive all rights against . . . each other . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work . . . ." Subparagraph 11.4.1 required Hearst to purchase a builder's risk "all-risk" property insurance policy "comprising total value for the entire Project at the site." Here, "Project" and "Work" are interchangeable. Hearst did not purchase a separate builder's risk policy covering the Work, but instead relied upon existing "all-risk" property insurance policies issued by Lexington and other companies. These all-risk policies collectively provided Hearst with $25 million in coverage for both the Work and the non-Work property. Lexington argues that the waiver of subrogation in subparagraph 11.4.7 applied only to damages to the Work. In other words, Lexington claims that even though Hearst's existing property insurance policies covered both the Work and the non-Work property, the parties waived subrogation only for damages to the Work property. Therefore, Lexington believes it can recover for claims it paid for damages to non-Work property.

Entrex, of course, contends that the waiver applies to all insured damages, including those to non-Work property.

Lexington argues that even if Entrex's interpretation is reasonable, the waiver is at most ambiguous. Lexington also claims that Entrex "drafted" the contract by requiring use of the standard AIA form and that therefore, we should construe any ambiguity against Entrex.

[7-10] We have stated that a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[19] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[20] Also, a contract must receive a reasonable construction, and we must construe it as a whole and, if possible, give effect to every part of the contract.[21] In construing a contract, we apply the general rule that when there is a question about the meaning of the contract's language, the contract will be construed against the party preparing it.[22]

We determine that the waiver of subrogation is subject to only one reasonable interpretation—that urged by Entrex. Therefore, as explained later, we conclude that the contract is not ambiguous and that here, the waiver applies to damages to both the Work and the non-Work property.

(a) Courts Addressing the Issue Generally Apply One of Two Approaches

A review of cases from other jurisdictions reveals two approaches to when an insurer's subrogation rights are barred. In *Trinity Universal Ins. Co. v. Bill Cox Const.*,[23] the Texas Court of Appeals has summarized the two approaches:

> [O]ne approach makes a distinction between Work (as that word is defined in the contract) and non-Work property and limits the scope of the waiver to damages to the Work;

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[19] *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[20] *Id.*

[21] See *id.*

[22] See *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989).

[23] *Trinity Universal Ins. Co. v. Bill Cox Const.*, 75 S.W.3d 6, 11 (Tex. App. 2001).

> and the second approach draws no distinction between Work and non-Work, but instead, limits the scope of the waiver to the proceeds of the insurance provided under the contract between the owner and contractor.

(b) Lexington Urges the First Approach

Lexington urges us to adopt the first approach described above. Lexington contends that "a reasonable construction of the waiver is that it has no relevance to claims for damage to non-Work property."[24] The New York Court of Appeals applied this approach in *S.S.D.W. Co. v. Brisk Co.*[25] The waiver clause in that case was nearly identical to the waiver clause here. The court explained that the waiver barred subrogation claims to the extent the damages sought were covered by either "(1) 'insurance obtained pursuant to [art 17] [here paragraph 11.4]' or (2) 'any other property insurance applicable to the *Work*.'"[26] Article 17.3 of the parties' agreement required the owner to provide insurance "'upon the entire *Work at the site*.'"[27] In deciding the waiver barred only claims for damages to the Work, the *S.S.D.W. Co.* court reasoned:

> It makes no difference whether the policy under which subrogation is sought is one which the owner purchased specifically to insure the Work pursuant to article 17.3 [here subparagraph 11.4.1] or some other policy covering the owner's property in which the owner has also provided coverage for the Work. In either event, the waiver clause, if given its plain meaning, bars subrogation only for those damages covered by insurance which the owner has provided to meet the requirement of protecting the

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[24] Brief for appellants at 24.

[25] *S.S.D.W. Co. v. Brisk Co.*, 76 N.Y.2d 228, 556 N.E.2d 1097, 557 N.Y.S.2d 290 (1990).

[26] *Id.* at 233, 556 N.E.2d at 1099, 557 N.Y.S.2d at 292 (emphasis in original).

[27] *Id.* at 233, 556 N.E.2d at 1099-1100, 557 N.Y.S.2d at 292-93 (emphasis in original).

> contractor's limited interest in the building—i.e., damages to the Work itself.[28]

Therefore, the *S.S.D.W. Co.* court concluded that to the extent the plaintiff sought recovery for damages to non-Work property, that claim was not barred by the waiver of subrogation. Other courts have similarly decided the waiver applies only to damages to the Work.[29]

(c) Entrex Urges the Second Approach

Entrex urges us to adopt the second approach described by the *Trinity Universal Ins. Co.* court. Entrex contends that we should follow those courts that have decided the waiver applies to all damages insured by the owner's property insurance policy, regardless of whether they represent damages to the Work or non-Work property. The courts adopting this approach represent the majority.[30]

The California Court of Appeal adopted this approach in *Lloyd's Underwriters v. Craig and Rush.*[31] Like Hearst, the owner in *Lloyd's Underwriters* elected not to purchase a separate "builder's risk" policy with coverage limited to the construction work. Instead, the owner chose to rely on its existing "all-risk" property insurance to satisfy its obligations under the contract to provide property insurance for the Work. Non-Work property was damaged while the contractor was repairing the roof of the owner's facility. The owner's insurers argued that these damages, although insured, fell outside the waiver of subrogation.

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[28] *Id.* at 233-34, 556 N.E.2d at 1100, 557 N.Y.S.2d at 293.

[29] See, e.g., *Midwestern Indem. Co. v. Systems Builders*, 801 N.E.2d 661 (Ind. App. 2004); *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo. 1995); *PEMCO v. Sellen Constr. Co.*, 48 Wash. App. 792, 740 P.2d 913 (1987).

[30] See, e.g., *ASIC II Ltd. v. Stonhard, Inc.*, 63 F. Supp. 2d 85 (D. Me. 1999); *Stop and Shop v. ABCO Refrigeration Supply*, 48 Conn. Supp. 301, 842 A.2d 1194 (Conn. Super. 2003); *Trinity Universal Ins. Co., supra* note 23; *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490 (Minn. 1998); *Lloyd's Underwriters v. Craig and Rush*, 26 Cal. App. 4th 1194, 32 Cal. Rptr. 2d 144 (1994); *Chadwick v. CSI, Ltd.*, 137 N.H. 515, 629 A.2d 820 (1993); *Haemonetics Corp., supra* note 17.

[31] *Lloyd's Underwriters, supra* note 30.

The *Lloyd's Underwriters* court read the waiver's language to mean that "so long as a policy of insurance 'applicable to the Work' pays for the damage, the waiver applies."[32] The court observed that the owner's insurers "[did] not dispute that their policies (1) were 'applicable to the Work' and (2) 'covered' or paid for the loss."[33] The court reasoned that satisfaction of these two criteria allowed the court to conclude the waiver applied. Stated another way, the *Lloyd's Underwriters* court essentially concluded that if a policy covering the Work paid for the losses, the parties waived subrogation for those losses, regardless of whether they were damages to the Work or non-Work property.

Another case often cited for the majority approach is *Haemonetics Corp. v. Brophy & Phillips Co.*[34] There, the owner also relied on an existing property insurance policy to meet its obligation to provide property insurance covering the Work. During construction, a fire damaged non-Work property, and the owner received insurance proceeds to cover the damage. The owner later argued that the parties' contract required only that it maintain property insurance on the Work, so the waiver applied only to damages to the Work property. The court disagreed, reasoning:

> The preexisting insurance policy . . . was the insurance the owner chose to provide to comply with § 11.3 [here subparagraph 11.4.1] even though that policy may have been more extensive than what was required. By the terms of [the waiver of subrogation provision], the waiver of rights extends to the proceeds of any insurance provided under § 11.3.[35]

The *Haemonetics Corp.* and *Lloyd's Underwriters* courts reached the same conclusion, but with different rationales. Again, for clarification, the waiver applies to the extent losses

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[32] *Lloyd's Underwriters, supra* note 30, 26 Cal. App. 4th at 1198, 32 Cal. Rptr. 2d at 146.

[33] *Id.*

[34] *Haemonetics Corp., supra* note 17.

[35] *Haemonetics Corp., supra* note 17, 23 Mass. App. at 257, 501 N.E.2d at 526.

are covered by (1) insurance obtained to meet the owner's obligation to acquire property insurance covering the Project or (2) "other property insurance applicable to the Work." The *Haemonetics Corp.* court reasoned that the owner's preexisting policy fell within the first alternative as the policy the owner chose to provide to comply with the contract. In contrast, the *Lloyd's Underwriters* court reasoned that the owner's preexisting policy came within the second alternative as "other property insurance applicable to the Work." Despite their different classifications of the policies, both courts decided the owner's preexisting policy fell within the waiver of subrogation clause. The courts concluded that the scope of the waiver clause was not defined by the property damaged, but, rather, by the extent the damages were covered by those policies described in the clause: All losses covered by those policies were subject to the waiver, whether those losses related to the Work or non-Work property.

#### (d) We Adopt the Majority Approach and Conclude That the Waiver Applies to Damages to Both the Work and the Non-Work Property

We find the majority courts' rationale persuasive. We also believe this approach is more consistent with other provisions in the parties' agreement and furthers the purpose of the waiver clause. Furthermore, construing the contract as a whole, we are unable to conclude that the minority approach is reasonable.

The majority interpretation is consistent with a related provision, subparagraph 11.4.5 in the parties' agreement, which states in relevant part:

> If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, . . . the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance.

We understand this provision to mean that if the owner acquires a separate property insurance policy to cover non-Project property—a policy that did not cover the Project or Work

property—and the non-Project property is damaged, the owner waives subrogation rights for the insurer as to those damages. So even though the damage occurred to non-Work property, the owner waived subrogation rights because the damages were insured. This provision shows that the contracting parties were not opposed to waiving damages to non-Work property.[36]

Subparagraph 11.4.5 reinforces our conclusion that the waiver in subparagraph 11.4.7 applies to all damages—including Work and non-Work damages—covered by the owner's property insurance policy. An example is helpful. Suppose the owner purchased two separate property insurance policies: "Policy A" that covered only the Project (Work) and "Policy B" that covered only the non-Work property. Under subparagraph 11.4.7, the owner waives subrogation rights as to any damages covered by Policy A (damages to the Work property). Under subparagraph 11.4.5, the owner waives subrogation rights as to any damages covered by the separate Policy B (damages to the non-Work property). So, applying subparagraphs 11.4.5 and 11.4.7, the owner waives damages to both the Work and the non-Work property when the owner obtains two separate policies. We see no reason why the parties would intend a different result when, instead of purchasing two separate policies, the owner relied on one policy covering both the Work and the non-Work property, as Hearst did here.

Also, as the *Haemonetics Corp.* court noted, the majority approach furthers the policy underlying the use of waiver of subrogation clauses in construction contracts. That court explained that a waiver of subrogation is useful in construction contracts because it avoids disrupting the project and eliminates the need for lawsuits.[37] The majority approach furthers this purpose. Applying the waiver to all losses covered by the owner's property insurance policy eliminates litigation over liability

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[36] See, *Lloyd's Underwriters, supra* note 30; *Walker Engineering v. Bracebridge Corp.*, 102 S.W.3d 837 (Tex. App. 2003).

[37] *Haemonetics Corp., supra* note 17, citing *Tokio Marine & Fire, supra* note 17.

issues and whether the claimed loss was damage to the Work or non-Work property.[38]

Lexington, of course, argues we should not adopt the majority approach. Lexington contends this approach is inconsistent with the agreement's allocation of insurance responsibilities. Again, under subparagraph 11.1.1, Entrex was obligated to obtain liability insurance covering claims for damages to non-Work property, while subparagraph 11.4.1 required Hearst to obtain property insurance covering the Project (Work). The insurers in *Lloyd's Underwriters* made a similar argument. They argued that the court must interpret the waiver of subrogation as waiving claims only to the extent the loss fell within the owner's area of insurance responsibility (i.e., a loss to the Work). The court decided this contention ignored the language defining the scope of claims falling within the waiver clause. The court explained, "The waived claims are *not* defined by what property is harmed (i.e., 'any injury to the Work'); instead, the scope of waived claims is delimited by the *source* of any insurance proceeds paying for the loss (i.e., whether the loss was paid by a policy 'applicable to the Work')."[39] We agree. Further, as another court noted, the waiver clause expressly provides that the "'waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise.'" This reconciles any inconsistency between the waiver of subrogation and the agreement's allocation of insurance responsibilities.[40]

Having reviewed the reasons that support the majority approach, we conclude that the minority approach is not a reasonable interpretation of subparagraph 11.4.7. First, the minority approach is inconsistent with the waiver's purpose of avoiding disruption and disputes among the parties to the project by eliminating the need for litigation. Adopting the

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[38] See, *Stop and Shop, supra* note 30; *S.S.D.W. Co., supra* note 25 (Alexander, J., dissenting); *Haemonetics Corp., supra* note 17.

[39] *Lloyd's Underwriters, supra* note 30, 26 Cal. App. 4th at 1200, 32 Cal. Rptr. 2d at 148 (emphasis in original).

[40] See *Chadwick, supra* note 30, 137 N.H. at 524, 629 A.2d at 826.

minority approach would actually *encourage* litigation about whether the claimed loss was damage to the Work or non-Work property. More important, we are unable to reconcile subparagraph 11.4.5 with the minority approach. If we applied the minority approach, we would be left with two disparate results depending on whether the owner (1) purchased a single policy covering both the Work and the non-Work or (2) purchased two separate policies. An owner relying on a single policy, as Hearst did here, would waive only damages to the Work (11.4.7). But an owner purchasing two separate policies, as in the example above, would waive damages to both the Work (11.4.7) and the non-Work (11.4.5). We do not believe the parties intended this disparity. Because we must construe the contract as a whole,[41] subparagraph 11.4.5 is a hurdle that prevents us from deciding that the minority approach is a reasonable interpretation of subparagraph 11.4.7. Because we decide that the minority approach is not a reasonable interpretation of subparagraph 11.4.7, we conclude that subparagraph 11.4.7 is not ambiguous. Instead, it is subject to only one reasonable interpretation—that of the majority courts. Therefore, we need not construe the contract against the drafter.

We find the majority courts' rationale persuasive. The Minnesota Supreme Court has summarized the result under this approach:

> The owner has the option of purchasing an all-risk policy specifically to cover the "work" or can rely on any existing property insurance which would cover the "work." However, the waiver clause creates the "work" and "nonwork" distinction based upon the owner's decision to purchase a new policy or to rely upon an existing one. The owner agrees to waive the right to sue for damages done only to the "work" if it purchases a separate all-risk policy specifically to cover the "work." But if the owner relies on an existing policy which is so broad that it covers both "work" and "nonwork" property, it waives the

[41] See *Kluver, supra* note 19.

> right to sue for all damages done as long as that damage is covered by the policy.[42]

We hold that the waiver of subrogation applies to all damages covered by a property insurance policy "obtained pursuant to . . . Paragraph 11.4" or other property insurance policy that covers the Work. When that policy is broad enough to cover both the Work and the non-Work property, the waiver extends to non-Work damages.

Here, Hearst relied on existing policies covering both the Work and the non-Work property. Because these policies are "applicable to the Work," they fall within the purview of subparagraph 11.4.7. Applying the approach adopted today, Hearst waived subrogation rights on behalf of Lexington for any damages covered by those policies, including damages to non-Work property. Therefore, the district court did not err in granting summary judgment for Entrex and dismissing Lexington's claims for the insurance proceeds it paid.

## V. CONCLUSION

We conclude that the district court correctly determined that contractual waivers of subrogation are effective to bar gross negligence claims. Therefore, the waiver of subrogation in the parties' agreement was enforceable even though Lexington alleged Entrex was grossly negligent. Also, we interpret the waiver of subrogation provision, subparagraph 11.4.7, as applying to all damages covered by a property insurance policy "obtained pursuant to . . . Paragraph 11.4" or other property insurance policy that covers the Work. When that policy is broad enough to cover both the Work and the non-Work property, as Hearst's policies were here, the waiver applies to both the Work and the non-Work damages. Thus, Lexington is unable to recover the proceeds it paid for damages to the Work and non-Work property. The district court did not err in granting Entrex's motion for summary judgment or in dismissing Lexington's claims for the insurance proceeds it paid.

AFFIRMED.

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[42] *Employers Mut. Cas. Co., supra* note 30, 580 N.W.2d at 493.

# Nathan Pierce, appellant, v. The Douglas County Civil Service Commission and the County of Douglas, Nebraska, appellees.

748 N.W.2d 660

Filed May 16, 2008. No. S-07-252.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.
3. **Administrative Law.** Administrative action must not be arbitrary or capricious.
4. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
5. **Judgments: Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues that do not involve factual disputes as a matter of law.
6. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
7. **Civil Service: Administrative Law: Final Orders: Breach of Contract: Appeal and Error.** Under Neb. Rev. Stat. § 23-2515 (Reissue 1997), an appeal from a final order of the Civil Service Commission is a petition in error, not an original breach of contract action against the county.
8. **Civil Service: Administrative Law: Statutes.** The Civil Service Commission is a statutorily created tribunal that is required to act in a judicial manner when deciding employee appeals.
9. **Civil Service: Administrative Law: Appeal and Error.** When the Civil Service Commission acts in a judicial manner, a party adversely affected by its decision is entitled to appeal to the district court through the petition in error statutes.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Reversed and remanded with directions.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

CONNOLLY, J.

Nathan Pierce appeals from the district court's order affirming the decision of the Douglas County Civil Service Commission (the Commission). The Commission affirmed Pierce's termination of employment (termination) by the Douglas County Public Properties Department (the Department). Initially, the Department suspended Pierce for 3 days in 2001 for verbally abusing another employee. This appeal stems from Pierce's alleged violation of a work restriction placed on him because of his first offense. Pierce's employment is governed by a collective bargaining agreement (CBA) between Douglas County (the County) and the International Union of Operating Engineers, Local 571.

This appeal presents two main issues. The first is whether the district court had jurisdiction over Pierce's petition in error that claimed the Department had breached the CBA. The second is whether the evidence supports Pierce's termination for committing a second offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct," as described in the Commission's personnel manual. We conclude that the district court did have jurisdiction over Pierce's claims that the Department breached the CBA as far as those allegations were relevant to Pierce's termination. However, we need not reach the merits of Pierce's claims under the CBA. We conclude that the evidence shows the Department did not consider Pierce's alleged conduct to be a serious violation of the Commission's personnel manual, warranting termination. We therefore reverse the district court's order affirming Pierce's termination.

## BACKGROUND

Although Pierce was a Department employee, his job duties required him to do maintenance work throughout the Douglas County Health Center (the Health Center). In June 2001, the Department suspended Pierce for verbally abusing Kimberly Fisher Nahriri (Nahriri), a licensed practical nurse in the Health Center's assisted living unit. After Nahriri refused to take Pierce's blood pressure, Pierce became belligerent. He frightened Nahriri by putting his arm on the back of her chair and his other arm on her desk, so that he hemmed her into her

workstation. The Department suspended Pierce for two offenses under the Commission's personnel manual: (1) fighting or causing a disturbance and (2) "[i]mmoral, indecent, disgraceful, or inappropriate conduct" that may reasonably be expected to affect the public's confidence in county government.

After his suspension for this incident, the County's assistant personnel director issued a written directive imposing work restrictions on Pierce. The personnel directive ordered Pierce to have no contact with Nahriri. In addition, the directive required Pierce to request accompaniment by a coworker or management representative if he worked in Nahriri's unit. It further stated that Pierce's presence in Nahriri's unit without another Department employee would violate the directive.

Later, in November 2001, the Commission affirmed the Department's suspension of Pierce. In its order, the Commission strongly recommended that management of both the Health Center and the Department take further steps. It recommended management neither allow Pierce in or near any area in which Nahriri worked nor allow him to approach her, speak to her, or observe her. The Commission's order, unlike the personnel directive, did not address whether Pierce could be in Nahriri's unit if accompanied by a coworker.

The record fails to show whether the personnel director, the Health Center, or the Department ever issued any further written directives following the Commission's recommendations. Thus, the record reflects an inconsistency. The Commission's recommendations effectively barred Pierce from being in an area where Nahriri worked, while the personnel directive allowed Pierce to be in Nahriri's work unit if accompanied by a coworker.

In September 2002, after a predisciplinary hearing, the Department terminated Pierce's employment for violating the Commission's 2001 order. Although the Department alleged two separate violations, it terminated Pierce's employment for a violation that occurred on August 6, 2002. At the Commission's hearing regarding the termination, the evidence of the August 6 violation showed that Pierce had walked through the assisted living unit in front of the nurses' station where Nahriri worked. While Nahriri was on duty, Pierce stopped to clean up some

ice he spilled in front of the nurses' station. The Department accused Pierce of committing a second offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct." The punishment for a second offense was termination.

The August 6, 2002, alleged violation stemmed from an incident report written by Nahriri. In the report, Nahriri stated that she had observed Pierce walking through the assisted living area on August 6 and on three to four other occasions since June. She did not state whether a coworker had accompanied Pierce. Nahriri did not attend the predisciplinary hearing or testify at the evidentiary hearing before the Commission. Nahriri had also alleged that on August 29, Pierce looked at her through a window while she was in a courtyard. The Department included this allegation in its notice of disciplinary charges as a second incident supporting the charge. Yet, the Commission neither discussed nor relied on the August 29 allegation in upholding Pierce's termination.

In its notice of disciplinary charges, the Department did not accuse Pierce of being in Nahriri's unit unescorted or of violating the personnel directive. Instead, the notice stated that Pierce was near Nahriri's work area on August 6, 2002, violating the Commission's 2001 order. The notice stated that the 2001 order prohibited him from being in or near any area where Nahriri worked. But the evidence before the Commission showed that the Department disciplined Pierce for being in Nahriri's work unit unaccompanied. The Department's assistant director, Marvin Olson, drafted the notice of charges. And he jointly decided with the Department's director, Al Hogan, to terminate Pierce's employment. Before the Commission, Olson testified that the Department terminated Pierce's employment for violating the Commission's 2001 order by being in the vicinity of Nahriri *unescorted* on August 6.

At the public hearing before the Commission, the evidence also showed that the Department and Health Center administrators disagreed on the type of work restrictions imposed by the Commission's 2001 order. The Health Center's administrator testified that Hogan told Pierce he must stay out of the assisted living unit and stay away from Nahriri. Hogan did not testify. In contrast, Olson testified that Pierce was instructed not to go

into the assisted living unit unescorted. He also stated that the Department made exceptions to the Commission's 2001 order to allow Pierce near Nahriri if someone escorted him. Olson specifically stated that "[i]n order to abide by the Civil Service guidelines, in order to remain efficient with the manpower that we had, we came to agree that . . . Pierce if he had to be in the vicinity of . . . Nahriri that he should do so in the presence of another engineer."

The record reflects other examples of misunderstandings about the work restrictions imposed because of the Commission's 2001 recommendations. For example, in August 2002, the personnel director wrote in a memorandum that he believed Nahriri understood Pierce could "be on the unit if accompanied by another Engineer." In contrast, the nursing director testified that she believed the Commission's order was controlling. She did not know until just before the public hearing in March 2004 that the personnel director had written that Pierce could work in Nahriri's unit if accompanied.

Pierce did not deny encountering Nahriri on August 6, 2002. In fact, he reported the incident to the temporary nursing director right after it occurred. But he also reported to her that someone was accompanying him when he encountered Nahriri. Pierce similarly testified before the Commission that a teenage summer helper was accompanying him to do maintenance work in the assisted living unit when he accidentally spilled ice by the nursing station. He stated that he left the area when a housekeeper told him she would finish cleaning up the ice. He stated that he did not speak or make any gestures to Nahriri. Pierce testified that his supervisor had authorized the summer helper to work with him in the building. Neither the supervisor nor the summer worker testified, but a coworker verified that the Department had assigned a summer helper to work with Pierce.

The housekeeper who cleaned up the ice, Vera Hill, confirmed that Pierce immediately left the area without speaking or making gestures to Nahriri. Hill was not asked and did not specifically state whether Pierce was accompanied by a coworker during this incident. Before Pierce's termination, Hill had also prepared a written statement for the Department at her

supervisor's request. The Commission admitted this statement at the hearing. In her statement, Hill said that while Nahriri was on duty, she had seen Pierce unaccompanied in the assisted living unit several times in the summer of 2002 and at least once in August. But she did not state that she had seen him in the unit unaccompanied on August 6, 2002, or when he spilled ice in front of the nurses' station.

The Commission found "conflicting testimony as to whether or not . . . Pierce was accompanied into the area in which he was required to have an escort." But it concluded that Pierce had failed to meet his burden of proving he was accompanied on August 6, 2002, because he did not present corroborating testimony. It therefore found that "Pierce violated the [2001] recommendation of the Commission and the work conditions of . . . Pierce as set forth by the County."

Pierce had also presented evidence at the Commission hearing to show that the Department and personnel director had violated the grievance procedures under the CBA. But other than to note that Pierce had raised these violations, the Commission did not address them.

Pierce filed a petition in error in the district court. In its order, the court rejected Pierce's claims that the County failed to produce sufficient evidence to support his termination. It also rejected his claim that the Commission had impermissibly shifted the burden of proof to him. It recognized that the "Commission's sole finding was that Pierce failed to provide corroborating evidence that he was accompanied by another employee when he was in . . . Nahriri's work area, violating the earlier recommendation (sanction), of the Commission." In addressing the burden of proof, the district court relied on this court's decision in *Caniglia v. City of Omaha*.[1] It concluded that Pierce had the "burden to show that good cause did not exist for his discharge from employment."

The court noted that Hill had reported in her written statement seeing Pierce in the assisted living unit unaccompanied several times in 2002, including one occasion in August. Based on this statement and the Commission's belief that Pierce was

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[1] *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982).

not credible, the court concluded that the evidence was sufficient to show Pierce's actions on August 6, 2002, violated the Commission's 2001 order. It further concluded the County had shown Pierce committed the offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct."

Further, the court determined that the August 6, 2002, violation occurred within 1 year of November 1, 2001, when the Commission affirmed Pierce's suspension for the first violation. Thus, the court concluded the Department had not violated the CBA by charging Pierce with a second offense past the 1-year limit for using an offense for further disciplinary action. But the court determined that it did not have jurisdiction to decide Pierce's remaining claims that the County had breached the CBA. It concluded Pierce's compliance with the county claims statute[2] was a prerequisite to its exercising jurisdiction. Pierce appeals.

## ASSIGNMENTS OF ERROR

Pierce assigns, restated, that the district court's order upholding the Commission's decision to terminate his employment was arbitrary and capricious, unreasonable, and unsupported by the facts and law for the following reasons: (1) There was no competent evidence that Pierce engaged in any misconduct on August 6, 2002; (2) the County did not initiate a disciplinary action within 10 working days of the incident on August 6 as required by the CBA; (3) the personnel director failed to respond within 10 days to Pierce's grievance as required by the CBA; (4) under the CBA, prior disciplinary offenses cannot be considered if they occurred more than 1 year before the incident for which the disciplinary action is being brought; and (5) the Commission did not render its decision within 5 calendar days of the hearing as required by the CBA.

Pierce further assigns that (1) the district court erred in concluding that it did not have jurisdiction under § 23-135 to decide his breach of contract claim and (2) the district court erred in failing to conclude that the Commission's decision

[2] See Neb. Rev. Stat. § 23-135 (Cum. Supp. 2002).

violated Pierce's due process right to be free from double jeopardy by disciplining him twice for the same conduct.

## STANDARD OF REVIEW

[1-4] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.[3] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.[4] In addition, the administrative action must not be arbitrary or capricious.[5] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.[6]

[5,6] We determine jurisdictional issues that do not involve factual disputes as a matter of law.[7] On a question of law, we reach a conclusion independent of the court below.[8]

## ANALYSIS

### JURISDICTION

The County argues that the district court correctly determined it lacked jurisdiction to decide issues related to the Department's breach of the CBA. Relying on *Jackson v. County of Douglas*,[9]

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[3] See *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007).

[4] See, *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004); *Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991).

[5] See, *Hickey, supra* note 3; *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987).

[6] *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

[7] See *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002).

[8] See *id.*

[9] *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986).

it contends that a claim for breach of a collective bargaining agreement against a county is subject to § 23-135.

Section 23-135 is the county claims statute. It provides, in relevant part, that "[a]ll claims against a county shall be filed with the county clerk within ninety days from the time when any materials or labor, which form the basis of the claims, have been furnished or performed . . . ." We discussed the county claims statute in *Jackson*. There, the county required some employees to show up for their shift 15 minutes early to exchange information with employees on the previous shift. But the county never paid them for this time. In their petition, the employees alleged the county had violated provisions of their labor agreement and the Commission's rules. We concluded that their claim was an action at law for the payment of services arising out of a contractual relationship. Because the employees did not comply with the county claims statute, we held that the district court properly dismissed their petition for lack of jurisdiction. *Jackson*, however, is not controlling here. We see a critical distinction.

[7] In *Jackson*, the employees were not appealing from a final order of the Commission, nor does the Commission have statutory authority to hear appeals that are unrelated to disciplinary actions.[10] In contrast, in appeals from the Commission's final orders, the appeal "shall be in the manner provided in sections 25-1901 to 25-1908."[11] That is, under § 23-2515, an appeal from a final order of the Commission is a petition in error, not—as in *Jackson*—an original breach of contract action against the county. Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2006) provides that a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court." And unlike a direct breach of contract action against the County, the County is on full notice of a breach of contract claim arising out of a labor agreement when the employee has complied with the County's agreed-upon procedures for asserting the claim.

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[10] See *Douglas Cty. Bd. of Comrs., supra* note 7.

[11] Neb. Rev. Stat. § 23-2515 (Reissue 1997).

[8,9] We have held that the Commission is a statutorily created tribunal that is required to act in a judicial manner when deciding employee appeals.[12] When the Commission acts in a judicial manner, a party adversely affected by its decision is entitled to appeal to the district court through the petition in error statutes.[13] Thus, the court erred in concluding that it lacked jurisdiction over Pierce's claims that the Department violated the CBA as far as those claims were related to his termination. As stated, however, we do not reach the merits of these claims.

### Employee's Burden of Proof Under *Caniglia* Is Questionable

Pierce contends that the Commission's decision to terminate his employment was arbitrary and capricious because it was unsupported by competent evidence. The County counters that the district court properly relied on *Caniglia*.[14] The County argues that in an appeal from a disciplinary action, this court puts the burden of persuasion on the employee. It argues that under *Caniglia*, the Commission correctly found that Pierce had failed to prove someone accompanied him and that his presence in Nahriri's unit was excused.

In *Caniglia*, we discussed an employee's burden of proof in appealing a disciplinary action to a city's personnel board. We stated that the employee had the "burden to show that good cause for her dismissal did not exist."[15] *Caniglia*, however, is an anomaly in our case law. In no other case has this court placed the burden on the employee to prove good cause did not exist in a disciplinary action.

Notably, *Caniglia* was decided before *Cleveland Board of Education v. Loudermill*.[16] Neb. Rev. Stat § 23-2510 (Reissue 1997) does provide that county employees may "appeal" a disciplinary order to the Commission. But when an employee

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[12] See *Douglas Cty. Bd. of Comrs., supra* note 7.

[13] *Id.*

[14] *Caniglia, supra* note 1.

[15] *Id.* at 407, 315 N.W.2d at 243.

[16] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

has a protected property interest in continued employment, the Commission's public hearing[17] is usually the postdeprivation hearing. That hearing satisfies due process requirements under *Loudermill*. Because the evidentiary hearing before the reviewing tribunal or agency is de novo, many courts hold that the employing authority bears the burden of proving that the employee engaged in the conduct on which the authority based its disciplinary charge.[18]

But we decline to decide the continued vitality of *Caniglia*. Assuming arguendo that the County proved Pierce was in Nahriri's unit unaccompanied, we nonetheless reverse. We conclude that the County has failed to show Pierce's mere violation of a work restriction, without any other showing of misconduct, warranted termination as a second offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct."

### The Record Does Not Support the Department's Alleged Second Offense of Immoral, Indecent, Disgraceful, or Inappropriate Conduct

In addition to contending that the County failed to prove he was unaccompanied, Pierce contends the evidence fails to show that he engaged in "[i]mmoral, indecent, disgraceful, or inappropriate conduct." Obviously, Pierce's conduct did not rise to the level of immoral, indecent, or disgraceful. The question is whether it constituted "inappropriate conduct." We agree that the term "inappropriate conduct," standing alone, could be broad enough to encompass any improper conduct by an employee. In this case, however, we decline to interpret it that broadly. The record clearly shows the Department did not consider Pierce's conduct on August 6, 2002, to be a serious offense warranting termination.

First, as Pierce argues, the CBA required the Department to initiate a disciplinary action within 10 days from the time his

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[17] See Neb. Rev. Stat. § 23-2511 (Reissue 1997).

[18] See, e.g., *Cal. Correctional Peace v. State Person.*, 10 Cal. 4th 1133, 899 P.2d 79, 43 Cal. Rptr. 2d 693 (1995); *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); *Thompson v. New Orleans Dept.*, 844 So. 2d 940 (La. App. 2003); *Thurmond v. Steele*, 159 W. Va. 630, 225 S.E.2d 210 (1976).

supervisor learned of the incident. That was not done. Nahriri wrote in her August 6, 2002, incident report that she had contacted the personnel director and Pierce's supervisor on that same morning. However, the Department took no disciplinary action in response to Nahriri's allegation until August 26—20 days later.

Second, the supervisor's disciplinary action on August 26, 2002, was an oral reprimand, an informal disciplinary action. The Commission's personnel manual provides: "Where corrective action can be accomplished through . . . oral reprimands or warnings, formal disciplinary action should not be taken." By giving Pierce an oral reprimand, the Department signaled that the violation did not justify formal disciplinary action.

Third, Pierce's alleged unaccompanied presence in Nahriri's unit would have violated the personnel directive and the Department's oral directives after the Commission's 2001 order. Although Hill testified that she did not perceive Pierce's conduct as threatening in any way, his alleged conduct unquestionably fell within less serious categories of offenses under the Commission's personnel manual. Yet, the Department took no action consistent with the lesser offenses.

Those lesser offenses included "[f]ailure to observe written . . . orders prescribed by competent authority . . . where safety of persons or property is not endangered thereby." The punishment for an employee's first failure to observe a written order is an official written reprimand. Unlike an oral reprimand, a written reprimand is a formal disciplinary action.

Similarly, the Department could have charged him with insubordination, i.e., refusal to obey orders. The punishment for a first insubordination offense is an official written reprimand to a 1-day suspension. But the Department did not issue a written reprimand for either offense. Thus, although Pierce's alleged violation of a written order constituted two lesser offenses, the Department apparently did not consider Pierce's conduct to rise even to this level.

We cannot judge an offense of "inappropriate conduct" in a vacuum, detached from the consequences for the offense. The Commission's personnel manual shows that this offense is reserved for conduct that minimally warrants a 1- to 10-day

suspension for a minor first offense or termination for a major first offense or for any second offense. Clearly, "inappropriate conduct" was not intended to include less serious offenses under the personnel manual. But the record shows the Department did not consider Pierce's alleged conduct on August 6, 2002, to be insubordination or a failure to observe a written order. In fact, it never considered the August 6 conduct, standing alone, serious enough to warrant any formal disciplinary action. Therefore, its decision to charge Pierce with a second offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct" can only be explained by Nahriri's second allegation on August 29.

The Department issued its notice of disciplinary charges on September 9, 2002, over 1 month after Pierce's alleged misconduct on August 6. As noted, on August 29, Nahriri alleged that Pierce had looked at her through a window while she was eating lunch in the courtyard. In its notice of disciplinary charges, the Department included this second incident to bolster its allegation that Pierce's August 6 conduct now constituted a serious offense warranting termination. But Pierce was not restricted from the courtyard, and at the Commission's hearing, he denied the allegation that he had looked at Nahriri; Nahriri did not testify. The Commission did not discuss the August 29 allegation in its order and based its decision solely on Pierce's failure to prove that someone had accompanied him on August 6. Thus, we do not consider the second allegation.

Both the Department's delay in responding to Nahriri's first allegation and the low level of its disciplinary response show that it did not consider Pierce's alleged conduct on August 6, 2002, to be a serious offense warranting termination. Pierce did not speak or make any gestures to Nahriri, nor did he do anything intimidating or offensive. Hill corroborated his testimony that he immediately left the area after she told him she would clean up the ice. Under these circumstances, we conclude that even if the Department proved Pierce engaged in the conduct of which he was accused, it was not an offense warranting termination.

## CONCLUSION

We conclude that the district court erred in refusing to review Pierce's claims that the Department violated grievance

procedures under the CBA in terminating his employment. In a petition in error appeal from the Commission, the district court has jurisdiction to determine contract issues related to disciplinary actions; the petitioner is not required to file a claim with the county under § 23-135.

Regarding Pierce's claims of insufficient evidence, we conclude that the evidence fails to show that the Department considered Pierce's alleged conduct on August 6, 2002, to be a serious violation of the personnel manual, warranting termination. The Department's decision to charge Pierce with a second offense of "[i]mmoral, indecent, disgraceful, or inappropriate conduct" was apparently motivated by a second allegation of misconduct that played no role in the Commission's decision to uphold Pierce's termination. The district court therefore erred in affirming Pierce's termination based on his alleged conduct on August 6. Accordingly, we reverse the district court's judgment, which affirmed the decision of the Commission to uphold Pierce's termination. We remand the cause with directions to the district court to remand the case to the Commission to vacate its order.

REVERSED AND REMANDED WITH DIRECTIONS.

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ROGER FRANK ET AL., APPELLEES, V. FRED A. LOCKWOOD AND FRED A. LOCKWOOD & CO., P.C., A NEBRASKA CORPORATION, APPELLANTS.

749 N.W.2d 443

Filed May 23, 2008. No. S-06-731.

1. **Directed Verdict: Evidence: Appeal and Error.** Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.

3. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
4. **Judgments: Verdicts: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained.
5. **Malpractice: Accounting: Negligence: Proximate Cause: Proof: Damages.** A plaintiff alleging accounting negligence must prove three elements: (1) the accountant's employment, (2) the accountant's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
6. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
7. **Malpractice: Accounting: Taxes: Interest: Proof: Damages.** Interest on taxes is recoverable in accounting malpractice actions to the extent plaintiffs carry their burden of showing that they were damaged by the imposition of interest.
8. **Malpractice: Accountants: Negligence: Penalties and Forfeitures: Damages.** Penalties may be recoverable as an element of damages when such penalties are the result of an accountant's negligence.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, reversed in part, and remanded for a new trial on the issue of damages.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., and Kevin J. Dostal for appellants.

Jarrod P. Crouse, of Sorensen, Mickey & Hahn, P.C., and Anthony Viorst, of Viorst Law Offices, P.C., for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Fred A. Lockwood and Fred A. Lockwood & Co., P.C., appeal the order of the district court for Scotts Bluff County overruling their motion for judgment notwithstanding the verdict. A jury had found in favor of Roger Frank (Frank) and his wife, Connie Frank, on their claim for accounting malpractice in connection with their 2001 personal federal and Nebraska

income tax returns and awarded damages of $37,879 against Lockwood. We reverse in part, and remand for a new trial.

## STATEMENT OF FACTS

Frank owns and operates various business ventures. In 1997, Frank purchased land near Scottsbluff, Nebraska, and titled the land in the name of one of his businesses, Frank Enterprises, Inc., an S corporation that for tax purposes passes its income and deductions through to its owners, Frank and his wife. In February 2001, Frank, on behalf of the corporation, entered into a contract to sell a portion of the land. After signing the contract, Frank explored possibilities for deferring taxation of gain on the sale of the land by use of a like-kind exchange pursuant to the Internal Revenue Code, I.R.C. § 1031 (2000).

In June 2001, Frank consulted an attorney who specialized in § 1031 exchanges. The attorney advised Frank that, among other things, he should consult a tax professional regarding tax implications of a § 1031 exchange. Frank's accountant at the time was Lockwood. Frank testified at trial in this present case that on occasions in June and September 2001, he spoke with Lockwood, and that Lockwood told him the Franks had $225,000 in tax credits that could be used to offset taxes that may be incurred as a result of the land sale. Frank's attorney testified that he spoke with Lockwood in September and that Lockwood also told him such tax credits were available. Lockwood testified at trial that he might have stated the Franks had tax credits, but he denied that he advised Frank such credits could be used to offset tax on the sale because such a calculation would require knowledge of financial information that was not available at that time.

The sale closed on October 9, 2001, and Frank Enterprises received proceeds of $1,296,781.20. Of this amount, $1 million was deposited with a qualified intermediary that would hold the proceeds for purposes of the anticipated § 1031 exchange. The remaining proceeds, less closing costs, were transferred to the Franks. Frank testified that his decision to retain the remaining proceeds rather than using the entire proceeds in a § 1031 exchange was based on Lockwood's advice regarding the availability of tax credits. Subsequent to the sale, on October 15,

Frank met with Lockwood to review the Franks' 2000 personal tax returns, the filing of which had been extended and which are not directly at issue in this case. Frank testified that at the October 15 meeting, Lockwood provided greater detail regarding the tax credits and again advised him that the credits could be used to offset tax from the sale. In contrast, Lockwood testified that he gave Frank information regarding the tax credits on October 15 but that he did not tell Frank that the credits could be used to offset tax from the land sale.

In early 2002, after using part of the land sale proceeds to purchase replacement properties for a § 1031 exchange, Frank determined that he had purchased sufficient replacement property and that he could withdraw the remaining proceeds of approximately $500,000 being held by the qualified intermediary. Frank testified that he made this decision based on Lockwood's advice that he could use tax credits to offset any capital gains tax resulting from failure to use the entire proceeds to buy replacement property.

On April 15, 2002, the date when the Franks' 2001 personal tax return was due, Frank met with Lockwood regarding his 2001 income taxes. On that day, Lockwood informed Frank, for what Frank testified was the first time, that Frank would not be able to use any of the tax credits to offset the capital gains tax from the land sale and that as a result, the Franks would owe a large tax liability for 2001. Lockwood advised Frank to file an extension, but Lockwood had not estimated the Franks' 2001 tax liability and did not advise Frank to pay an estimate of taxes due. Frank testified that if Lockwood had advised him to pay estimated taxes on April 15, 2002, he would have done so.

On October 4, 2002, Lockwood provided the Franks with a 2001 tax return. Filing instructions included with the return stated that the return was to be mailed on or before October 15, 2002. After receiving the return, Frank decided to consult with another accountant to review the return. After reviewing the return, the other accountant gave Frank a list of suggestions for reducing the tax liability, which list Frank gave to Lockwood. Lockwood incorporated most of the suggestions into revised tax returns which were completed in November. Frank did

not file the returns and pay the tax liability until some time in December. Frank consulted with his attorney prior to filing the tax returns. Frank testified at trial that in December, prior to filing the returns, he was aware that penalties and interest were accruing. A letter dated December 12, 2002, from Frank's attorney to Lockwood was entered into evidence at trial. Frank had authorized the attorney to write the letter. The attorney stated in the letter that although penalties and interest were accruing, it was important to take time to ensure that "whatever is filed is the best result you can prepare."

After the Franks filed the tax returns and paid the taxes for 2001, both the Internal Revenue Service (IRS) and the Nebraska Department of Revenue provided the Franks notices that penalties and interest were due with respect to the 2001 returns. Penalties were approximately $27,925 for the federal and $2,291 for the state; interest was approximately $6,285 for the federal and $1,378 for the state. Penalties and interest related to both returns totaled approximately $37,879.

On July 15, 2003, the Franks and Frank Enterprises filed a complaint against Lockwood and Fred A. Lockwood & Co., P.C. (hereinafter referred to collectively as "Lockwood"). The Franks asserted a cause of action for accounting malpractice. Trial in the matter was held February 13 through 16, 2006. After the Franks rested their case, Lockwood moved for directed verdict, arguing that there was no proof of damages and no proof of proximate cause of damages. The court sustained the motion for directed verdict as to Frank Enterprises on the basis that all income and deductions were passed through to the Franks and therefore the damage, if any, was to the Franks and not to Frank Enterprises. The court also sustained the motion for directed verdict to the extent that the Franks claimed lost profits because any such damages were not definite. The court overruled the remainder of the motion for directed verdict, and the defense presented its case. Lockwood renewed the motion for directed verdict at the close of all the evidence, and the court overruled the renewed motion.

On February 16, 2006, the jury returned a verdict in favor of the Franks and awarded damages in the amount of $37,879. Lockwood filed a motion for judgment notwithstanding the

verdict. The court overruled the motion. The court noted that the jury's damage award was equal to the amount the evidence established as penalties and interest paid by the Franks with respect to their 2001 federal and Nebraska tax returns. The court therefore determined that "the jury awarded nothing in actual income taxes paid" and that the verdict "represents the exact amount the jury concluded was paid in penalties and interest." The court noted that there was evidence from which the jury could find that (1) Lockwood gave Frank erroneous advice regarding the availability of tax credits to offset any tax due on the 2001 returns that might result from the land sale; (2) Frank's decision to forgo reinvesting the entire proceeds of the land sale in a like-kind exchange was based on such erroneous advice; (3) if Frank had known that the tax credits could not be used to offset tax and that he would have a large tax liability for 2001, he would have paid estimated taxes in order to avoid penalties and interest for late payment of such tax liability; and (4) Lockwood's erroneous advice caused the Franks to incur penalties and interest that they would not otherwise have incurred. The court concluded that "the verdict represents an appropriate item of damage that was proximately caused by negligent professional advice, and the verdict should stand."

Lockwood appeals.

## ASSIGNMENTS OF ERROR

Lockwood generally asserts, restated, that the district court erred in overruling his motions for directed verdict and his motion for judgment notwithstanding the verdict because there was insufficient evidence that the Franks suffered damages as the result of his advice in connection with the preparation and filing of the Franks' 2001 income taxes.

## STANDARDS OF REVIEW

[1] Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

[2,3] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Id*. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id*.

## ANALYSIS

[4] Lockwood assigns error to the denial of his motions for directed verdict and for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). We conclude that the court erred in denying parts, but not all, of Lockwood's motion for judgment notwithstanding the verdict.

### *Evidence Supports Finding That Lockwood Neglected a Reasonable Duty.*

[5,6] We have stated that before a plaintiff may recover for accounting malpractice, the essential elements of any negligence action must be proved, namely, (1) duty, (2) breach, (3) causation, and (4) resulting damages. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). Stated in the terms we have used in other cases of professional negligence, a plaintiff alleging accounting negligence must prove three elements: (1) the accountant's employment, (2) the accountant's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. See *Bellino, supra* (regarding attorney negligence). Lockwood does not appear to dispute that his employment by the Franks was shown. Therefore, in determining whether the district court should have granted judgment notwithstanding the verdict, we consider whether the evidence supports findings that Lockwood neglected a reasonable duty and that such negligence resulted in

and was the proximate cause of the penalties and interest paid by the Franks. In this respect, we note that a proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Id*.

With regard to neglect of a reasonable duty, the district court's ruling referred primarily to evidence that Lockwood gave erroneous advice regarding the § 1031 transaction. Although it recognized that the jury's damage award was attributable to penalties and interest, the court emphasized that the Franks' mistaken assumption, based on Lockwood's erroneous advice, that tax credits were available to offset tax on the land sale was the cause of the damages awarded. We disagree with the emphasis of such analysis.

Based on evidence in the record that the Franks paid penalties and interest of approximately $37,879 related to their 2001 federal and Nebraska tax returns, the district court determined that the jury found malpractice and that the damages awarded by the jury consisted exclusively of penalties and interest. Neither Frank nor Lockwood disputes this characterization, and we agree that the evidence supports this interpretation of the jury's award. Because only penalties and interest are at issue, we need not determine or comment on whether any other items, such as the taxes paid by the Franks, were recoverable as damages. In this regard, we note that the Franks did not file a cross-appeal relative to the fact that the jury did not award damages in connection with the amount of taxes paid.

The Franks incurred penalties and interest on their 2001 tax returns because the taxes were not timely paid on April 15, 2002, and because the tax returns were not timely filed on the extended due date of October 15. Although Lockwood's advice in connection with the payment and filing of the returns can give rise to liability, as discussed below, based on the evidence in this case, Lockwood's advice regarding the availability of credits as they pertained to the Franks' tax exposure due to the land sale could not be found to be the proximate cause of the penalties and interest actually incurred.

We recognize that erroneous advice regarding the § 1031 transaction could conceivably have caused the Franks to fail to plan ahead for taxes being due on April 15, 2002. However,

Frank's testimony was that he learned from Lockwood on April 15 that the tax credits were not available and that a large tax liability would be due. Frank further testified that if Lockwood had advised him to pay an estimated tax on that day, he would have done so. Such testimony indicates that Frank's financial situation was such that he would have been able to timely pay the taxes on April 15, thereby avoiding penalties and interest for late payment of taxes, even without advance knowledge that a tax liability would be due.

However, we note that Frank also testified that Lockwood failed to advise him on April 15, 2002, that when filing for an extension of time to file their 2001 returns, the Franks should have paid an estimate of their tax liability in order to avoid penalties and interest. The accountant who was asked by Frank to review the returns prepared by Lockwood testified at trial that a reasonable accountant would have advised a client to pay such estimate when filing for an extension. Based on this evidence, the jury could have found that Lockwood neglected a reasonable duty by failing to advise the Franks to pay an estimated tax liability on April 15, 2002. Therefore, although Lockwood's advice regarding the § 1031 transaction could not be found to have caused the Franks to fail to timely pay their taxes, the jury could have found that Lockwood's further failure to advise the Franks to pay an estimated tax on April 15 caused the Franks to fail to timely pay their taxes.

We therefore determine that there was evidence from which the jury could have found that Lockwood neglected a reasonable duty and was liable for damages that resulted from such negligence. We must next consider whether Lockwood's negligence in failing to advise the Franks to pay estimated taxes on April 15, 2002, resulted in and was the proximate cause of the penalties and interest that comprise the jury's award of damages.

*Although Interest May Be Recoverable Under Proper Circumstances, Evidence in This Case Did Not Establish That the Franks Suffered Damages From Paying Interest on Taxes.*

The evidence indicates that the Franks paid interest of $7,663 with respect to their federal and Nebraska taxes. Although we

adopt a rule that interest paid to taxing authorities is available as an item of damages in an accounting malpractice case upon proper proof, and we reject a rule that interest on taxes is precluded as a recoverable item of damages, we conclude that under the evidence presented in this case, the jury could not have found that the Franks suffered damage as a result of the payment of interest. Therefore, the district court should have granted judgment notwithstanding the verdict to the extent interest was awarded as an item of damages.

We note that some courts have held that interest due on taxes is not recoverable as an item of damages in an accounting malpractice action. See, *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230 (E.D. Cal. 1996); *Leendertsen v. Price Waterhouse*, 81 Wash. App. 762, 916 P.2d 449 (1996); *Alpert v Shea Gould Climenko*, 160 A.D.2d 67, 559 N.Y.S.2d 312 (1990); *Orsini v. Bratten*, 713 P.2d 791 (Alaska 1986). Generally, the reasoning behind such decisions is that because the plaintiff had the use of the money during the period of late payment or underpayment, the plaintiff is not damaged when he or she is ultimately required to pay interest for such use of the money. The court in *Eckert Cold Storage, Inc.*, stated that "interest paid to the I.R.S. represents a payment for the plaintiffs' use of the tax money during the period after the taxes came due and before they were paid; as such, to the extent that the I.R.S. charges the market rate, interest is not a proper element of damages." 942 F. Supp. at 1235. We agree with the reasoning of these courts to the extent that interest paid to the IRS represents a payment for use of money and that therefore, a person who has use of the money is not generally damaged by the payment of interest. However, as discussed below, we also recognize that there may be exceptions to this general rule.

The Franks urge us to reject a blanket rule precluding recovery of interest on taxes as an item of damages, and we agree that a blanket rule should not be adopted. The Franks cite to *O'Bryan v. Ashland*, 717 N.W.2d 632 (S.D. 2006), as the preferred analysis. In *O'Bryan*, the Supreme Court of South Dakota held that "the issue whether a plaintiff has actually been damaged from the interest charged by the IRS to the taxpayer on unpaid tax liability is a question of fact," and the court

refused "to adopt a blanket rule forbidding interest recovery in accounting malpractice actions." 717 N.W.2d at 639. The Supreme Court of South Dakota noted that other courts have acknowledged the possibility that plaintiffs could prove that they were truly damaged by the imposition of interest and that such courts have determined that "whether a [plaintiff] has been damaged is left to the finder of fact, with the burden of proof on the [plaintiff]." *Id.* at 637.

We agree with the Supreme Court of South Dakota that it is possible that a plaintiff could prove under appropriate circumstances that the plaintiff was damaged by the imposition of interest. A plaintiff might be able to show that he or she was damaged by the imposition of interest either because he or she could have borrowed money during that time at a rate lower than what was assessed by the taxing authorities or because he or she had sufficient money to pay the taxes but the value of the use of such money to the plaintiff during the penalty period was less than the rate of interest charged by the taxing authorities. For example, in *O'Bryan*, the South Dakota Supreme Court noted evidence that the plaintiff "would not have necessarily had to borrow the money [to pay taxes] from a bank; he may have been able to borrow money from his family as he had done before." 717 N.W.2d at 639. The jury in *O'Bryan* could have inferred from such evidence that the plaintiff would have paid his family no interest or interest at a rate below the market rate that would have been charged by a bank. Therefore, the jury could have found that the plaintiff suffered a loss when he had to pay interest to the IRS at a rate higher than was otherwise available to the plaintiff.

[7] The *O'Bryan* approach, which we favor, is similar to that taken by the Massachusetts Court of Appeals in *Miller v. Volk*, 63 Mass. App. 303, 305-06, 825 N.E.2d 579, 582 (2005), in which the court did not adopt a blanket rule precluding recovery of interest paid to the IRS in an accounting malpractice action, but denied recovery of interest under the particular facts of the case because "no proof was offered that the interest paid to the IRS on the deficiency exceeded the value to the plaintiffs of having use of the money in the meantime. There was, in other words, no proof of actionable damages." While we do not

hold that plaintiffs are completely barred from recovering damages related to interest paid to the IRS, we think that the burden remains on the plaintiff to prove that the circumstances were such that he or she was damaged by the payment of interest. We therefore do not adopt a blanket rule precluding recovery of interest on taxes as an element of damages. Instead, we hold that interest on taxes is recoverable in accounting malpractice actions to the extent plaintiffs carry their burden of showing that they were damaged by the imposition of interest.

The dissent in this case disagrees with placing such burden on the plaintiff. The dissent urges adoption of an approach set forth in *Ronson v. Talesnick*, 33 F. Supp. 2d 347 (D.N.J. 1999). Under the *Ronson* approach, once the plaintiff has proved that he or she paid interest to the IRS, the burden shifts to the defendant to prove that the plaintiff benefited from the defendant's negligence. In *Ronson*, the federal district court for New Jersey attempted to determine whether New Jersey state law would allow a plaintiff to recover interest paid to the IRS in an accounting malpractice action. Based on New Jersey's adoption of the collateral source rule and the benefits rule in other types of tort actions, the federal district court predicted that New Jersey would follow the above approach in which the plaintiff merely needed to prove that he or she paid interest to the IRS as a result of the defendant's negligence and then the defendant had the burden to show that the plaintiff benefited from the defendant's negligence.

We disagree with the underlying reasoning in *Ronson*. We do not think the collateral source rule and the benefits rule are applicable to the present question because such rules presume that the plaintiff has proved damages. As noted above, we generally agree with the reasoning of other courts that interest paid to the IRS represents a payment for use of money and that therefore, a person who has use of the money is not generally damaged by the payment of interest. We recognize that there may be circumstances under which a plaintiff actually is damaged, but the burden remains on the plaintiff to prove that such circumstances exist. We have stated, "Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer

evidence sufficient to prove the plaintiff's alleged damages." *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 195, 639 N.W.2d 88, 92-93 (2002). The dissent agrees with the reasoning in *Ronson* that a defendant should not benefit from a presumption that a plaintiff maintained a sum of money and earned interest in an amount comparable to the interest rate charged by the IRS. However, because the plaintiff has the burden to prove his or her damages, we do not think that the plaintiff should benefit from the presumption that he or she did not benefit from having use of the money and therefore was damaged by paying interest. "[T]o the extent that the I.R.S. charges the market rate, interest is not a proper element of damages." *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1235 (E.D. Cal. 1996). To the extent that interest charged by the IRS is above the market rate or does not reflect the value of the use of the money, we think it is the plaintiff's duty to so prove, and the plaintiff must put on evidence, that the interest charged by the IRS was greater than the value of the use of the money. In the present case, the Franks put on no such evidence.

The dissent also cites cases which adopt an interest differential approach to measuring damages in these situations. We note that the *Ronson* approach and the interest differential approach are significantly different in that *Ronson* puts the burden on the defendant to prove a benefit to the plaintiff, while under the interest differential approach, the burden apparently still remains on the plaintiff to prove the interest differential. We do not reject the interest differential approach as a possible measure of damages, and we think that it could be one of the circumstances referred to above in which a plaintiff could prove damages from the payment of interest to the IRS. However, in the present case, the Franks did not present sufficient evidence regarding the interest differential; they presented evidence that they paid interest to the IRS, but they presented no evidence that they actually earned less than what they paid. Because the Franks' evidence regarding interest differential was inadequate, we need not decide in this case whether we would adopt the interest differential approach. However, we note that even if we were to adopt the interest differential approach, we would still conclude in this case that because the Franks did not present

sufficient evidence regarding interest differential, they did not prove damages with respect to the interest paid to the IRS.

With the foregoing principles in mind, we observe that under the circumstances of this case, the Franks failed to provide evidence that they were damaged by the payment of interest. To the contrary, Frank testified that if Lockwood had told him to pay estimated taxes on April 15, 2002, he would have done so. The evidence also indicates that the Franks paid the taxes due when they filed the tax returns in December. Such evidence indicates that the Franks had the use of the money for the period after the taxes were due on April 15 and before they paid the taxes in December. The Franks did not present evidence to indicate that there were circumstances, such as those outlined above, such that they were damaged by the payment of interest on their taxes. The evidence showed only that the Franks had to pay interest to the taxing authorities for use of the money between April and December. There was no evidence from which the jury could have concluded that the Franks were damaged by payment of the interest because there was no evidence that the value of the use of the money to the Franks during that time was less than the rate of interest charged by the taxing authorities. Because there was no evidence of damage resulting from the payment of interest, we conclude that the district court erred when it failed to grant Lockwood's motion for judgment notwithstanding the verdict to the extent that the jury awarded damages of $7,663 for interest paid on the Franks' federal and Nebraska taxes, and we reverse the district court's ruling to that extent.

*Under the Facts of This Case, the Franks May Recover Penalties Related to Failure to Timely Pay Taxes, But Not Penalties Related to Failure to Timely File Returns.*

The evidence presented at trial indicates that the Franks incurred penalties of $27,925 with respect to their federal taxes and $2,291 with respect to their Nebraska taxes, for a total of $30,216. We conclude that penalties may be a recoverable element of damages; however, we further conclude that only a portion of the penalties in this case was the result of Lockwood's

advice and, in particular, his failure to advise the Franks to pay estimated taxes on April 15, 2002.

[8] As a general matter, it has been held that penalties may be recoverable as an element of damages when such penalties are the result of an accountant's negligence. See, *Bick v. Peat Marwick & Main*, 14 Kan. App. 2d 699, 799 P.2d 94 (1990); *Moonie v. Lynch*, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967). We agree with these authorities that penalties may be recovered as an item of damages in an accounting malpractice action. Unlike interest, penalties are not a payment for use of money but instead are a payment beyond interest to penalize a taxpayer for late payment of taxes or late filing of a return. To recover penalties, the taxpayer must show that the accountant's negligence was the proximate cause of the penalties.

The penalties incurred by the Franks in this case appear to have been of two types—those incurred because the Franks failed to pay taxes when due on April 15, 2002, and those incurred because the Franks failed to file their returns when due as extended to October 15. Under federal law, I.R.C. § 6651 (2000) provides in subsection (a)(1) that a taxpayer may be assessed a penalty for failure to timely file a return and provides in subsection (a)(2) that a taxpayer may be assessed a separate penalty for failure to timely pay taxes due. In addition, I.R.C. § 6654 (2000) provides that penalties may be assessed for underpayment of estimated taxes. Nebraska law provides for similar penalties for failure to timely file returns, Neb. Rev. Stat. § 77-2789 (Reissue 2003), and for underpayment of estimated taxes, 316 Neb. Admin. Code, ch. 20, § 007 (1998).

The evidence indicates that the Franks were required to pay their federal and Nebraska tax liabilities for 2001 on April 15, 2002. Because extensions were filed for and granted, the tax returns themselves were not due on April 15, but were due on the extended due date of October 15. However, the Franks did not file their 2001 tax returns or pay the tax due on such returns until December. Because the Franks failed to timely pay on April 15 and failed to timely file on October 15, they were subject to both penalties for late payment of taxes and penalties for late filing of returns.

As indicated above, there was sufficient evidence from which the jury could find that Lockwood was negligent in failing to advise the Franks to pay an estimate of their 2001 tax liability on April 15, 2002. Because the failure to timely pay taxes subjected the Franks to possible penalties, the jury could have found that Lockwood's negligence resulted in and was the proximate cause of any such penalties that were imposed. We therefore conclude that the district court did not err in denying Lockwood's motion for judgment notwithstanding the verdict with respect to any portion of the damages award that was attributable to penalties for the Franks' failure to timely pay taxes.

However, to the extent any penalties were imposed for the Franks' failure to timely file the tax returns, such late filing penalties were not a result of Lockwood's advice or the failure to pay taxes on April 15, 2002. Instead, based on the evidence, the late filing penalties were the result of the Franks' failure to file their 2001 federal and Nebraska tax returns on or before the extended due date of October 15. In this regard, there was evidence that Lockwood provided a tax return to the Franks in early October with instructions that stated that the return was to be mailed on or before October 15. The evidence further indicates that the return was not filed at that time because Frank chose to have another accountant and Frank's attorney review the return. Frank's testimony and the letter Frank's attorney sent to Lockwood in December indicated that Frank was aware that penalties and interest were accruing but chose to take time for a careful review of the returns. Therefore, the evidence was not sufficient for a jury to determine that Lockwood breached a duty with respect to the October 15 filing deadline or that any damages resulting from the late filing of returns were the result of Lockwood's advice. Because late filing penalties imposed were not the result of Lockwood's negligence, the district court erred when it denied Lockwood's motion for judgment notwithstanding the verdict with respect to the portion of the damages award that was attributable to late filing penalties, and we reverse the district court's ruling to that extent.

We note that the evidence presented at trial establishes only total amounts for the penalties imposed by the IRS and for

penalties imposed by the Nebraska Department of Revenue. The evidence does not distinguish whether such penalties were penalties occasioned by the failure to timely pay taxes or by the failure to timely file returns, or some combination of both. As we have determined above, to the extent such penalties are penalties for failure to timely file returns, under the facts of this case, they are not recoverable as damages. However, to the extent such penalties are penalties for failure to timely pay the taxes, under the facts of this case, they are recoverable as damages. Because the evidence in the record does not allow us to determine what portion of the penalties are for late payment of the taxes which are recoverable, we find it necessary to remand this cause to the district court for a new trial limited to a determination of the portion of damages attributable to penalties imposed for failure to timely pay taxes and, upon a proper showing, awarding the Franks an amount of damages equal to penalties for failure to timely pay taxes. See *Adams State Bank v. Navistar Financial Corp.*, 229 Neb. 334, 426 N.W.2d 525 (1988) (holding that district court erred in denying judgment notwithstanding verdict as to two components of damages but not as to third component and remanding for new trial to determine damages with respect to third component).

## CONCLUSION

We conclude that there was not sufficient evidence from which the jury could find that the Franks were damaged by the imposition of interest on taxes and that there was not sufficient evidence that Lockwood's negligence was the proximate cause of penalties for the Franks' failure to timely file their tax returns. The district court therefore erred in denying Lockwood's motion for judgment notwithstanding the verdict with regard to those two portions of the damages awarded by the jury, and we reverse the district court's ruling to that extent. We further conclude that there was sufficient evidence from which the jury could find that Lockwood neglected a reasonable duty by failing to advise the Franks to pay an estimate of their taxes on April 15, 2002, and that the evidence supported a finding that Lockwood's negligence was the proximate cause of penalties imposed for the Franks' failure to timely pay

their taxes. Therefore, the district court did not err in denying Lockwood's motion for judgment notwithstanding the verdict with regard to the portion of damages attributable to such late payment penalties. However, because the portion of damages awarded attributable to late payment penalties is not ascertainable from the record on appeal, we remand the cause to the district court for a new trial limited to a determination of the portion of damages attributable to penalties for the failure to timely pay taxes. The court thereafter should enter judgment, notwithstanding the original verdict, in the amount determined to be attributable to late payment penalties.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., not participating.

CONNOLLY, J., dissenting in part.

I disagree with that part of the majority opinion that holds that the Franks cannot recover interest they paid to the IRS because of their accountant's negligence. The opinion concludes that the Franks had use of the money, and the IRS interest is just their "payment" for that use.

I do not believe that the Franks should have the burden to prove the value of their use of the money was less than the rate of interest charged by the IRS when they incurred the interest only because of Lockwood's negligence. The majority's holding ignores the essential fact that the Franks would not have incurred a "payment" for their unlawful use of the money but for Lockwood's negligent advice, so they are not placed in a better position by their recovery of this "payment." I concede that there may be circumstances when the harm caused by the practitioner's negligence is offset by the benefit the taxpayer received from having use of the money. But the "special benefit" is Lockwood's burden to prove.

The majority concedes that there was sufficient evidence for a jury to conclude that Lockwood breached a duty to the Franks and "was liable for damages that resulted from such negligence." But it fails to answer the question "whether Lockwood's negligence in failing to advise the Franks to pay estimated taxes on April 15, 2002, resulted in and was the proximate cause of the interest" the Franks paid. To the extent the majority's failure

to discuss causation implies that the Franks' payment of IRS interest is not a legally recognized or compensable injury, I point out that such a reading is contrary to the greater weight of authority in tax malpractice cases.

Many courts have recognized compensatory damages for the difference between what the taxpayers owe the IRS because of a practitioner's negligence and what they would have owed absent that negligence.[1] It is true that taxpayers have the burden of proving that they incurred tax liabilities they could have avoided but for the practitioner's negligence.[2] But the majority's opinion imposes an additional burden: Taxpayers must rebut the presumption that they received a benefit from their unlawful use of the money. If taxpayers do not rebut this presumption, then the majority holds that their payment of interest is not damages. Thus, the issue is not proximate causation, but legally recognized damages.

The rule that taxpayers must show they were damaged seems reasonable enough on its face; damages are an element of the taxpayer's negligence claim. But the real issue is whether the Franks received a benefit because of Lockwood's negligence that offset the additional costs they incurred. Obviously, the Franks had use of the money only because of Lockwood's

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[1] See, e.g., *Carroll v. LeBoeuf, Lamb, Green & MacRae, L.L.P.*, 392 F. Supp. 2d 621 (S.D.N.Y. 2005); *Ronson v. Talesnick*, 33 F. Supp. 2d 347 (D.N.J. 1999); *Jobe v. International Ins. Co.*, 933 F. Supp. 844 (D. Ariz. 1995), *order withdrawn upon settlement* 1 F. Supp. 2d 1403 (D. Ariz. 1997); *Dail v. Adamson*, 212 Ill. App. 3d 66, 570 N.E.2d 1167, 156 Ill. Dec. 445 (1991); *Cameron v. Montgomery*, 225 N.W.2d 154 (Iowa 1975); *Jamie Towers Housing v. William B. Lucas*, 296 A.D.2d 359, 745 N.Y.S.2d 532 (2002); *Wynn v. Estate of Holmes*, 815 P.2d 1231 (Okla. App. 1991), *overruled on other grounds, Stroud v. Arthur Andersen & Co.*, 37 P.3d 783 (Okla. 2001); *McCulloch v. Price Waterhouse LLP*, 157 Or. App. 237, 971 P.2d 414 (1998); *Merriam v. Continental Cas. Co.*, No. 98-2522-FT, 1999 WL 326183 (Wis. App. May 25, 1999) (unpublished disposition listed in "Table of Unpublished Opinions" at 228 Wis. 2d 510, 597 N.W.2d 774 (Wis. App. 1999)). See, also, *Jamison, Money, Farmer & Co. v. Standeffer*, 678 So. 2d 1061 (Ala. 1996); *Worman v. Carver*, 87 P.3d 1246 (Wyo. 2004); Jacob L. Todres, *Malpractice and the Tax Practitioner: An Analysis of the Areas in Which Malpractice Occurs*, 48 Emory L.J. 547 (1999).

[2] See *Ronson, supra* note 1.

negligence. Both their harm and any benefit they received from having use of the money flowed from Lockwood's negligence. But this point gets lost in the majority opinion because it omits any discussion of causation.

If the Franks' harm should be offset by the benefit of their having use of the money, the burden of proving the offset falls on Lockwood. This commonsense notion of equitable burdens is addressed in the Restatement (Second) of Torts § 920 at 509 (1979), the "special benefit" rule:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

Mitigation of damages is an affirmative defense, which the defendant has the burden to prove.[3] Under the Restatement, Lockwood must prove that a "special benefit" to the Franks resulted from his negligence and offset the taxpayer's damages. While "mitigation of damages" here is merely shorthand for expressing the plaintiff's net damages, many courts have recognized the rule that a "defendant generally may show that an act or omission forming the basis of a complaint was a benefit as well as an injury to the plaintiff."[4]

Other courts put the burden on the tax practitioner to prove it is equitable to offset the taxpayer's harm with the taxpayer's benefit in using the money.[5] Yet the majority opinion relies on *O'Bryan v. Ashland*[6] to place the burden on the Franks to prove they have not benefited from the use of the money. This burden runs counter to the special benefit rule. Notably, the *O'Bryan* court made conflicting statements on this issue. Both parties

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[3] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). Compare *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

[4] See 22 Am. Jur. 2d *Damages* § 383 at 347 (2003).

[5] See, *Ronson, supra* note 1; *Billings Clinic v. Peat Marwick Main*, 244 Mont. 324, 797 P.2d 899 (1990); *Wynn, supra* note 1. Compare *Lee v. Lee*, 47 S.W.3d 767 (Tex. App. 2001).

[6] *O'Bryan v. Ashland*, 717 N.W.2d 632 (S.D. 2006).

had presented evidence on interest rates, and the court reserved for a future case the refinement of equitable burdens. It quoted with approval the federal district court's statement in *Ronson v. Talesnick*.[7] There, the court stated that "defendants should be permitted to come forward with evidence of benefit from the malpractice that could be applied to reduce a plaintiff's recovery."[8] I believe the majority opinion allows Lockwood to escape his burden to prove the Franks had received a benefit from his negligence.

Although the majority opinion states that it is not adopting a blanket rule precluding the recovery of IRS interest, it appears to set a high bar for taxpayers to prove damages. Its rule is consistent with the reasoning of a minority of courts that have denied recovery. Those courts reasoned that the recovery of IRS interest represents a windfall when the taxpayer had use of the money and could have presumably earned interest on the money while holding it.[9] But I find persuasive the reasoning of the federal district court in *Ronson*, rejecting the windfall rationale for denying interest damages:

> Denying recovery of IRS interest from a negligent accountant permits the tortfeasor to benefit from the presumption that a harmed taxpayer has been or should have been ingenious enough to (1) maintain a sum of money that he would have otherwise had to pay over to the IRS and (2) invest that money in a manner in which he earned interest in an amount comparable to the interest rate charged by the IRS.[10]

Like the district court in *Ronson*, I am not that naive to presume the taxpayer is clairvoyant. Other courts have also addressed the "windfall" concern. Those courts adopted a measure of damages that ensures both that the taxpayer does not receive a double recovery and that the taxpayer is not punished

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[7] *Ronson, supra* note 1.

[8] *Id.* at 355.

[9] See, *Alpert v Shea Gould Climenko*, 160 A.D.2d 67, 559 N.Y.S.2d 312 (1990); *Leendertsen v. Price Waterhouse*, 81 Wash. App. 762, 916 P.2d 449 (1996).

[10] *Ronson, supra* note 1, 33 F. Supp. 2d at 355.

for failing to anticipate the practitioner's negligence. In *Streber v. Hunter*,[11] the Fifth Circuit allowed damages for the difference between the interest the taxpayer earned while having use of it and the interest charged by the IRS.[12] The court reasoned that "interest differential" damages is not a double recovery: "[A]sking for 'interest differential' is not asking to keep the money earned on the [amount owed for taxes] while possessing it unlawfully; rather, it is asking to pay only the interest earned while possessing it unlawfully and not be penalized for conservative investing."[13]

Although the burden of proof was not at issue in *Streber*, the case demonstrates that there is no windfall concern if the plaintiff's harm is offset by any benefit the taxpayer received from having use of the money. The question here is which party should have the burden of proving that offset. In other cases, we have put the burden of proving an offset on the party claiming the offset.[14] In condemnation actions, we have specifically held the burden is on the condemnor to plead and prove special benefits to the remaining property that offset damage to the property.[15]

The Franks satisfied the elements of their claim when they proved that Lockwood breached a duty to them to use reasonable prudence and skill in advising them on tax matters for which they employed him and that his negligence caused them to incur expenses they would not have incurred otherwise. Requiring Lockwood to prove an offset does not permit the Franks to benefit from any presumption regarding damages. Instead, it eliminates presumptions against either party and

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[11] *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000).

[12] See *id*. See, also, *King v. Deutsche Bank Ag*, No. CV 04-1029-HU, 2005 WL 611954 (D. Or. Mar. 8, 2005) (unpublished opinion).

[13] *Streber, supra* note 11, 221 F.3d at 735. See, also, *O'Bryan, supra* note 6.

[14] See, e.g., *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 472 N.W.2d 381 (1991); *Phillips v. State*, 167 Neb. 541, 93 N.W.2d 635 (1958).

[15] See *Frank v. State*, 177 Neb. 488, 129 N.W.2d 522 (1964). Accord *Richardson v. Big Indian Creek Watershed Conservancy Dist.*, 181 Neb. 776, 151 N.W.2d 283 (1967). See, also, NJI2d Civ. § 13.10.

requires each party to produce proof supporting their claims. Because the evidence did not support an offset of the Franks' damages, I would give the Franks the benefit of their jury verdict for the interest they paid to the IRS.

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## AMANDA C., BY AND THROUGH GARY RICHMOND, NATURAL PARENT AND NEXT FRIEND, APPELLEE, V. KELLY CASE, APPELLANT.

749 N.W.2d 429

Filed May 23, 2008. No. S-06-1097.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming it went uncontested at trial, would entitle the party to a favorable verdict.
3. ____: ____. If the moving party makes a prima facie case that it is entitled to summary judgment, the burden then shifts to the nonmoving party to avoid summary judgment by producing admissible contradictory evidence which raises a genuine issue of material fact.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
5. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
6. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future lawsuit.
7. ____: ____. Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
8. **Constitutional Law: Actions.** A civil remedy is provided under 42 U.S.C. § 1983 (2000) for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law.
9. ____: ____. In any 42 U.S.C. § 1983 (2000) action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether

the conduct complained of was committed by a person acting under color of state law and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

10. **Constitutional Law: Parental Rights: Minors.** Under the U.S. Supreme Court's longstanding precedent, a parent has a constitutional right to retain custody and control of his or her child.
11. **Due Process: Parental Rights: Parent and Child.** The substantive due process right to family integrity protects not only the parent's right to companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by his or her biological parent.
12. **Due Process: Parent and Child.** Both parents and their children have cognizable substantive due process rights to the parent-child relationship.
13. ____: ____. The Due Process Clause would be offended if a state were to attempt to force the breakup of a natural family without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests.
14. ____: ____. Substantive due process rights between a parent and child do not arise simply by virtue of a genetic connection. Rather, they depend on a deeper, more enduring relationship.
15. **Due Process: Parental Rights: Minors.** Blood alone may not suffice to permit a parent to assert the due process right to custody and control of his or her child if the parent has altogether failed to shoulder the responsibilities inherent in the parenthood.
16. **Civil Rights: Public Officers and Employees: Immunity.** Public officials who have been sued in their personal capacities under 42 U.S.C. § 1983 (2000) may invoke qualified immunity as a shield from liability if the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
17. **Appeal and Error.** An appellate court will not review errors that were not assigned and argued in a party's brief.
18. **Actions: Civil Rights: Damages: Proof.** To recover compensatory damages in a 42 U.S.C. § 1983 (2000) action, the claimant must show that the violation of his or her rights resulted in some actual harm.
19. **Actions: Civil Rights: Torts.** Causation issues in 42 U.S.C. § 1983 (2000) actions are generally resolved according to common-law tort principles.
20. **Proximate Cause: Words and Phrases.** As a general matter, a proximate cause is defined as that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred.
21. **Proximate Cause: Proof.** Ordinarily a plaintiff must meet three basic requirements in establishing proximate cause: (1) that without the misconduct, the injury would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the misconduct; and (3) that there was no efficient intervening cause.
22. **Negligence: Proximate Cause: Proof.** When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a substantial factor in bringing about the injury.

23. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellant.

Monte L. Neilan, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellee.

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

HEAVICAN, C.J.

## I. INTRODUCTION

Amanda C., by and through her natural father, Gary Richmond, sought damages, costs, and attorney fees from Kelly Case, an employee of the Nebraska Department of Health and Human Services (DHHS). The suit was filed against Case in her personal capacity based on her alleged interference with Amanda's constitutional right to a relationship with Richmond. The district court for Kimball County granted summary judgment in favor of Amanda on the issue of Case's "liability" and held a bench trial to determine damages. The court ultimately awarded Amanda $150,000 in damages, $53,437.50 in legal fees, and $11,260.03 in costs and expenses. Case now appeals. We affirm for reasons set forth below.

## II. BACKGROUND

Richmond and Carol C. married and settled in the Omaha, Nebraska area. While living in Omaha, Richmond and Carol had two children together. For reasons that are not entirely clear from the record, both of these children were taken into DHHS custody at birth. It is clear, however, that Carol suffered from a mental illness, and this may have been a contributing factor. Regardless, both of the children were eventually placed with Carol's father and stepmother, Clyde and Connie C., who also lived in Omaha. Richmond and Carol eventually relinquished their custodial rights to both children.

When Carol became pregnant with Amanda, Richmond and Carol moved from Omaha to Kimball, Nebraska. The move was apparently made to prevent DHHS from seizing Amanda at birth. Amanda was born on July 21, 1987. Approximately 5 years later, a neighbor reported that Carol was abusing Amanda. No allegations of abuse were or have been made regarding Richmond. On July 23, 1993, DHHS took Amanda into its custody.

Initially, Amanda was placed in a foster home in Kimball, where she prospered and had regular visitation with Richmond. It appears, however, that Carol still managed to abuse Amanda, though it is not clear exactly how she did so. Regardless, on June 1, 1995, DHHS placed Amanda with her maternal grandfather and stepgrandmother, Clyde and Connie, in Omaha. Richmond was not consulted about this move. No arrangements were made to allow Richmond to have regular visitation with Amanda. There is some evidence that Richmond did not have a friendly relationship with Clyde and Connie. Once Amanda was relocated to Omaha, her visits with Richmond ceased.

On September 4, 1996, the Kimball County Attorney filed a petition in the county court for Kimball County to terminate Richmond's parental rights. On July 29, 1997, the court appointed Monte Neilan to represent Richmond in the matter. Meanwhile, DHHS representatives began contacting Richmond and asking him to voluntarily relinquish his parental rights. Richmond repeatedly refused these requests. Not long after Neilan was appointed to represent Richmond, the two lost contact for the better part of a year. On May 5, 1998, the juvenile court entered an order stating that Neilan would be excused from the case if Richmond did not immediately contact him. Richmond resumed contact with Neilan a day or two later.

On August 4, 1998, Case, a caseworker at DHHS, was assigned to Amanda's file. As with prior caseworkers before her, Case wanted Richmond to relinquish his parental rights so that Amanda could be formally adopted by Clyde and Connie. To that end, Case spoke with Richmond over the telephone and met with him in person immediately after she was assigned to the case. Richmond initially explained that he was not willing to relinquish his rights. However, he also indicated that

he wanted to take Amanda's preferences into account. During their conversations, Case explained that if they could arrange an open adoption, Richmond could still visit Amanda even if he relinquished his parental rights. Case also explained that such visitation opportunities would disappear if Richmond's parental rights were terminated in the proceeding pending in county court.

On August 13, 1998, Case met with Richmond at the DHHS office in Scottsbluff, Nebraska. During the meeting, Case placed a call to Clyde and Connie's residence in Omaha. A conference call was held with Case and Richmond in Scottsbluff and Connie and Amanda in Omaha. During the telephone call, Amanda stated that she wanted to be adopted by Clyde and Connie, since she was in Omaha and Richmond was in Kimball. However, Amanda also stated that she wanted to have contact and visits with Richmond. Promises were made—though it is not clear whether by Case, Connie, or both—that an open adoption would be used. Notably, Case did not inform Neilan, the Kimball County Attorney, Amanda's guardian ad litem, or the county court about any of the above.

After the conference call, Case prepared the documents that, once signed, would divest Richmond of his parental rights over Amanda. Case then contacted Neilan to inform him that she was working with Richmond to secure his relinquishment of parental rights. In response, Neilan sent a letter to Case stating that Richmond did not want to relinquish his parental rights. Case would later claim that she did not receive the letter. Either way, Case avoided further contact with Neilan.

Case then met with Richmond to discuss the relinquishment. Notably, Case once again counseled Richmond regarding the legal ramifications of a relinquishment as opposed to a court-ordered termination of parental rights. In particular, Case explained that relinquishment left open the possibility of visitation with Amanda, whereas termination would not. Case left the relinquishment documents with Richmond and told him to discuss them with his attorney. It is not clear whether Richmond ever did. Once again, Case never notified Amanda's guardian ad litem, the county attorney, or the county court about these meetings.

Case and Richmond met for a final time on August 25, 1998. Case again explained the legal benefits of relinquishment and stated that relinquishment was in Richmond's best interests. Richmond then signed the documents and thereby relinquished his parental rights over Amanda. Case filed the documents with the county court.

In 1999, Richmond sued Case based on the aforementioned sequence of events.[1] Richmond alleged that, among other things, Case engaged in the unauthorized practice of law—and thereby abused her authority as a DHHS employee—when she counseled Richmond about the legal benefits of relinquishing his parental rights. Richmond alleged that this action deprived him of his substantive due process right to custody of his child and therefore sought relief pursuant to 42 U.S.C. § 1983 (2000).

A jury trial was held on February 6, 2003. The jury found in favor of Richmond on his § 1983 claim, but awarded him a mere $1 in compensatory damages. The jury did, however, award Richmond $65,000 in punitive damages. It is unclear whether attorney fees were awarded. Moreover, the relinquishment agreements were declared null and void by the court in its June 3, 2003, judgment.

Case appealed to this court. While that appeal was pending, the parties agreed to a settlement. Case agreed to abandon the appeal if Richmond accepted a $130,000 settlement, of which $84,031.65 was for attorney fees and another $4,977.17 for costs. The remaining $40,991.18 represented "compensatory damages" under the terms of the agreement. Richmond accepted the offer, and the appeal was dismissed by joint stipulation.

On May 20, 2004, less than a year later, Richmond filed another complaint against Case in the district court for Kimball County. This time, Richmond filed the complaint against Case in her personal capacity on behalf of his then minor daughter, Amanda. Among other claims, the complaint alleged that Case's misconduct had deprived Amanda of her substantive due process rights to a parent-child relationship in violation of

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[1] See Richmond v. Case, Kimball County District Court, case No. CI99-82.

§ 1983. All other causes of action were quickly abandoned so that only the § 1983 claim remained. Amanda then moved for summary judgment on the issue of "liability." A hearing was held on November 1, 2005, to resolve the motion.

The district court found that the judgment against Case in the previous suit in Kimball County District Court, case No. CI99-82 (hereinafter CI99-82), had a preclusive effect regarding her misconduct in dealing with Richmond. The court concluded that such misconduct not only violated Richmond's parental rights, but also violated Amanda's substantive due process rights as a child. Finally, the court relied on deposition testimony by Dr. Daniel Scharf, a psychologist who evaluated Amanda, in concluding that the relinquishment had caused harm to Amanda. Accordingly, the court granted Amanda's motion for summary judgment as to Case's liability and scheduled a bench trial on the issue of damages.

On May 24, 2006, the district court issued a judgment awarding Amanda $150,000 in damages. In its judgment, the court recounted the aforementioned sequence of events. The court also noted that sometime after the relinquishment, Amanda began to use drugs, ran away from (and refuses to return to) the home of Clyde and Connie, gave birth to a child out of wedlock, and appears to be suffering financially. In short, the court found that Case "interfered with [Amanda's] parent-child relationship with [Richmond]." and that Amanda's life "spun out of control" as a result.

After the court issued its judgment, Amanda filed a petition on June 13, 2006, requesting legal fees, expenses, and costs. Per a stipulated order, the court awarded Amanda $53,437.50 in attorney fees and another $11,260.03 in costs and expenses. Case now appeals.

## III. ASSIGNMENTS OF ERROR

Case assigns, restated, that the district court erred when it (1) relied on the doctrine of collateral estoppel to find that Case violated Amanda's substantive due process rights, (2) mishandled the inquiry into whether Case's actions caused actual harm to Amanda, and (3) failed to recognize the existence of genuine issues of fact.

## IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.[2]

[2,3] A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming it went uncontested at trial, would entitle the party to a favorable verdict.[3] If the moving party makes such a case, the burden then shifts to the nonmoving party to avoid summary judgment by producing admissible contradictory evidence which raises a genuine issue of material fact.[4]

[4,5] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[5] On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[6]

## V. ANALYSIS

### 1. Collateral Estoppel

In her first assignment of error, Case contends that the district court erroneously concluded that the judgment in CI99-82 had a preclusive effect regarding whether Case violated Amanda's constitutional rights in this case. To refresh, in CI99-82, a jury found that Case violated Richmond's substantive due process right to custody of Amanda. The district court found that Case's "interference with the parent-child relationship between Gary Richmond and Amanda C[.]" was an issue "fully determined"

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[2] See *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[3] See *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[4] See *id.*

[5] See *Didier, supra* note 2.

[6] *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

in CI99-82. This conclusion was based on the court's belief that "[t]he facts are the same and the same relationship was affected [in this case]." As a result, the court determined that the judgment in CI99-82 rendered it unnecessary to relitigate whether Case violated Amanda's constitutional rights.

[6,7] Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future lawsuit.[7] Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[8]

There is no dispute that CI99-82 resulted in a final judgment on the merits. Nor is there a dispute that Case—the party against whom issue preclusion is sought—was a party in CI99-82. The only real question is whether Case's interference with Richmond's substantive due process rights regarding Amanda is identical to the underlying issue of whether Case interfered with Amanda's substantive due process rights, if any, regarding Richmond. If so, then Case had the opportunity to fully and fairly litigate that issue in CI99-82 and Amanda would therefore be entitled to collateral estoppel.

[8,9] Amanda alleged that Case interfered with her substantive due process rights regarding the parent-child relationship between her and Richmond. Accordingly, Amanda sought relief under § 1983, which provides a civil remedy for "deprivations of federally protected rights," statutory or constitutional, "caused by persons acting under color of state law."[9]

> [I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action

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[7] See *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007).

[8] See *id.*

[9] *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

> are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[10]

Case concedes that she was acting under color of state law at all times relevant to this controversy. The only remaining question, then, is whether Case's interference with Richmond's constitutional rights also deprived Amanda of *her* constitutional rights.

[10] It is beyond dispute that under the U.S. Supreme Court's longstanding precedent, a parent has a constitutional right to retain custody and control of his or her child.[11] A fundamental question here is whether the corollary is true—that is, whether a child has a constitutional right to be under the care, custody, and control of his or her parent.

[11,12] In *In re Guardianship of D.J.*, we observed that both "'parents *and their children* have a recognized unique and legal interest in, and a constitutionally protected right to, companionship.'"[12] In other words, the substantive due process right to family integrity "'protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the *child's reciprocal right to be raised and nurtured by* [*his or her*] *biological . . . parent*.'"[13] It is clear, therefore, that both parents and their children have cognizable substantive due process rights to the parent-child relationship.

Nevertheless, Case presents two arguments as to why her interaction with Richmond, however wrongful, did not actually violate Amanda's substantive due process rights to be raised

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[10] *Id.*

[11] See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) (citing *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)).

[12] *In re Guardianship of D.J.*, 268 Neb. 239, 246, 682 N.W.2d 238, 244 (2004) (emphasis supplied).

[13] *Id.* (emphasis supplied).

and nurtured by Richmond. First, Case suggests that even if she violated Richmond's constitutional rights by persuading him to relinquish his right to custody, she did not violate *Amanda's* constitutional rights because the relinquishment was ultimately in Amanda's best interests. Case does not, however, support her conclusion with any proof that the relinquishment was in Amanda's best interests. In fact, the evidence presented at the summary judgment stage suggests quite the opposite—that the relinquishment led to a downward spiral in Amanda's development.

[13] The irony is that due to Case's intervention, the county court for Kimball County was never able to accurately determine if, in fact, a termination of Richmond's parental rights was in Amanda's best interests. This is significant because, as the U.S. Supreme Court observed in *Quilloin v. Walcott*,[14] "the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" Under *Quilloin*, Case's belief that she was acting in Amanda's best interests does not diminish the fact that Case violated Amanda's constitutional rights by subverting established procedure in an attempt to divest Richmond of his parental rights.

[14] Case next argues that her conduct did not actually implicate either Richmond's or Amanda's substantive due process rights because the parent-child relationship had deteriorated by the time she intervened. As Case correctly points out, substantive due process rights between a parent and child do not arise simply by virtue of a genetic connection. Rather, they depend on a deeper, more enduring relationship.

[15] For example, in *Lehr v. Robertson*,[15] the U.S. Supreme Court held that a father who

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[14] *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (alteration in original) (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (Stewart, J., concurring in judgment)).

[15] *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

> accepts some measure of responsibility for the child's future . . . may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. [But if] he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

We can infer from this language that blood alone may not suffice to permit a parent to assert the due process right to custody and control of his or her child if the parent has altogether failed to shoulder the responsibilities inherent in the parenthood. Relying on such sentiments, Case reminds us that Richmond had largely failed to maintain the father-daughter relationship in the years prior to Case's intervention.

But even if Richmond did neglect Amanda, such neglect is irrelevant because this case involves Amanda's constitutional rights, not Richmond's. It is doubtful that *Lehr*'s emphasis on responsibility works exactly the same in reverse—that is, that a minor child could not assert his or her due process right to parental control where the child "allowed" his or her parental relationship to lapse. But even if it does, Case has not shown that Amanda, a young child at the time, voluntarily failed to embrace her relationship with Richmond. The evidence shows that at a very young age, Amanda was taken from her home, placed in DHHS custody, and thereafter relocated as DHHS saw fit. Although the bond between Amanda and Richmond had withered before Case even intervened, it was not due to Amanda's failure to nurture it. So while Richmond's alleged failure to embrace his relationship with Amanda might have affected *his* ability to invoke his parental rights and thus recover under § 1983, it will not prevent *Amanda* from doing so.

[16] Having rejected those two arguments, we pause to note another avenue Case could have pursued—but inexplicably avoided—in an attempt to evade liability. We refer, of course, to the defense of qualified immunity. Public officials like Case who have been sued in their personal capacities under § 1983 may invoke qualified immunity as "a shield from liability" if the "official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known."[16] This defense is commonly raised by, and has been granted to, social service workers.[17]

[17] Case referred to the qualified immunity defense in her responsive pleading before the district court. It is clear that the district court did not grant Case qualified immunity. But the record does not show whether this was because the court concluded that Case was not entitled to such immunity or because Case abandoned the claim herself. Either way, Case did not mention the defense in her brief before this court. We will not review errors that were not assigned and argued in a party's brief.[18] Accordingly, we will not consider whether Case is entitled to qualified immunity. Instead, we mention the qualified immunity defense only to dispel any notion that state employees will automatically be held personally liable for substantial monetary damages any time they infringe upon a citizen's constitutional rights.

We conclude that proof that Case wrongfully interfered with Richmond's custody and control over Amanda would also establish that Case wrongfully interfered with Amanda's constitutional right to be in Richmond's custody. Whether Case wrongfully interfered with Richmond's right to custody and control of Amanda was the issue at the heart of CI99-82. Case suffered an adverse judgment on that issue after full and fair litigation. Accordingly, the district court did not err in concluding that the judgment in CI99-82 precludes Case from contesting whether she interfered with Amanda's constitutional rights by wrongfully counseling Richmond to relinquish custody of Amanda.

### 2. Causation

In her next assignment of error, Case contends that the district court mishandled the inquiry into whether Case's conduct was the cause of Amanda's harm. Case's argument in this

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[16] *Williams v. Baird*, 273 Neb. 977, 985, 735 N.W.2d 383, 391 (2007).

[17] See *id.* n.32 (collecting cases).

[18] See, *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on other grounds* 274 Neb. 267, 759 N.W.2d 113; *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

regard proceeds in two parts. First, Case argues that Amanda failed to present sufficient evidence that Case's misconduct resulted in actual harm to Amanda. Second, Case argues that the district court's causation analysis was inherently flawed because it considered evidence of Amanda's "damages" instead of confining its analysis solely to issues of "liability."

(a) Actual Harm

[18] To recover compensatory damages in a § 1983 action, the claimant must show that the violation of his or her rights resulted in some actual harm.[19] This requires both proof of some actual harm to the claimant and a causal relationship between that harm and the violation of the claimant's federal rights.

Case does not seem to dispute that Amanda actually suffers from numerous social problems. Rather, Case seems to argue that those problems did not result from any misconduct by Case, but stem from a number of other threats to Amanda's ordinary social development. As Case points out, Amanda was abused by her mother, Carol; removed from her biological home at an early age; relocated from Kimball to Omaha to live with Clyde and Connie; and was unable to see Richmond on a regular basis, if at all. All of these things, Case argues, affected Amanda's development and cannot be attributed to Case. At bottom, this argument refers to causation.

[19-21] Causation issues in § 1983 actions are generally resolved according to common-law tort principles.[20] As a general matter, a proximate cause is defined as "that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred."[21] So, ordinarily,

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[19] See *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

[20] See, e.g., *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) (citing *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), and *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)); *Ricketts v. City of Columbia, Missouri*, 36 F.3d 775 (8th Cir. 1994).

[21] *Haselhorst v. State*, 240 Neb. 891, 899, 485 N.W.2d 180, 187 (1992).

> a plaintiff must meet three basic requirements in establishing proximate cause: (1) that without the [misconduct], the injury would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the [misconduct]; and (3) that there was no efficient intervening cause.[22]

[22] We have also held, however, that an act need not be the *sole* cause of harm to qualify as a proximate cause. When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a *substantial factor* in bringing about the injury.[23]

In support of her motion for summary judgment, Amanda presented deposition testimony and an accompanying affidavit from Scharf, a psychologist licensed in the State of Nebraska. Scharf evaluated Amanda and reviewed her file. Scharf's testimony supports the conclusion that the relinquishment was a substantial factor in bringing about Amanda's subsequent social problems.

Scharf acknowledged that Amanda faced a number of "risk factors" in addition to Richmond's relinquishment of custody and thus, that the "relinquishment [was] one of a couple of risk factors" affecting Amanda's development. However, Scharf also noted that Amanda seemed to handle most of the other developmental risk factors without many adverse effects. Scharf found that "until about age 12 or 13," the approximate time of the relinquishment, Amanda had "adjusted fairly well . . . and done real well in school and done well with friends." But soon after the relinquishment, Amanda faced a "decrease in scholastic achievement, . . . substance abuse, [and] difficulties with depression." Ultimately, this led Scharf to conclude that "the relinquishment did have an effect on Amanda."

Scharf's testimony not only supports a finding that Amanda suffered actual harm, but also that the relinquishment was a substantial factor in causing that harm. Scharf's testimony

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[22] *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 609-10, 667 N.W.2d 244, 254 (2003).

[23] *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000).

suggests that the relinquishment was at least as significant an agent as the other obstacles Amanda faced in bringing about her downward social spiral. Amanda's presentation of such evidence therefore shifted the burden to Case to present contradictory evidence that Amanda did not suffer actual harm or at least evidence that the formal relinquishment was not a substantial factor in bringing about such harm. Case did not present any such evidence. The court did not err, therefore, in concluding that summary judgment was proper on the issue of proximate causation.

(b) Consideration of "Damages" Evidence at Causation Stage

At one point in her brief, Case argues that the district court's causation analysis was flawed because the court "failed to distinguish [(1)] the causal connection between [Case's] conduct and the alleged violation of [Amanda's] civil rights from [(2)] the causal connection between the violation of [Amanda's] civil rights and the alleged injury to [Amanda]."[24] Case believes that the first inquiry—whether Case's conduct violated Amanda's civil rights—is a question of *liability* and was therefore properly considered by the court at the summary judgment stage. But Case believes that the second question—whether the alleged violation of Amanda's civil rights caused any actual harm—is more a question of damages. Thus, Case believes that the district court erroneously merged these two issues when, in the course of ruling on Case's "liability," it considered Scharf's testimony regarding actual harm to Amanda.

There is no limit, however, to the issues that a party can focus on in his or her own motion for summary judgment. Amanda moved for summary judgment on the "issue of liability" and was free to define the scope of that motion. To Amanda, "liability" appears to have meant not only that Case's conduct violated her constitutional rights, but also that the violation of those rights caused actual harm to her. On the former issue, Amanda offered evidence of the prior judgment in CI99-82 and argued that the judgment had preclusive effect. Regarding the

[24] Reply brief for appellant at 7.

latter issue, Amanda offered Scharf's deposition testimony and a sworn affidavit.

By arguing that the district court improperly considered Scharf's testimony at the summary judgment stage, Case attempts to supplant her own characterization of what Amanda actually sought with her motion for summary judgment. That is, Case attempts to characterize Amanda's motion as a motion for summary judgment only on the issue of whether Case violated Amanda's constitutional rights.

But if Amanda sought summary judgment on that issue alone, there was no reason to submit Scharf's testimony and affidavit in support of her motion. As was shown above, that evidence does nothing more than establish the existence of actual harm and provide a causal link between that harm and the violation of Amanda's rights. As such, the inclusion of that evidence should have sent a clear sign to Case that if the court granted Amanda's motion in full, the only issue left to resolve regarding "damages" would be the *extent*, not the *existence*, of those damages. Case had the opportunity, therefore, to present evidence that would negate the existence of Amanda's damages. For whatever reason, Case did not make the most of that opportunity. But Case's omission does not mean the district court erred in its causation analysis.

### 3. Genuine Issues of Fact

In her final assignment of error, Case contends that the district court erred by failing to recognize the existence of genuine factual disputes regarding Case's conduct and proximate causation.

#### (a) Genuine Issues Regarding Case's Conduct

As Case notes, the parties disagree on a number of details surrounding Case and Richmond's interactions before Richmond agreed to relinquish custody of Amanda. Case believes that these factual disputes raise legitimate issues of fact as to whether she truly violated Amanda's constitutional rights.

These factual disputes, however, are made irrelevant by the preclusive effect that the prior judgment in CI99-82 is entitled to in this case. Factual disputes between the parties regarding Richmond and Case's encounters leading up to the

relinquishment did not deter a jury from finding that Case violated Richmond's rights. If Case has no right to challenge that determination, it obviously follows that she has no right to question the facts upon which that determination depends.

(b) Genuine Issues Regarding Causation

Case also argues that genuine issues of fact exist regarding whether Case's misconduct caused Amanda any harm. In support of this proposition, Case renews the argument that Amanda and Richmond were essentially estranged before she even intervened. Indeed, Case maintains that "it was by no means a for[e]gone conclusion that [Richmond] would be reunited with [Amanda] but for the signing of the relinquishment papers."[25] This may be true, but the argument misses the point.

[23] The question at this stage is whether there are genuine issues of *material* fact.[26] In the summary judgment context, a fact is material only if it would affect the outcome of the case.[27] Proof that Amanda and Richmond would not have reunited even without Case's intervention is not material because, according to Scharf's testimony, the formal relinquishment caused harm to Amanda *in and of itself*. As Scharf testified, the relinquishment harmed Amanda because it contributed to a downward spiral in her social life, not because it reduced the odds that Amanda and Richmond would unite.

The only real evidence that might raise a genuine issue of material fact in light of Scharf's testimony would be contrary testimony by another psychological expert. But Case did not present such evidence. Accordingly, it cannot be said that genuine issues of *material* fact remain regarding the causal relationship between Case's violation of Amanda's rights and the resulting harm to Amanda.

## VI. CONCLUSION

The district court did not err in concluding that the judgment in CI99-82, the prior controversy involving Richmond

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[25] *Id*. at 11.

[26] See *Didier, supra* note 2.

[27] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

and Case, precluded Case from relitigating the wrongfulness of her decision to counsel Richmond to relinquish custody of Amanda. A violation of Richmond's constitutional rights as a parent would also result in a violation of Amanda's reciprocal constitutional rights as a child. Therefore, under the doctrine of collateral estoppel, the judgment in CI99-82 precluded Case from disputing the fact that she violated Amanda's constitutional rights.

The district court also did not err in concluding that Case's violation of Amanda's rights resulted in actual harm to Amanda. The evidence shows that the relinquishment that Case wrongfully orchestrated was a substantial factor in Amanda's downward social spiral. Nor did the court err in considering such evidence at the summary judgment stage.

Finally, there are no genuine issues of material fact regarding Case's liability to Amanda. Any factual disputes regarding Case's actual conduct are made irrelevant by the preclusive effect of the judgment in CI99-82. Similarly, the fact that Amanda might not have reunited with Richmond even if Case never intervened is irrelevant. The evidence shows that the relinquishment in and of itself caused harm to Amanda. From the above, we conclude that the district court did not err in granting summary judgment to Amanda.

AFFIRMED.

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SHARON K. RANKIN, APPELLANT, V.
W.K. STETSON, M.D.,
ET AL., APPELLEES.

749 N.W.2d 460

Filed May 23, 2008. No. S-07-073.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.

3. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
4. **Rules of Evidence: Expert Witnesses.** Where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
5. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law.
7. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion.
8. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

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

Lonnie R. Braun, of Thomas, Nooney, Braun, Solay & Bernard, L.L.P., for appellees.

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

WRIGHT, J.

## NATURE OF CASE

Sharon K. Rankin sued her treating physicians and the Chadron Medical Clinic, P.C. (collectively defendants), for negligently failing to properly diagnose and treat her spinal cord injury. Following the completion of discovery, all

defendants moved to strike the testimony of Rankin's expert witness and also moved for summary judgment on the issue of proximate causation. The district court sustained both motions. Rankin appeals, claiming the court erred in sustaining the defendants' motions.

## SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Wolski v. Wandel, ante* p. 266, 746 N.W.2d 143 (2008).

[2,3] 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. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007). The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

## FACTS

On October 31, 2002, Rankin was injured when she fell on ice near her residence in Chadron, Nebraska. She was examined in a Chadron hospital emergency room by Dr. W.K. Stetson. He ordered x rays and an MRI of the lumbar spine, which images showed no injury. Rankin was released from the hospital on November 3. She was directed to follow up with Dr. C.A. Sutera, her personal physician. She underwent physical therapy, but her symptoms persisted.

Sutera referred Rankin to Dr. Brent Peterson, a neurosurgeon. An MRI of her entire spine in February 2003 revealed a disk herniation at the T10-11 level with spinal stenosis. Peterson diagnosed Rankin with thoracic myelopathy, likely due to the ruptured disk at T10-11. He recommended a diskectomy and "fusion of T10-11 with autograft and rod and screw fixation." Peterson believed that the surgery was not an emergency at that point, since the compression had occurred a few months earlier.

During the following months, Rankin sought several opinions. Dr. Curtis Dickman, a neurosurgeon, saw Rankin on May 12, 2003. By that time, she had seen three other surgeons, who had all recommended surgery, but Dickman was the only surgeon who recommended thoracoscopic surgery rather than an open thoracotomy, which requires a large incision in the chest wall. Dickman operated on Rankin to fuse T10-11 of the spine.

Rankin recovered satisfactorily but was unchanged neurologically. By October 2003, the disk herniation was no longer evident and there was no residual compression of the spinal cord. However, Rankin continued to experience pain. Dickman recommended rigid fixation with screws and rods in her spine. Following the second surgery, Rankin was fitted with a brace to maintain alignment of the fused segments. By December, she was walking independently, although she reported using a walker intermittently.

On March 8, 2004, Dickman reported that the bone in Rankin's spine was fusing, and radiographs showed the formation of new bone. Rankin had persistent spasticity in her lower extremities, but she was walking without a walker. She had barely detectable weakness of the legs. Dickman recommended physical therapy to strengthen Rankin's back and abdominal muscles and to work on her endurance. He recommended she discontinue use of the brace, because the fusion had healed satisfactorily.

In October 2004, Dickman determined that Rankin was neurologically stable. She still had very mild weakness of the legs, spasticity, and local tenderness and pain at the site of the surgery. When Dickman saw Rankin on March 7, 2005, she had pain and spasticity, but there was no significant change. He again recommended physical therapy to help with her walking.

Rankin filed her complaint on October 28, 2004, alleging that the defendants' delay in diagnosing the damage to her spinal cord and their failure to repair it left her with permanent damage to her spinal cord and permanent impairment in her lower extremities. She alleged that the delay in diagnosis and the subsequent damage were proximately caused by the negligence of the defendants in failing to order "appropriate studies" in

a timely manner. In separate answers, the defendants denied Rankin's allegations and asserted that Rankin unreasonably delayed in following physician directions and may have caused some or all of her alleged damages.

Prior to trial, the defendants moved to exclude the testimony of Rankin's expert, Dr. Michael Brown, a neurosurgeon. Brown's affidavit contained a summary of his testimony to be offered at trial and the information upon which his opinions were based. Brown had been in private practice since 1985 and had completed a 5-year residency in neurosurgery at the University of Arkansas for Medical Sciences, where he received his medical degree. He was certified by the American Board of Neurological Surgery.

Based on reasonable medical probability, Brown stated that the neurological deficits Rankin currently suffered were permanent and were the result of her fall and the disk's contacting the spinal cord at the T10 level. Brown opined it was more likely than not that Rankin would have recovered if the surgical repair had occurred within the first 72 hours after her injury. He also believed that Rankin's chance of avoiding permanent injury decreased each day after the 72-hour period until she was finally diagnosed with the thoracic disk herniation with resultant spinal cord compression and thoracic myelopathy.

Brown had reviewed Rankin's medical records and her lumbar and thoracic MRI studies. His opinions were based on the training he received in medical school and his residency, his 20 years of experience in dealing with spinal cord injuries, information from discussions with colleagues and fellow neurosurgeons, and attendance at conferences.

Brown opined that the general standard for treating spinal cord injuries was to operate on the patient as soon as it could be accomplished if there was no significant reason which argued against surgery and that 72 hours was the general standard. The district court excluded Brown's testimony based on the principles of *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

The district court granted the defendants' subsequent summary judgment motion and dismissed the complaint. It concluded that Rankin had failed to produce competent expert

testimony or evidence showing that any actions or inactions of the defendants proximately caused the injury complained of by Rankin.

## ASSIGNMENTS OF ERROR

Rankin asserts that the district court erred in sustaining the defendants' motion to strike Brown's testimony and in sustaining the defendants' motion for summary judgment.

## ANALYSIS

### Exclusion of Brown's Testimony

In refusing to allow Brown to give his opinion, the district court concluded that Brown failed to disclose the underlying facts or data for his opinions as required under Neb. Evid. R. 705, Neb. Rev. Stat. § 27-705 (Reissue 1995). It also held that Brown did not qualify to give his opinion under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), because he failed to set forth any methodology from which it could be determined that his opinions arose from facts or procedures that could be tested.

[4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007). The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). Where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. *Schafersman, supra*.

Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." We

have held that pursuant to rule 705, "'"an expert's opinion is ordinarily admissible 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."'" *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 594, 705 N.W.2d 432, 439 (2005), quoting *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

In *Schafersman v. Agland Coop*, 262 Neb. 215, 225, 631 N.W.2d 862, 872 (2001), we stated:

> The *Daubert* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. Under *Daubert, supra*, when faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert, supra*.

The U.S. Supreme Court has set out a number of considerations that a trial court may use to evaluate the validity of scientific testimony, which include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "general acceptance" of the theory or technique. *Schafersman, supra*, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

In the case at bar, Brown was asked to give his opinion whether Rankin received the appropriate treatment at the hospital when she was admitted and during the 3 days until she was released. The subject of Brown's opinion was whether a patient with the type of injury sustained by Rankin should have

had surgery within 72 hours of the injury. The district court, in applying the principles of *Daubert/Schafersman*, acted as a gatekeeper to ensure that the reasoning or methodology underlying the expert testimony was valid and properly applied to the facts in issue. Because Brown failed to disclose the underlying facts or data for his opinions under rule 705, Brown did not qualify to give his opinion under rule 702.

In his deposition, Brown was asked to define "more likely than not." He stated:

> Well, that's what it says. I guess, you know, you could say 51/49. If, you know, 51 percent get better, then you could say it's more likely than not. But based on my experience with these, and it's limited, you know, but in my knowledge, and I have read about these things, I have been educated on these things, go to meetings on these things, and I know about myelopathy; just based on my knowledge, the patient has a better opportunity to recover fully if they're operated more promptly, if it's recognized and dealt with.

Brown was asked for the basis of his opinion concerning the 72-hour timeframe. He stated: "I couldn't sit here and quote you . . . specific articles at this point, no. I mean, there's some literature out there that talks about 24 hours or two weeks, you know. But as far as the 72-hour figure that I gave, no, I can't give you anything specific on that." When asked where the 72-hour standard came from, Brown said: "Well, that's a good question. Primarily, that's just based on what my opinion is on when they should be done after they're discovered." Brown said there is a controversy in his profession about the optimal timing: "I think people still wonder exactly what the right timing is." Brown said there is a big difference between early surgery and later surgery in acute disk herniations. Asked whether he agreed that most of the rapid changes in the spinal cord tissues occur within 8 hours or less, Brown said,

> You know what? I really am not an expert on what's happening physiologically there. What I'm basing my opinions on are clinical outcomes. So I don't know in any given case how long it's going to take for you to get permanent changes

> in the spinal cord, you know, before surgery wouldn't help. I really don't know what that time frame is.

Brown was asked what happens after 72 hours, and he stated:

> Well, in any given patient, again, I'm testifying as to what's more likely than not. And that 72-hour standard is one where I feel — and, again, this is partially based upon my training — not partially. It's based upon my training and experience. But what I'm saying is, if you operate before 72 hours, it's more likely than not they're going to make a full recovery. After that 72-hour period, then I think their chances diminish for them making a full neurological recovery.

Brown said he was not aware of any peer-reviewed literature that would support his opinion concerning the 72-hour period. Although he had no way to quantify how Rankin's deficits were increased or exacerbated by delaying surgery for more than 72 hours, Brown stated it would have been very unlikely for Rankin to make a complete recovery.

The defendants objected to Brown's opinion, and the district court excluded his testimony. A trial judge may consider a number of factors that might bear on its gatekeeping function. These factors include whether a theory can be, and has been, tested; whether the theory has been subjected to peer review and publication; and whether the theory enjoys "general acceptance" within a relevant scientific community. See *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Brown was unable to state that his theory concerning the timeframe for spinal surgery had been tested in any way. He was also unable to provide a basis for his 72-hour theory. He could not cite any peer-reviewed literature to support his theory, and he did not provide any testimony to suggest that the 72-hour theory is generally accepted.

The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). The district court rejected Brown's testimony based on the principles announced in *Schafersman,*

*supra*. We conclude that the court's refusal to admit Brown's testimony into evidence was not an abuse of discretion.

## Summary Judgment

[5] Rankin claims that the district court erred in granting summary judgment in favor of the defendants. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Wolski v. Wandel, ante* p. 266, 746 N.W.2d 143 (2008). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

In their motion for summary judgment, the defendants alleged that Rankin could not produce any competent evidence to prove that the defendants' alleged medical negligence proximately caused any injury to her. The district court found that Rankin had not produced competent expert testimony or evidence showing that any actions or inactions of the defendants proximately caused the injury of which Rankin complained.

[6,7] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law. *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007). A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion. *Id.*

In support of their motion for summary judgment on the issue of causation, the defendants offered published medical articles. One article stated that despite its widespread use in patients with acute spinal cord injury, the role of surgery in improving neurological recovery remained controversial. It opined that the role and timing of surgical decompression after an acute spinal cord injury remained one of the most controversial topics

pertaining to spinal surgery. The other printed article dealt with a subgroup of patients with very large thoracic disk herniations. It stated there was scant literature on the treatment options and outcome of such patients.

There is some question whether the defendants' evidence made a prima facie case that entitled them to summary judgment. Medical literature which opines that the role of surgery in cases of acute spinal cord injuries remains controversial would not demonstrate that the defendants were entitled to judgment. It is true that Rankin must establish causation at trial, but the defendants must make a prima facie case at the summary judgment stage. Assuming for purposes of this opinion that such literature created a prima facie case in favor of the defendants, as the court must have so found, Rankin has successfully rebutted such evidence.

In opposition to the motion for summary judgment, Rankin offered several affidavits, including the affidavit of Dr. Jeffrey Gross, a neurosurgeon. Gross had reviewed Rankin's medical records, Dickman's deposition, and certain evidence-based medical literature. Gross was asked to address whether early surgical decompression to relieve pressure on the spinal cord would have made it more likely than not that Rankin would have recovered with a lesser degree of neurological deficit. The defendants made no objection to the admission of Gross' affidavit.

From the materials he reviewed, Gross learned that immediately after the accident, Rankin suffered temporary total paralysis of her lower extremities, numbness, and loss of feeling. She had a "burning/tingling feeling" in her back and in the lower abdomen, especially on the left side. Gross noted that although Rankin had reported some improvement, the primary neurological deficits remained.

Gross stated that the longer a compressive spinal cord injury existed without remediation, the less likely the patient would regain lost neurological function. He stated that this principle was consistent with the findings of Rankin's treating doctors, all of whom agreed that her condition would not correct itself without surgery.

Gross further stated that medical literature supported his opinion that early surgical decompression of the spinal cord will

more likely than not improve a patient's prognosis and would have led to an improved outcome for Rankin. He referred to certain articles in the medical literature that recommended surgical decompression at the earliest opportunity. He summarized one article which stated that if disk herniation is treated with early surgical decompression, the patient has a significantly increased opportunity to experience a "good outcome."

Gross was trained to understand that spinal cord compression constituted a surgical emergency, and he had applied that training to his own practice. His board-certified peers and colleagues agreed that spinal cord compression constituted a surgical emergency. Gross noted that the phrase "the sooner, the better," as applied to when a patient should undergo surgical decompression of a disk herniation, was not a "vague or cavalier statement." He stated that a reasonable neurosurgeon would agree that surgical decompression of a thoracic disk herniation causing spinal cord compression with neurological symptoms should occur within a matter of hours rather than weeks or months.

Gross based his opinion upon his training in medical school, his residency and spine fellowship, 14 years of experience in dealing with spinal cord injuries, discussions of the issue with fellow board-certified neurosurgeons, medical literature, and conferences where the subject had been discussed. He opined that the standard for treating such injuries was to operate within a matter of hours unless there were significant reasons which argued against surgery. Gross stated that evidence-based medicine, experimental data, and the practice of reasonable surgeons dictated that when a patient presented with an acute neurological change due to spinal cord compression, the appropriate treatment was acute surgical decompression.

Gross also stated it was more likely than not that Rankin would have had a better prognosis for neurological recovery if her thoracic disk herniation had been properly diagnosed and treated via surgical decompression by the morning after her accident, and he stated that her chance of avoiding permanent neurological injury decreased each day without surgery.

On appeal, the defendants argue that Gross' opinions were framed in terms of "loss of chance" and were therefore

insufficient to establish the defendants' alleged negligence as a proximate cause of Rankin's injury. We agree that an opinion framed in terms of loss of chance would not sustain Rankin's burden of establishing that the defendants proximately caused her injury. We also note that Nebraska has not recognized the loss-of-chance doctrine. See *Steineke v. Share Health Plan of Neb.*, 246 Neb. 374, 518 N.W.2d 904 (1994).

Gross' statements that Rankin would have had a "better prognosis" and a "chance of avoiding permanent neurological injury" do not equate with an opinion that it was more likely than not that Rankin would have had a better outcome if she had undergone surgery immediately following her injury. Opinions dealing with proximate causation are required to be given in terms that express a probability greater than 50 percent. Thus, Gross' statements do not establish the required certainty to prove causation. While a 49-percent chance of a better recovery may be medically significant, it does not meet the legal requirements for proof of causation. The terms "chance" and "prognosis" by definition do not establish the certainty of proof that is required.

On the other hand, an opinion expressed in terms that it is more likely than not that a plaintiff "would have had a better outcome" is sufficiently certain to establish causation. A *better outcome* is not the same as a *chance of a better outcome*. Rather, it is a definite result. In this case, there were statements within Gross' affidavit that were sufficient to establish causation.

When reviewing a summary judgment, we view Gross' affidavit in a light most favorable to Rankin and give her the benefit of all reasonable inferences from such evidence. Contrary to the defendants' assertion, Gross' affidavit espoused more than a mere "loss of chance." Gross opined that early surgical decompression of the spinal cord would more likely than not have led to an improved outcome for Rankin. This evidence established causation for the purpose of opposing the defendants' motion for summary judgment on such issue. Thus, Gross' affidavit satisfied the requirement that Rankin produce some expert testimony to establish that the actions or inactions of the defendants were a proximate cause of Rankin's injury.

## CONCLUSION

[8] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007). We view the evidence in the light most favorable to Rankin and give her the benefit of all reasonable inferences deducible from the evidence. See *Neiman v. Tri R Angus*, 274 Neb. 252, 739 N.W.2d 182 (2007).

The issue presented was whether Rankin had produced competent expert testimony showing that any actions or inactions of the defendants were a proximate cause of her injury. Gross' opinion that early surgical decompression would more likely than not have led to an improved outcome for Rankin was sufficient to establish an issue of fact concerning causation. Since there remains a material issue of fact in dispute, the district court erred in granting summary judgment. Therefore, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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MARY E. BROAD, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID D. SCHEKALL, DECEASED, APPELLANT, V. RANDY BAUER INSURANCE AGENCY, INC., AND RANDY S. BAUER, APPELLEES.

749 N.W.2d 478

Filed May 30, 2008. No. S-06-844.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against

whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Complaints: Appeal and Error.** Whether a complaint states a cause of action is a question of law, which requires an appellate court to reach a conclusion independent of the trial court.
4. **Insurance: Brokers: Principal and Agent.** Whether an insurance intermediary is an agent of the insured or the insurer is generally a question of fact.
5. **Contracts: Principal and Agent: Liability.** When a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.
6. **Breach of Contract: Insurance: Principal and Agent: Liability.** An action for breach of contract to procure insurance is inappropriate when brought against an insurer's agent who, within the scope of his or her authority, contracted on behalf of the disclosed principal and did not bind himself or herself personally.
7. **Actions: Breach of Contract: Insurance: Brokers.** A claim against a broker for breach of contract to procure insurance is a valid cause of action.

Appeal from the District Court for Scotts Bluff County: BRIAN C. SILVERMAN, Judge. Reversed and remanded for further proceedings.

John F. Simmons and Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees.

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

CONNOLLY, J.

## SUMMARY

The personal representative of David D. Schekall's estate appeals the district court's order granting the appellees' motion for summary judgment. David and a passenger were killed in an automobile accident. The personal representative sued Randy S. Bauer and the Randy Bauer Insurance Agency, Inc. (collectively Bauer), for breach of an agreement to procure insurance coverage for David. The personal representative alleged Bauer failed to obtain the insurance he had agreed to procure and, as

a result, David's estate had to pay $165,000 to settle a suit by the passenger's estate.

The district court granted Bauer's motion for summary judgment. The court concluded David should have read his policies. According to the court, either David read the policies and was satisfied with their coverage or he did not read them. The court reasoned that Bauer was insulated from liability if David failed to read the policies.

We conclude that the threshold issue of law is whether the personal representative has stated a valid cause of action. We recognize a breach of contract action for "failure to procure" for claims against a broker acting on behalf of an insured, but not against an agent acting solely on behalf of a disclosed insurer. We also conclude there are genuine issues of material fact whether Bauer was a broker or an agent. We therefore decline to decide whether an insured's failure to read a policy insulates an insurance broker from contract liability for failure to procure requested coverage. We reverse, and remand.

## BACKGROUND

David's parents, Jim and Donna Schekall, had a 9-year insurance relationship with Bauer. On December 31, 2002, Jim and Donna met with Bauer to review their insurance coverage. David also attended the meeting. David had recently moved back to Hemingford, Nebraska, to start his own farming operation. He had obtained land and cattle and needed insurance coverage.

According to Jim's affidavit, the parties agreed at the meeting that Bauer would obtain the same coverage and policies for David that he had obtained for Jim and Donna—except Jim and Donna would have $3 million in personal liability umbrella coverage and David would have $1 million in the same coverage.

According to Bauer's affidavit, Jim and Donna told him that David needed a farm and ranch premises/personal liability policy. Bauer's affidavit also states that David told him he had homeowners and automobile insurance with an independent insurance agent. Bauer's affidavit claims David "never requested [Bauer's] advice on the adequacy of that insurance, on umbrella policies, or the adequacy of any other insurance that he had, nor did [Bauer] give such advi[c]e."

Bauer issued David a farm and ranch premises/personal liability policy, which was effective on December 31, 2002. On July 10, 2003, Bauer issued a separate "farm/ranch" policy to David because David had mortgaged farm equipment that required a different type of coverage than a farm and ranch premises/personal liability policy.

David and his passenger were killed in an automobile accident in August 2003. The passenger's estate sued David's estate. Neither the December 31, 2002, policy nor the July 10, 2003, policy provided personal liability umbrella coverage. The only available coverage was an Allied Insurance policy that provided a maximum $100,000 liability coverage. This amount was inadequate to settle the claims made by the passenger's estate. David's estate paid an additional $165,000 to settle the claim.

The December 31, 2002, and July 10, 2003, policies were attached to Bauer's affidavit. The December 31, 2002, policy expressly excludes from personal liability coverage any bodily injury arising out of the operation of a motor vehicle. The July 10, 2003, policy contains a similar exclusion from liability coverage. The parties do not know whether David read these policies.

The personal representative of David's estate sued Bauer. The amended complaint alleged Bauer "breached [an] agreement with Plaintiff to provide personal liability coverage that would have provided coverage in the case of an automobile accident."

Bauer moved for summary judgment. The trial court found that the policies were not ambiguous and that they did not provide coverage for automobiles or any umbrella protection. The court determined David had an obligation to read the policies and stated, "He either read the same and was satisfied with the coverage or did not, in which case his failure insulates the insurance agent and the agency from liability." The court granted Bauer's motion for summary judgment.

## ASSIGNMENTS OF ERROR

The personal representative of David's estate assigns, restated, that the court erred in (1) determining there was no genuine issue of material fact, (2) determining that David's opportunity

to read the policy insulated Bauer from liability, and (3) granting Bauer's motion for summary judgment.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] Whether a complaint states a cause of action is a question of law, which requires us to reach a conclusion independent of the trial court.[3]

## ANALYSIS

As presented by the parties, the issue on appeal is whether an insured's failure to read an issued policy insulates an insurance agent from liability for failure to "provide" the requested coverage. But we do not reach that issue. Instead, we reverse the district court's summary judgment to resolve a factual issue.

We first identify the cause of action alleged by the personal representative: breach of contract for failure to procure insurance. We then review agency principles to determine the proper context in which a party may bring an action for breach of contract to procure insurance. We conclude that an issue of material fact exists about whether the personal representative properly stated a breach of contract claim against Bauer.

### The Personal Representative Asserts a Claim for Breach of Contract to Procure Insurance

Our first question concerns the personal representative's claim: The personal representative alleges Bauer's breach of

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[1] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[2] *Id.*

[3] See *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

contract, but what was the contract Bauer allegedly breached? The amended complaint alleges that Bauer breached an agreement "to provide personal liability coverage that would have provided coverage in the case of an automobile accident, and would have provided additional coverage to pay the wrongful death claim." (Emphasis supplied.) We do not read this as an allegation that Bauer promised David he was immediately insured for automobile accident liability, i.e., that the agreement was an oral *contract of insurance*.[4] Instead, we read the personal representative's complaint to allege a breach of a *contract to procure* the allegedly requested personal liability coverage. The personal representative specifically states in her brief that this "is an action at law against an insurance agent for failure to procure the insurance it had promised to procure."[5] We now consider whether this is a proper cause of action.

### An Action for Breach of Contract to Procure Insurance Is an Appropriate Cause of Action When Brought Against a Broker

We have recognized a *negligence* action for an insurance agent's failure to obtain insurance coverage: "An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent."[6] The personal representative directs us to two cases that she claims "implicitly recognize a claim for breach of a contract to procure insurance."[7] Yet, the personal representative

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[4] See, *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003); *Rodine v. Iowa Home Mutual Cas. Co.*, 171 Neb. 263, 106 N.W.2d 391 (1960); *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16, 248 N.W. 692 (1933).

[5] Brief for appellant at 1.

[6] *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 803, 515 N.W.2d 767, 770 (1994). Accord *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

[7] Brief for appellant at 11. See, *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 570 N.W.2d 525 (1997); *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992).

does not direct us to any cases, nor has our research uncovered any cases, in which we expressly recognized a cause of action for breach of contract to procure insurance.

One commentator has explained, "In most jurisdictions, the cause of action for an insurance agent's failure to procure insurance may be either in contract or in tort."[8] We believe, however, that we must qualify the general rule that a plaintiff may bring an action in contract for an insurance agent's failure to procure insurance. To provide context for our qualification, we first digress and address agency principles.

[4] We have often used the term "insurance agent" loosely. And other courts often do the same. But because the term invokes agency principles, we must identify the principal for whom the insurance intermediary is an agent. "A party who negotiates an insurance contract to cover someone else's risk is acting as an agent for either the insured or the insurer."[9] Depending on whose interests the "insurance agent" is representing, he or she may be a "broker" or an "agent." A critical distinction exists:

> A representative of the insured is known as an "insurance broker." A broker represents the insured by acting as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, places it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker. In contrast, an "insurance agent" represents an insurer under an exclusive employment agreement by the insurance company.[10]

Whether an insurance intermediary is an agent of the insured or the insurer is generally a question of fact.[11]

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[8] 12 Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 83.4 at 125 (1999). See, also, 43 Am. Jur. 2d *Insurance* § 163 (2003).

[9] 3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 45:1 at 45-2 (2007).

[10] *Id.* at 45-2 to 45-3. See, also, *Moore, supra* note 7 (quoting 3 George J. Couch, Cyclopedia of Insurance Law § 25:93 (rev. 2d ed. 1984)).

[11] *Moore, supra* note 7.

Having recognized the distinction between a "broker" (the insured's agent) and an "agent" (the insurer's agent), we consider how agency principles affect the intermediary's contract liability.

[5-7] When a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.[12] Commentators have recognized this principle in the insurance context:

> In the absence of an express undertaking of a broader duty, an agent of the insurer who acts in an authorized, lawful manner is not personally liable to the insured for his or her acts or for any contracts which the agent makes on behalf of his or her disclosed principal . . . .[13]

We conclude that an action for breach of contract to procure insurance is inappropriate when brought against an insurer's agent who, within the scope of his or her authority, contracted on behalf of the disclosed principal and did not bind himself or herself personally. Specifically, an insurance agent's mere promise to procure requested coverage through his sole principal is insufficient to create the agent's personal liability because that promise is clearly within the scope of the agent's authority.[14] However, we will recognize a cause of action against a broker for breach of contract to procure insurance because the broker is the insured's agent.

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[12] See, *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998).

[13] 4 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 55:1 at 55-3 (2005). See, also, 7 Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 44.7 (1998).

[14] See *Gieseke v. Hardware Dealers Mut. Fire Ins. Co.*, 46 Ill. App. 2d 131, 195 N.E.2d 32 (1963).

### A Question of Fact Remains Regarding Whether the Personal Representative's Claim Was a Valid Claim Against Bauer

In her amended complaint, the personal representative alleges that Bauer's "business is to market, advise, recommend, and sell policies of insurance and coverages through State Farm Insurance Company." This statement may suggest that Bauer was an agent solely for State Farm Insurance Company, acting within the scope of his authority, when he allegedly agreed to procure personal liability coverage for David. If true, the personal representative's breach of contract claim against Bauer does not state a valid cause of action. The pleadings fail to show that Bauer expressly agreed to undertake a broader duty that would have rendered him personally liable on that agreement.[15] The personal representative's statement in the complaint, however, is the extent of information in the record regarding Bauer's relationship to an insurer. An issue of material fact remains regarding whether Bauer was solely the insurer's agent or an independent broker. As such, we cannot determine whether the personal representative properly stated a claim against Bauer.

### Reverse and Remand to Resolve This Factual Issue

If Bauer was an agent solely for State Farm Insurance Company, and was acting within the scope of his authority when he allegedly contracted with David, the personal representative's breach of contract action against Bauer would fail for that reason alone. Because this threshold issue of fact has not been resolved, we decline to decide whether an insured's failure to read a policy would be a valid defense in a contract action for a broker's failure to procure requested coverage. We reverse the district court's summary judgment and remand the cause to resolve this factual issue. If the facts show Bauer was acting as a broker, the parties can present arguments to the district court regarding the effects of David's alleged failure to read the policy.

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[15] See *id.*

## CONCLUSION

We decline to recognize a cause of action for an insured's allegations against an insurance agent acting solely on behalf of a disclosed insurer that the agent breached an agreement to procure the insured's requested coverage. We do, however, recognize such a claim against an insurance broker acting on behalf of the insured.

We also decline to decide whether an insured's failure to read a policy is a valid defense in a contract action against a broker for failure to procure requested insurance coverage. A threshold factual issue regarding the agency relationship has not been resolved. Therefore, we reverse the district court's summary judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# JCB ENTERPRISES, INC., DOING BUSINESS AS BILL'S LIQUOR WEST, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

749 N.W.2d 873

Filed May 30, 2008. No. S-06-1373.

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: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
4. **Administrative Law.** Administrative adjudicators must avoid an appearance of impropriety.
5. **Administrative Law: Liquor Licenses: Evidence.** The Nebraska Liquor Control Commission's decisions in contested cases are to be decided on the evidence adduced during the proceedings involving those contested cases.
6. **Administrative Law: Liquor Licenses: Public Meetings: Due Process.** The Nebraska Liquor Control Commission should conduct its proceedings in such a

manner as to avoid due process challenges due to a perception that commentary offered during the public meeting portion of the commission's agenda improperly impacted the commission's decision in a contested case.

7. **Administrative Law: Liquor Licenses: Appeal and Error.** When the district court conducts its review of a final decision of the Nebraska Liquor Control Commission, it is required to make independent factual determinations.
8. ____: ____: ____. In its proceedings for review of a final decision of the Nebraska Liquor Control Commission, the district court shall conduct the review de novo on the record of the agency.
9. **Due Process: Notice: Words and Phrases.** The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified.
10. **Administrative Law: Due Process: Notice.** Due process requires that an administrative adjudication be preceded by notice and an opportunity for the agency hearing.
11. **Administrative Law: Liquor Licenses: Revocation.** The Nebraska Liquor Control Commission has broad discretion in deciding whether licenses should be suspended or revoked upon violations of the liquor law.
12. **Administrative Law: Liquor Licenses: Statutes.** The Nebraska Liquor Control Act and the Nebraska Liquor Control Commission's rules and regulations give the commission discretion in the imposition of penalties for violations of the act and rules.
13. **Statutes: Presumptions: Words and Phrases.** When "may" is used in a statute, permissive or discretionary action is presumed.
14. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record that supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors will be affirmed.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Daniel L. Lindstrom and Justin R. Herrmann, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

JCB Enterprises, Inc. (JCB), appeals from the decision of the district court for Lancaster County that affirmed the decision of the Nebraska Liquor Control Commission (Commission) that

had revoked the liquor license of JCB, doing business as Bill's Liquor West (Bill's). The Commission had determined that JCB had violated Neb. Rev. Stat. § 53-180 (Reissue 2004) and 237 Neb. Admin. Code, ch. 6, § 019.01A (1994), of the rules and regulations of the Commission by selling alcoholic liquor to a minor. Because competent evidence supports the decision of the district court, and the decision is neither arbitrary, capricious, nor unreasonable, we affirm.

## FACTS

There is essentially no dispute with regard to the facts relevant to our decision in this appeal. JCB was the holder of a class D liquor license for the operation of Bill's, a liquor store in Kearney, Nebraska. On the evening of February 5, 2005, a sales clerk at Bill's sold alcoholic liquor consisting of a bottle of Jim Beam whiskey, a 30-pack of Busch Light beer, and a 30-pack of Miller High Life Light beer to T.B. At the time of the sale, T.B. was 18 years of age, and the clerk did not ask for identification. The clerk estimated that T.B. had purchased alcohol from Bill's approximately 10 to 20 times prior to February 5 and that on three or four prior occasions, T.B. had shown the clerk a Canadian identification card that indicated a date of birth that would make the bearer at least 21 years of age. The record does not specify the nature of the Canadian identification. There is some evidence that T.B. also presented his brother's driver's license to purchase alcohol at some point in the past. There is no suggestion that T.B. represented in any other form of writing that he was age 21 or older.

During the early morning of February 6, 2005, T.B. was killed while riding in the rear passenger side of a 1998 Volkswagen Jetta driven by K.W. At the time of the accident, K.W. was also 18 years of age. The record reflects that K.W. had been drinking Jim Beam whiskey prior to the accident, and officers investigating the accident reported finding nine unopened cans of Miller High Life beer in the car at the accident scene. Following the accident, K.W. was given a breath test indicating an alcohol level of .211. According to the record, the Jetta was traveling approximately 75 miles per hour in a residential area when it collided with a parked pickup truck. The Jetta was extensively

damaged in the collision, including significant metal tearing and exposure of the rear passenger side. T.B. died from blunt force trauma to his head, neck, and trunk.

In May 2005, Bill's failed a compliance check and admitted to this violation of selling liquor to a minor. Bill's had a previous violation in 1997.

In a certified letter dated August 8, 2005, the Commission notified JCB that the Commission was charging it with violating § 53-180 and 237 Neb. Admin. Code, ch. 6, § 019.01A, as a result of the February 2005 incident. Section 53-180 provides that "[n]o person shall sell . . . or permit the sale . . . of any alcoholic liquors, to or for any minor . . . ." Section 019.01A states that "[n]o . . . employees of any licensee shall sell any alcoholic liquors to any person who is a minor . . . ."

JCB denied the charges, and a contested hearing was held before the Commission on October 19, 2005. Four witnesses testified at the hearing, and seven exhibits were received into evidence, including approximately 50 pages from the police investigation of the accident. Proof of the two prior violations was included in this evidence.

In an order dated November 4, 2005, the Commission found that on February 5, 2005, Bill's sold alcoholic liquor to a person under the age of 21, which the Nebraska Liquor Control Act defines as a "minor." See Neb. Rev. Stat. § 53-103(22) (Supp. 2007). The Commission found that at the time of this sale, T.B. was not asked to show proof of identification of age. The Commission found that T.B. had "on multiple occasions previously purchased alcoholic liquor from [Bill's]." Finally, the Commission determined that there was no evidence that the "Alberta, Canada" identification constituted valid proof of identification of age under Nebraska law. The Commission determined that these facts demonstrated that JCB was "unable to comply with the requirements of the Nebraska Liquor Control Act," and the Commission ordered that the liquor license of "JCB Enterprises Inc dba 'Bill's Liquor West'" be revoked.

JCB filed a motion for rehearing before the Commission. JCB effectively raised two arguments in its motion. First, JCB noted that immediately prior to its contested hearing, which had commenced at 9:58 a.m., the Commission had held a public

meeting that had commenced at 9 a.m. During the public meeting, Diane Riibe, the executive director of an advocacy group, addressed the Commission and made unsworn comments seeking the revocation of JCB's liquor license. Specifically, in her comments, Riibe urged the Commission to revoke JCB's liquor license because Bill's had sold liquor to T.B., a minor, on February 5, 2005, and because T.B. had "paid a price that far exceeds any that will be imposed today on" JCB. JCB argued on rehearing that Riibe's comments were unsworn ex parte comments that had been improperly considered by the Commission when it reached its decision to revoke the license of JCB.

For its second argument, JCB claimed that the Commission's decision to revoke the license of JCB was inappropriate and too severe. In support of this argument, JCB offered the affidavit of Hobert Rupe, the executive director of the Commission. In his affidavit, Rupe stated that there were a total of 1,057 "Sale to Minor Convictions" of licensees in the time period from 2001 through 2005 and that during that time period, the Commission had imposed revocation as a penalty twice, including the revocation of JCB's license in the instant case.

On January 26, 2006, the Commission overruled JCB's motion for rehearing and again ordered JCB's liquor license revoked.

On February 23, 2006, JCB filed a petition for review with the district court. In its petition, JCB effectively raised two arguments. First, JCB claimed that in reaching its decision, the Commission had improperly considered Riibe's unsworn ex parte comments made during the public meeting portion of the agenda prior to the contested hearing in this matter. Second, JCB claimed that the revocation of its liquor license was an inappropriate penalty.

On September 27, 2006, a hearing was held on JCB's petition. The district court received into evidence the transcript and the bill of exceptions from the Commission hearing. At JCB's request, the district court also agreed to take judicial notice of the Commission's rules and regulations.

On November 2, 2006, the district court filed its order affirming the revocation order of the Commission. With regard to Riibe's ex parte comments, the district court stated that

> there [was] no evidence that anything outside the evidence adduced at the hearing was relied upon . . . by the Commission. Further, in this court's de novo review of this case, this court specifically has not considered any evidence which was not received at the actual hearing in this matter which took place before the Commission . . . .

As for the appropriateness of the revocation order, the district court determined that

> the evidence is undisputed that [T.B.], an 18-year-old with a date of birth of January 17, 1987, went into Bill's . . . on February 5, 2005 and was allowed to purchase a 12-pack [sic] of beer, an 18-pack [sic] of beer, and a bottle of whiskey without showing or being asked for any identification by the employee who sold to him.

The district court also determined that although the Nebraska Liquor Control Act allowed for an "absolute defense" when a licensee could show that the purchaser had presented "documentary proof" that he or she was of legal age to purchase alcoholic liquor, see Neb. Rev. Stat. § 53-180.07 (Reissue 2004), the evidence adduced in this case "fail[ed] to show that the Canadian identification was a valid driver's or operator's license which would make it a valid form of documentary proof of age."

The district court affirmed the Commission's revocation order, concluding that

> [u]nder the facts of this case . . . the determination of the . . . Commission, revoking the Class D license of JCB . . . doing business as Bill's . . . was neither arbitrary nor capricious. The evidence supports a finding that [JCB] did sell alcoholic liquor to a minor on February 5, 2005 and based upon the record, the sanction of revocation is appropriate.

JCB appeals.

## ASSIGNMENTS OF ERROR

On appeal, JCB claims, restated and renumbered, that the district court erred in affirming the Commission's revocation order, first, because the Commission improperly considered unsworn ex parte comments in rendering that order and, second, because the Commission's finding of a violation was

unwarranted and the revocation order was an inappropriate penalty for a variety of reasons.

## STANDARDS 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); *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006). 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. *Schwarting v. Nebraska Liq. Cont. Comm., supra.*

## ANALYSIS

For its first assignment of error, JCB argues that the Commission improperly considered Riibe's statements made during the public comment portion of the Commission's meeting held immediately prior to the contested hearing portion of the proceedings and that the district court erred in affirming the Commission's order. JCB claims that it was unfairly prejudiced by the Commission's receipt of Riibe's unsworn ex parte comments directed at JCB's case. Although Riibe's comments directed at a contested case are problematic and we are concerned with the procedure followed by the Commission in the instant case, given the district court's exclusion of Riibe's remarks in its de novo review of the Commission's order, we determine there is no merit to this assignment of error.

The public and contested proceedings at issue in this appeal were conducted by the Commission pursuant to statute and the rules and regulations of the Commission. See, Neb. Rev. Stat. § 53-114 (Reissue 2004); 237 Neb. Admin. Code, ch. 1, § 001 (1994). We have noted that the Commission is empowered to promulgate rules and regulations to carry out the provisions of the Nebraska Liquor Control Act (hereinafter the Act), Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2004). *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d

29 (2004). Those rules and regulations provide for public meetings of the Commission, which are held at the Commission's headquarters, and further provide that "[p]ublic presentation(s) before the Commission at a public meeting shall be allowed at the start of a scheduled meeting . . . ." 237 Neb. Admin. Code, ch. 1, § 001. A purpose behind the public presentation portion of the meeting is to permit the public to comment on issues of general concern relating to the business of the Commission.

The record in the instant case indicates that the Commission commenced the public meeting portion of its agenda at 9 a.m. and that the contested case portion of the meeting, including the case involving JCB, began at 9:58 a.m. The record further reflects that during the public meeting portion of the proceedings, Riibe commented on underage drinking in general and in particular made unsworn comments before the Commission that, in summary, urged the revocation of JCB's liquor license because of the incident that led to the charge in the instant case. Nothing in the record suggests that Riibe was a fact witness who had information directly relevant to the merits of the JCB contested matter.

[3-6] The Commission's receipt of Riibe's unsworn comments during the public meeting portion of the Commission's agenda, which were directed to the merits of a contested matter set to be heard by the Commission immediately following the public meeting, was inappropriate. Although "administrative adjudicators serve with a presumption of honesty and integrity," see *Barnett v. City of Scottsbluff*, 268 Neb. 555, 564, 684 N.W.2d 553, 560 (2004), they must nonetheless avoid an appearance of impropriety, see *Sussel v. City & County,* 71 Haw. 101, 109, 784 P.2d 867, 871 (1989) (stating that "an administrative adjudicator should [not] be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality"). The Commission's decisions in contested cases are to be decided on the evidence adduced during the proceedings involving those contested cases. See § 53-117 (authorizing Commission to hear testimony and take proof material for its information). See, also, *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006); *Lariat Club v.*

*Nebraska Liquor Control Comm., supra*. Further, it is prudent that the Commission conduct its proceedings in such a manner as to avoid due process challenges due to a perception that commentary offered during the public meeting portion of the Commission's agenda improperly impacted the Commission's decision in a contested case.

[7,8] When the district court conducts its review of a final decision of the Commission, it is required to make independent factual determinations. See *Schwarting v. Nebraska Liq. Cont. Comm., supra*. In its proceedings for review of a final decision of the Commission, the district court shall conduct the review de novo on the record of the agency. *Id.* In this case, the district court stated in its order that when it conducted its de novo review, it "specifically ha[d] not considered any evidence which was not received at the actual hearing in this matter which took place before the Commission." Thus, any irregularities before the Commission were cured when the district court ignored Riibe's comments in its de novo review of the record in the instant case. See *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 265, 494 N.W.2d 535, 537 (1993) (stating that although board erred in failing to consider all evidence, that error was "cured" by appellate court's de novo review of record). Accordingly, because our consideration of this appeal is limited to the propriety of the district court's ruling, we conclude that JCB's first assigned error is without merit.

Encompassed in its second group of claimed errors is JCB's assertion, for numerous reasons, that the district court erred in affirming the Commission's penalty of revocation. JCB raises several arguments to the effect that the Commission erroneously considered JCB's character and reputation in reaching its decision that a violation occurred and that the revocation of JCB's license was an inappropriate penalty. We have considered JCB's arguments and determine that none of these arguments have merit.

JCB notes that in the Commission's August 8, 2005, charge, it was notified that it had been charged with selling alcohol to a minor, and as a result, a hearing would be held at which it would be determined if JCB's license should be suspended,

canceled, or revoked. JCB asserts that Riibe's comments at the public meeting prior to the contested hearing injected character and reputation as an issue before the Commission, and because JCB had not been notified that character and reputation were in issue, its due process rights were violated by the Commission's ruling. Contrary to JCB's assertions, neither the record nor the Commission's order suggests that JCB's character and reputation were at issue with respect to either the alleged violation or the penalty to be imposed. To the extent JCB claims that Riibe's comments caused the Commission to consider JCB's character and reputation and reached an erroneous decision, such a claim is without merit because, as we have explained above, the district court expressly ignored Riibe's comments when it conducted its de novo review and affirmed the Commission's decision.

The evidence offered by the State at the contested hearing in support of the Commission's charge addressed T.B.'s age on February 5, 2005, the alcoholic liquor purchased by T.B. on February 5, and JCB's efforts or lack thereof to review T.B.'s identification to determine his age prior to his making this purchase. None of this evidence goes to JCB's character and reputation. The Commission's order gives no indication that JCB's character and reputation were considered by the Commission. Compare *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). Instead, the Commission's findings of fact and conclusions of law are limited to JCB's sale of alcoholic liquor to T.B., who was under the age of 21 at the time of the sale.

[9,10] The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Due process requires that an administrative adjudication be preceded by notice and an opportunity for the agency hearing. See *Lariat Club v. Nebraska Liquor Control Comm., supra*. The record here shows that JCB was notified of the only violation at issue and decided and had a fair opportunity to be heard with respect to that issue. Due process was met.

As its next argument in support of its claim that the district court erred in affirming the Commission's revocation order, JCB asserts that the penalty imposed by the Commission was contrary to the Act and the Commission's "Violations/Penalty Schedule." Brief for appellant at 29. JCB refers us to the statutes and a certain penalty schedule and asserts that the violation resulting from its February 5, 2005, sale of alcohol to T.B. constitutes its second violation in addition to the May 2005 compliance check within a 1-year period, for which JCB claims its license should have been merely suspended, not revoked. JCB's claim is without merit.

[11,12] This court has long stated that the Commission "has broad discretion in . . . deciding whether licenses should be suspended or revoked upon violations of the liquor law." See *Eleven Eighteen Co. v. Nebraska Liquor Control Commission*, 191 Neb. 572, 574, 216 N.W.2d 720, 721 (1974). With the exception of § 53-1,104(3)(a), which we discuss below and conclude is not controlling, JCB has not directed this court to any provision of the Act that JCB claims would result in a different penalty. To the contrary, the Act provides that "[n]o person shall sell . . . alcoholic liquors, to or for any minor," § 53-180, and that the Commission is authorized to "suspend[], cancel[], or revoke[]" the "license of any licensee who violates any of the provisions of the . . . Act," § 53-117.08. Section 53-1,104 further provides that "[a]ny licensee which sells or permits the sale of any alcoholic liquor not authorized under the terms of such license . . . shall be subject to suspension, cancellation, or revocation of such license by the commission." These statutory provisions authorize the Commission in its discretion to revoke a license when a licensee makes an unauthorized sale of alcohol. The rules and regulations similarly provide that "[n]o licensee . . . shall sell any alcoholic liquors to a person who is a minor," 237 Neb. Admin. Code, ch. 6, § 019.01A, and that entities "holding licenses issued pursuant to the provisions of [the Act] will be subject to citation and possible administrative sanction to include suspension or revocation" for selling alcohol to minors, 237 Neb. Admin. Code, ch. 6, § 019.01. We read the rules and regulations as giving the Commission discretion in the imposition of penalties for violations of the rules.

JCB relies upon the provisions of § 53-1,104(3)(a) as support for its argument that its license should have been suspended rather than revoked. Section 53-1,104(3)(a) provides in part as follows:

> For a second suspension for violation of section 53-180 or 53-180.02 occurring within four years after the date of the first suspension, the commission, in its discretion, may order that the licensee be required to suspend sales of alcoholic liquor for a period of time not to exceed forty-eight hours and that the licensee may not elect to pay a cash penalty.

Although we recognize that § 53-1,104(3)(a) permits a graduated scheme of penalties, in view of the provisions of § 53-117.08, JCB's reliance on § 53-1,104(3)(a) is misplaced.

[13] We have previously noted that when "may" is used in a statute, permissive or discretionary action is presumed. See *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). See, also, Neb. Rev. Stat. § 49-802(1) (Reissue 2004) (stating that "[w]hen the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed"). Thus, the exercise of the Commission's authority to suspend a license under § 53-1,104(3)(a) is optional and does not serve as a limitation on the broader discretion otherwise granted to the Commission to suspend, cancel, or revoke a licensee's license for a violation of the Act. See §§ 53-117.08 and 53-1,104.

As noted above, JCB also relies upon a "Violations/Penalty Schedule" prepared by the Commission as support for its argument that the Commission's penalty in the instant case was inappropriate. The schedule is not in the record on appeal. Given the record, JCB's reliance is misplaced.

[14] This court can take judicial notice of the Commission's rules and regulations. See Neb. Rev. Stat. § 84-906.05 (Reissue 1999). However, the "Violations/Penalty Schedule" is not part of the Commission's rules or regulations and, as noted, is not included in the record on appeal. It is incumbent on the party appealing to present a record that supports the errors assigned; absent such a record, as a general rule, the decision of the lower

court as to those errors will be affirmed. See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

At oral argument in this case, the parties informed the court that a version of the Commission's "Violations/Penalty Schedule" as of September 12, 2007, is currently available on the Commission's Web site. At this time, this court has no method by which to determine the accuracy of matters located on the Web site or, more particularly, to verify the contents of the version of the schedule that may have been in effect during the time relevant to the matters now on appeal. We decline to take judicial notice of the current schedule. See, generally, *State v. Bush*, 254 Neb. 260, 265, 576 N.W.2d 177, 180 (1998) (discussing appellate courts' refusal to take judicial notice of ordinances, stating such courts "'cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, *or in some manner present them as a part of the record*'"). JCB's argument requires that this court review the Commission's "Violations/Penalty Schedule," which is not appropriate. Because no such schedule was included in the record on appeal, JCB's argument relying on the schedule is unavailing.

As noted above, the Commission has broad discretion when imposing punishment for the violation of a liquor law. *Eleven Eighteen Co. v. Nebraska Liquor Control Commission*, 191 Neb. 572, 216 N.W.2d 720 (1974). 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. *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006). In a review de novo on the record, the district court 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. *Id*. Upon an appeal from the district court, this court's 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 *id.*

The record in the instant case supports the district court's factual determination that on February 5, 2005, Bill's sold alcoholic liquor to T.B., a minor, in violation of the provisions of the Act and the Commission's rules and regulations, as charged. With respect to the penalty to be imposed, the evidence showed that at some point in the past, Bill's had seen an unspecified Canadian identification presented by T.B. and that on this basis, had sold liquor to T.B. on 10 to 20 occasions. The Canadian identification served as a poor foundation for establishing T.B.'s age, as the district court noted. See § 53-180.06 (listing proper documentary proof of age). Bill's did not check T.B. for proof of age on February 5. After February and before the October 2005 hearing in this case, Bill's failed a compliance check and admitted to a violation for selling liquor to a minor in May 2005. The district court determined that based upon the record, the sanction of revocation imposed by the Commission was appropriate.

Based on the record before the district court and our standard of review, we conclude that the district court's order following its de novo review, which affirmed the order of the Commission, is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. We affirm.

## CONCLUSION

We conclude that the district court did not err when it affirmed the order of the Commission that revoked JCB's liquor license. Accordingly, we affirm.

AFFIRMED.

GERRARD, J., not participating.

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DON DUANE NIELSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBARA JEAN NIELSEN, APPELLANT AND CROSS-APPELLEE, v. DONALD E. NIELSEN, APPELLEE AND CROSS-APPELLANT.

749 N.W.2d 485

Filed May 30, 2008. No. S-07-312.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment under Neb. Rev. Stat.

§ 25-2001(4)(b) (Cum. Supp. 2006) only if the litigant shows that the district court abused its discretion.

2. **Courts: Judgments: Fraud: Proof.** A party seeking to set aside a judgment after term for fraud under Neb. Rev. Stat. § 25-2001(4)(b) (Cum. Supp. 2006) must prove that he or she exercised due diligence at the former trial and was not at fault or negligent in the failure to secure a just decision.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Richard J. Thramer for appellant.

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

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

CONNOLLY, J.

## SUMMARY OF CASE

The personal representative of Barbara Jean Nielsen's estate (the Estate) petitioned to vacate the marital estate distribution in a 1989 dissolution decree. The decree dissolved the marriage of Barbara and Donald E. Nielsen. The Estate claimed that Donald obtained the decree by fraud and that the parties' property settlement agreement did not accurately reflect the marital estate's value. The district court dismissed the Estate's petition. The court concluded the Estate failed to prove that Barbara acted with due diligence in determining the value of the marital estate during the divorce proceeding. We agree with the district court and affirm.

## BACKGROUND

Donald and Barbara were married in 1951. They had three sons. In the mid-1970's, Donald incorporated Nielsen Oil and Propane, Inc. (Nielsen Oil). Donald and Barbara were the shareholders of Nielsen Oil. Donald held an 80-percent interest, and Barbara held the remaining 20 percent. Donald ran the business, and Barbara was the company's bookkeeper.

About 1980, Barbara was diagnosed with breast cancer. But she continued to work for Nielsen Oil, as her health allowed, until 1987 or 1988. In 1988, she met with attorney Ronald K. Parsonage to discuss estate planning and the possibility

of pursuing a divorce. Barbara suggested to Parsonage that Donald was hiding assets from her. Parsonage's file is in the record. The file contains a notarized affidavit of Barbara stating that she had transferred title to property to Donald and others because he inflicted duress upon her and undue influence over her. The affidavit also stated she had reason to believe Donald had forged her name on "numerous" documents of title and had transferred the property to the "detriment" of Barbara.

### Barbara Files for Dissolution

In September 1989, Barbara filed for divorce. William Line represented Barbara, and Clarence Mock represented Donald. In November, the parties signed a property settlement agreement. The settlement agreement awarded most of the parties' real and personal property to Donald and required Donald to pay (1) $625,000 cash to Barbara; (2) $15,000 in attorney fees to Barbara's attorney, Line; and (3) Barbara's medical expenses for the remainder of Barbara's life. The settlement agreement included an acknowledgment that each party was aware of the other's financial position and that there had been a full disclosure of the financial assets of both parties.

### Dissolution Hearing

Barbara's health was deteriorating, and she could not attend the final hearing on November 20, 1989. At the hearing, Donald testified that the settlement agreement fully, fairly, and equitably divided the marital estate. The court asked for a property statement, but Line stated he had not brought one with him. He then stated:

> [Barbara] is in extremely poor health. I have gone over it in considerable length with her. I can assure the Court that I have fully advised her of her rights and fully analyzed the property and I believe this to be in her best interest because of her extremely frail health.

The parties' attorneys then stipulated, "from their independent investigations," that the value of the marital estate was between $1 million and $3 million. The court entered a decree approving the settlement agreement. The same day, Donald paid Barbara the $625,000 and Barbara executed a will devising all her property to the couple's three sons. On July 24, 1990, Barbara died.

### Estate Petitions to Vacate

Almost 15 years later, in March 2004, the Estate petitioned to vacate the dissolution decree. The Estate alleged that Donald obtained the decree by fraud. It alleged that he never fully informed Barbara of the value and investments composing the marital estate. It further alleged that Donald, Mock, and Line conspired to conceal the value and extent of the marital estate from Barbara and the court. According to the Estate, Donald obtained Line's cooperation by paying him $25,000, including the $15,000 in attorney fees in the settlement agreement. The Estate also alleged Barbara relied on a financial statement that did not list all the marital assets and that failed to reflect the fair market value of the assets. Finally, the Estate alleged that the personal representative first learned of the conspiracy and the extent of Donald's financial holdings at a meeting with Rodney Zwygart, Donald's accountant, in December 2001. Zwygart had contacted the personal representative and requested the meeting. The Estate's petition requested that the court vacate and set aside the decree's distribution of the marital estate and that it determine a fair and equitable division of the marital estate.

Donald moved for summary judgment. In resisting summary judgment, the Estate relied on Zwygart's affidavit. According to the Estate, Zwygart opined in his affidavit that at the time of the divorce proceedings, the marital estate had a fair market value between $60 million and $80 million. The court granted summary judgment for Donald. The court acknowledged that some evidence showed the marital assets were greater than the $1- to $3-million range stipulated by the parties. The court concluded, however, there was no evidence that the parties were dissatisfied with the property settlement or that Barbara was misled into signing the agreement. The Estate appealed.

### Estate Appeals, and Cause Remanded

In an unpublished decision, the Nebraska Court of Appeals reversed the district court's entry of summary judgment.[1] Viewing the evidence in the light most favorable to the Estate,

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[1] *Nielsen v. Nielsen*, No. A-04-894, 2005 WL 1719731 (Neb. App. July 26, 2005) (not designated for permanent publication).

the court concluded that Zwygart's deposition testimony presented material issues of fact. The Court of Appeals determined that material issues of fact existed regarding the true value of the marital estate and whether Barbara was fully aware of that value.

After a bench trial following remand, the district court entered judgment for the Estate in December 2006. The court decided that the Estate proved by clear and convincing evidence the theories of fraudulent concealment and fraudulent misrepresentation. The court determined that Donald underrepresented the marital estate's value and that a more accurate representation "would have been conservatively $4 million." The court rejected Donald's affirmative defenses.

Donald moved for a new trial. In a March 2007 order, the court sustained Donald's motion and dismissed the Estate's petition. The court stated that the reasoning in its December 2006 order was flawed in that it provided an incomplete analysis. The court explained that its prior order focused on Donald's conduct and did not consider whether Barbara acted with due diligence as required by *Eihusen v. Eihusen*.[2] Upon further consideration, the court determined Barbara did not exercise due diligence to determine the entire marital estate. According to the court, Barbara failed to do discovery that should have led to the disclosure of assets and their valuations. The court dismissed the Estate's petition. The Estate appeals.

## ASSIGNMENTS OF ERROR

The Estate assigns, restated, that the district court erred in (1) concluding Barbara did not exercise due diligence to ascertain the entire value of the marital estate, (2) determining the marital estate had a value of $4 million, and (3) deciding Barbara was entitled to only 40 percent of the marital estate.

Donald's consolidated assignment of error on cross-appeal is that the district court erred in rejecting his affirmative defenses in its December 2006 order.

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[2] *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

## STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment under Neb. Rev. Stat. § 25-2001(4)(b) (Cum. Supp. 2006) only if the litigant shows that the district court abused its discretion.[3]

## ANALYSIS

The Estate's petition to vacate sought to set aside the marital estate distribution in the 1989 dissolution decree for fraud. The Estate contends that the district court erred in concluding that Barbara failed to exercise the requisite due diligence during the divorce proceeding.

[2] Under § 25-2001(4)(b), a district court may vacate or modify its own judgments or orders after term for fraud practiced by the successful party in obtaining the judgment or order. But we have held that a party seeking to set aside a judgment after term for fraud under this section must prove that he or she exercised due diligence at the former trial and was not at fault or negligent in the failure to secure a just decision.[4] Here, the Estate must prove that the alleged failure to secure a just decision was attributable only to Donald's misrepresentation or concealment, and not to any fault or negligence of Barbara.[5]

### Applicable Case Law

In *Caddy v. Caddy*,[6] we affirmed the district court's denial of a motion to vacate or modify a divorce decree. There, the appellant had moved to vacate or modify the decree, alleging that during the divorce proceedings, the appellee had submitted a false financial statement that left out items of property. We concluded the appellant had failed to exercise due diligence. We observed that she later testified that at the divorce proceeding, she was aware of the existence of the property allegedly

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[3] See *Eihusen*, *supra* note 2.

[4] See, *Eihusen, supra* note 2; *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Caddy v. Caddy*, 218 Neb. 582, 358 N.W.2d 184 (1984).

[5] See, *Eihusen, supra* note 2; *McCarson, supra* note 4.

[6] *Caddy, supra* note 4.

concealed, although she did not then know the property's exact value. We also noted that she had available to her the same avenues to discover the facts at trial as she employed for her motion to vacate. We decided the trial court properly denied her motion, because she "chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information."[7]

We similarly affirmed the denial of a petition to vacate a divorce decree for fraud in *Eihusen*. There, the appellant claimed the appellee procured the parties' settlement agreement by concealing the true value of a debenture listed in the property settlement. We noted that during the settlement negotiations and throughout the divorce proceeding, the appellant was aware of the debenture's existence. As in *Caddy*, we observed that during the negotiations and divorce proceeding, the appellant had the same means of discovery that she employed to support her motion to vacate. But she had elected not to use them to her advantage. We concluded that the appellant failed to exercise due diligence because she "proceeded through the settlement negotiations and divorce proceeding without making any effort to ascertain what she now asserts to be the true value of the debenture, despite a general knowledge of the debenture and the [share price she now uses as the basis for valuing the debenture]."[8]

## Resolution

We disagree with the Estate's attempt to distinguish our decisions in *Caddy* and *Eihusen*. The Estate contends that the appellants in those cases were aware of the allegedly concealed property at the time of the divorce proceedings but had failed to determine the property's value at that time. The Estate argues that here, Barbara was unaware of the existence of many assets. We find this distinction of little import. Although Barbara may not have been aware of all the assets in the marital estate, the evidence shows that a year before she filed for divorce, she had suggested to Parsonage, her attorney at the time, that she

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[7] *Id.* at 584, 358 N.W.2d at 186.

[8] *Eihusen, supra* note 2, 272 Neb. at 469, 723 N.W.2d at 65.

suspected Donald was hiding assets from her. Yet, the evidence fails to show that Barbara acted on those suspicions and exercised due diligence to determine the value of the marital estate during the settlement negotiations or divorce proceedings.

We recognize that Barbara's health was fragile, but she was represented by legal counsel during all the relevant proceedings. And although the Estate alleged that Barbara's attorney, Line, was involved in a conspiracy to conceal the value of the marital estate, the district court determined the evidence did not support such a finding. The Estate does not assign as error the district court's determination on that issue. So, in addition to Barbara's efforts, we will consider Line's efforts to conduct discovery on Barbara's behalf. As the district court observed, absent from the record is evidence that Barbara or Line conducted extensive discovery that should have led them to the disclosure of marital assets and the assets' valuations.

After Zwygart met with the personal representative in December 2001, one of the sons called Line, but Line hung up on him. After Line died, the Estate made discovery attempts to obtain Barbara's file, but was informed that Line's files were destroyed after his death. Therefore, the evidence about Line's discovery efforts came from others' testimony.

The record shows that Line submitted interrogatories to Donald. But Mock objected because there were more than 50 interrogatories, which violated the discovery rules. According to Mock, the court sustained his objection. This is the only evidence in the record of formal discovery conducted by Line. Mock also testified that Line had told Mock he had investigated Donald's properties and that he had copies of the parties' financial statements. But the record does not establish the extent of Line's investigations or identify any other discovery Line may have conducted. Zwygart, as Donald's accountant, was a seemingly likely source for information regarding the marital estate. Zwygart testified, however, that during the divorce proceedings, neither Barbara nor Line asked him to supply any financial documents. Nor did Barbara ever ask him about the value of the marital estate.

The Estate contends that the court "must measure requisite due diligence in light of the active fraudulent concealment and

fraudulent misrepresentation"[9] that Donald was allegedly committing before and during the dissolution proceedings. But the record does not show that Donald's alleged misrepresentations or concealments prevented Barbara or Line from conducting an independent investigation into the marital estate and its value. For instance, no evidence shows that responses to discovery requests were fraudulent or untrue. The Estate's argument has little merit.

The Estate also contends that Barbara had a right to rely on the district court's order restraining the parties from transferring or concealing real or personal property assets. According to the Estate, Barbara "had a right to believe that Donald . . . had made full disclosure and that he would testify truthfully in [c]ourt."[10] Apparently, the Estate believes that the court's order somehow excused Barbara from exercising due diligence to independently determine the marital estate's value. The Estate, however, fails to provide any authority supporting its contention that the order excused Barbara from conducting an independent investigation.

A year before the divorce proceeding, Barbara suspected that Donald was hiding assets. The record, however, does not establish that she or Line made sufficient efforts to determine the value of the marital estate during the settlement negotiations or divorce proceedings. Without further evidence of Barbara's or Line's efforts to determine the marital estate's value, we cannot conclude that the Estate proved Barbara exercised the requisite due diligence. The record shows that Barbara's failure to secure a more favorable result was attributable to her failure to use discovery methods to uncover the assets and their value. And this failure to conduct discovery may have been intentional given her circumstances.

Admittedly, the record reflects that the marital estate might have been greater than the $1- to $3-million range stipulated by Line at the final hearing. But we cannot conclude that Line was negligent in representing Barbara. Because Barbara and Line are both dead, we cannot know why Barbara agreed

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[9] Brief for appellant at 10.

[10] *Id.* at 12.

to the settlement. The evidence suggests that settling for the lesser amount may have been Barbara's strategy because of her impending death. Mock testified that he had instructions from Donald that the divorce should be "done by the book" to draw out the divorce proceedings. The record suggests that the only property Barbara held solely in her name was a 20-percent minority interest in Nielsen Oil and that she sought the divorce to secure other marital assets she could pass to the couple's sons upon her death. This would not have occurred if Barbara had died before the divorce was complete. A reasonable inference is that Barbara agreed to the property settlement to complete the divorce before her impending death. At the final hearing, Mock explained to the court that "part of the reason for the settlement has to do with the result for estate planning purposes on her part." Line agreed that estate planning was "a strongly motivating factor" in agreeing to the settlement. Perhaps this strategy to quickly settle explains why neither Barbara nor Line conducted extensive discovery. We conclude that the district court did not abuse its discretion in denying the Estate's petition to vacate.

## CONCLUSION

The Estate did not prove that Barbara exercised due diligence during the divorce proceeding. Nor did the Estate prove that the alleged failure to secure a just decision was not attributable to the fault or negligence of Barbara. Therefore, the district court did not abuse its discretion in denying the Estate's petition to vacate. Because we affirm the dismissal of the petition, we need not reach the Estate's other assignments of error or Donald's assignments of error on cross-appeal.

AFFIRMED.

GERRARD, J., not participating.

# Michelle Hug and Henstock, Inc., appellants, v. City of Omaha, appellee.

749 N.W.2d 884

Filed May 30, 2008. No. S-07-324.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Statutes: Legislature: Words and Phrases.** Legislative history is defined as the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates.
4. **Statutes: Legislature.** There is a distinction between legislative history made contemporaneously with the passage of legislation and statements made subsequently to the passage of legislation.
5. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.

Appeal from the District Court for Douglas County: John D. Hartigan, Jr., Judge. Reversed and remanded with directions.

K.C. Engdahl and Karisa D. Johnson, of Engdahl Johnson, L.L.C., for appellants.

Thomas O. Mumgaard, Deputy Omaha City Attorney, and Jo A. Cavel for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Heavican, C.J.

## INTRODUCTION

Appellants Michelle Hug and Henstock, Inc. (collectively Hug), brought this action in the district court against appellee City of Omaha (City) contending that the City's ordinance prohibiting smoking[1] was unconstitutional. The district court

[1] Omaha Mun. Code, ch. 12, art. VIII, §§ 12-160 to 12-172 (2006).

concluded the ordinance was constitutional. We reverse, and remand with directions.

## FACTS

On June 20, 2006, the Omaha City Council voted to adopt an ordinance prohibiting smoking in most public places and places of employment within its city limits. Under the ordinance, certain facilities were exempted from the operation of the ordinance until May 14, 2011.[2] Those facilities included stand-alone bars, keno establishments which applied for their license on or before June 8, 2006, and horseracing simulcasting locations. Also exempted under the ordinance are tobacco retail outlets, defined under the ordinance to include establishments that sell not only tobacco products, but also "other products that are incidental to the tobacco sales." Tobacco-only retail establishments are not regulated under the City's ordinance.

The City's ordinance indicated that its intent was

> (1) to protect the public health and welfare by prohibiting smoking in public gathering places and places of employment; and (2) to guarantee the right of employees, residents, and visitors to breathe smoke free air, and to recognize that the need to breathe smoke free air shall have priority over the desire to smoke.[3]

Hug owns the Marylebone, a bar located in the City. It is undisputed the Marylebone, which provides some food service, is covered by the prohibition against smoking and is not currently eligible for any of the exemptions provided under the ordinance.

Hug filed suit against the City challenging the constitutionality of the ordinance. In particular, Hug argued that the exemptions provided under the ordinance amounted to special legislation under Neb. Const. art. III, § 18.

The district court concluded that the ordinance was constitutional and dismissed Hug's complaint. The district court noted that

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[2] *Id.*, § 12-165.1.

[3] *Id.*, § 12-160.

> [t]he classification drawn by the Ordinance is reasonably connected to the legitimate purpose of promoting the public health and is based on substantial differences between the regulated public gathering places and the temporarily exempted businesses. . . . Notwithstanding [Hug's] assertions, the Ordinance is not arbitrary simply because it does not prohibit smoking in all places immediately. There is no permanently closed class. The class goes out of existence in 2011. It is a temporary classification. [The City] has also presented evidence that it is possible that other locations can join the class, thus increasing its size.

In so finding, the district court relied upon exhibits 3 and 4, affidavits by Omaha City Council members James Suttle and Franklin Thompson detailing the reasoning behind the exemptions to the ordinance. Hug appeals.

## ASSIGNMENTS OF ERROR

Hug assigns, renumbered, that the district court erred in (1) applying an equal protection standard of review rather than the special legislation standard when analyzing the ordinance under Neb. Const. art. III, § 18; (2) admitting exhibits 3 and 4 into evidence; (3) failing to find that the ordinance did not violate Neb. Const. art. III, § 18; (4) overruling Hug's motion for summary judgment; and (5) granting the City's motion for summary judgment.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

[2] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.[5]

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[4] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[5] *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

## ANALYSIS

Hug's primary contention on appeal is that the exemptions provided for by the ordinance are special legislation in violation of the special privileges and immunities clause of Neb. Const. art. III, § 18, and that the district court erred in finding otherwise. In connection with this, Hug also argues that the district court erred in utilizing an equal protection, rather than special legislation, standard when conducting its analysis and in admitting the affidavits of Suttle and Thompson. We note that Hug is not asking this court to find the smoking ban *itself* unconstitutional, but, rather, is arguing only that the exemptions to the ban are unconstitutional.

Before reaching the principal issue on appeal, however, we must address Hug's arguments that the district court utilized an incorrect standard in analyzing her contention that the exemptions were special legislation and that the district court erred in admitting into evidence exhibits 3 and 4.

*Proper Standard Under Neb. Const. Art. III, § 18.*

Hug first assigns that the district court incorrectly utilized an equal protection standard when conducting its analysis. Hug acknowledges that the district court, in its order, stated that it was using the special legislation standard. Hug argues, however, it was evident that the court was actually employing an equal protection standard.

Even assuming that Hug is correct that the standard actually applied by the district court was an equal protection standard and therefore incorrect, the primary issue presented by this appeal is a question of law. As a question of law, this court will conduct a de novo review of the claim that the ordinance is unconstitutional special legislation. In conducting such a review, this court will make its own independent determination as to the ordinance's constitutionality.[6] As such, the standard utilized by the district court is of no consequence to our analysis. We need not further address Hug's first assignment of error.

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[6] See *id.*

*Admissibility of Exhibits 3 and 4.*

Hug next argues that exhibits 3 and 4, Suttle's and Thompson's affidavits, are inadmissible because the ordinance itself sets forth its purposes and no other evidence is necessary, or indeed relevant, to determine that purpose. In addition, Hug notes that "[t]he affidavits . . . contained statements regarding their personal concerns and state of mind when voting to enact [the] Ordinance" and that "[e]ven though both Thompson and Suttle are members of the Omaha City Council, their statements are merely reflective of their own concerns, and are not competent statements of the ***City Council's purpose*** in enacting the Ordinance."[7]

Generally, outside of the plain language used in legislation, a legislative body's purpose or intent in enacting legislation is determined through an examination of the legislative history of a particular enactment. And this court has previously considered legislative history when determining whether particular enactments are unconstitutional as special legislation.[8] However, we conclude that the affidavits in question do not qualify as legislative history.

[3,4] Legislative history is defined as "[t]he background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates."[9] We see a distinction between legislative history made contemporaneously with the passage of legislation and statements made subsequently to the passage of legislation. In discussing the latter, the U.S.

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[7] Brief for appellants at 22 (emphasis in original).

[8] *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[9] Black's Law Dictionary 919 (8th ed. 2004).

Supreme Court has noted that "postenactment views 'form a hazardous basis for inferring the intent' behind a statute."[10]

The record in this case clearly establishes that the ordinance was passed on June 20, 2006, but the affidavits in question were not made until early September. The affidavits were not made contemporaneously with the enactment of the ordinance, and instead are "postenactment views" referred to by the U.S. Supreme Court.

In addition to the concerns we have regarding the timing of the statements in question, we also note that, as argued by Hug, the affidavits in question reflect the viewpoints of Suttle and Thompson, and not of the entire Omaha City Council. "'[O]ne member of a legislature which passes a law is not competent to testify regarding the intent of the legislature in passing that law.'"[11]

Because the affidavits were made subsequently to the passage of the ordinance, and because they reflect the viewpoints of just two of the seven members of the Omaha City Council, we conclude that the district court erred in receiving exhibits 3 and 4.

*Is Ordinance Unconstitutional Special Legislation in Violation of Neb. Const. Art. III, § 18?*

In her third assignment of error, Hug argues that the district court erred in concluding the exemptions to the City's ordinance were not unconstitutional special legislation. The enactment of special legislation is prohibited by Neb. Const. art. III, § 18, which provides in relevant part that

> [t]he Legislature shall not pass local or special laws in any of the following cases, that is to say:
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> . . . .

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[10] *United States v. Monsanto*, 491 U.S. 600, 610, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989) (quoting *United States v. Price*, 361 U.S. 304, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960)). See, also, *Seven Islands Land Co. v. Maine Land Use Reg.*, 450 A.2d 475 (Me. 1982).

[11] *Picture Rocks Fire Dist. v. Pima County*, 152 Ariz. 442, 444, 733 P.2d 639, 641 (Ariz. App. 1986), *disapproved on other grounds, Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990). See, also, *O'Loughlin v. W.C.A.B.*, 222 Cal. App. 3d 1518, 272 Cal. Rptr. 499 (1990).

> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[5] The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.[12]

When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.[13] Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.[14]

Special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts.[15] As a result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis.[16] But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose.[17]

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[12] *Le v. Lautrup, supra* note 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

As noted, in this case, we are asked to determine whether the exemptions to the City's smoking ban, and not the smoking ban itself, are special legislation. In making such determination, we focus our inquiry on the City's purpose behind exempting certain entities and decide whether there is a substantial difference of circumstances between exempted and nonexempted facilities which would suggest the expediency of diverse legislation.

In determining the City's purpose in enacting the ordinance, we do not consider the reasoning set forth in exhibits 3 and 4. Instead, we focus our attention upon the purpose in the ordinance itself: the prohibition of smoking in public gathering places and in places of employment in order to protect the public health and welfare and to guarantee the right to breathe smoke-free air.

The challenged exemptions to the ordinance include standalone bars, keno establishments, horseracing simulcasting locations, and tobacco retail outlets. The stated purpose of the ordinance is to recognize the right of everyone to breathe smoke-free air in order to protect the public health and welfare. Nothing in the ordinance's stated purpose would explain why employees of the exempted facilities or members of the public who wish to patronize those establishments are not entitled to breathe smoke-free air or to have their health and welfare protected. Nor does the City offer any other admissible evidence which might support this distinction. We determine that on the record before us, there is no "substantial difference of circumstances to suggest the expediency of diverse legislation."[18] As such, we conclude that the district court erred in finding the exemptions to the ordinance were not special legislation. We do not hold that similar exemptions could not be constitutionally justified—just that, given the record in this instance, the exemptions in this particular case are not.

Because we conclude that the exemptions to the City's ordinance "create[] an arbitrary and unreasonable method of classification,"[19] we need not address whether the exemptions

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[18] *Le v. Lautrup, supra* note 8, 271 Neb. at 941, 716 N.W.2d at 722.

[19] *Id.*

also create one or more permanently closed classes. We also consider, but reject on this record, the City's contention that it is per mitted to enact its smoking ban in phases.

As an additional matter, we note that Omaha Mun. Code, ch. 12, art. VIII, § 12-172, provides:

> If any provision, clause, sentence, or paragraph of this Article or the application thereof to any person or circumstances shall be held invalid, that invalidity shall not affect the other provisions of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

We conclude that pursuant to this section the exemptions to the ordinance set forth in Omaha Mun. Code, ch. 12, art. VIII, § 12-165.1, are severable from the remainder of the ordinance, and the remaining provisions continue to have full force and effect.

Because the district court erred in finding that the exemptions to the ordinance were not special legislation, we also conclude that the district court erred in granting the City's motion for summary judgment while denying Hug's motion.

## CONCLUSION

The district court erred in admitting exhibits 3 and 4. Moreover, because there is no "substantial difference of circumstances to suggest the expediency of diverse legislation," we conclude that the exemptions set forth in the ordinance are special legislation. We therefore conclude that the district court also erred in finding the exemptions to be constitutional, and in granting the City's motion for summary judgment and denying Hug's motion. We reverse the judgment of the district court and remand the cause with directions to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., concurring.

I concur in the majority's opinion. I write separately to emphasize that the fundamental purpose of the prohibition against special legislation is to prevent the enactment of laws bestowing economic favors on preferred groups or classes. Here, the City created exemptions bestowing economic favors

on specific types of businesses: tobacco-only retail outlets, keno establishments, stand-alone bars providing limited food service, and horseracing operations.

The Constitution requires uniformity of laws:

> "Uniformity [of laws] is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted."[1]

So, it has fallen on the courts to ensure that the citizens of this state can compete on a level playing field. In setting the boundaries of the field, we have specifically held that the "test of validity under the special legislation prohibition is more stringent than the traditional rational basis test" under the Equal Protection Clause.[2] An equal protection challenge requires a plaintiff to show that an economic classification is irrational or wholly irrelevant to the legislative objective.[3] In contrast, a special legislation challenge is satisfied if an economic classification does not bear *a reasonable and substantial relation* to the legislative objective.[4]

For example, this court has twice upheld legislation imposing a cap on damages a claimant can recover from health care professionals in medical malpractice actions.[5] This cap on damages was not available to other tort-feasors, but it was intended to benefit the public generally—not practitioners—by making medical services more affordable. The rising cost of malpractice

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[1] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003), quoting *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). See, also, *Cox v. State*, 134 Neb. 751, 279 N.W. 482 (1938).

[2] *Haman, supra* note 1, 237 Neb. at 713, 467 N.W.2d at 847.

[3] See, e.g., *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[4] See *Haman, supra* note 1.

[5] See, *Gourley, supra* note 1; *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

insurance and the resulting burden on the public created by medical practitioners passing on this cost or dropping malpractice coverage made this class of tort-feasors substantially different. And the Legislature could justifiably conclude that there were substantial reasons for protecting medical practitioners.[6]

In contrast, we have struck down an economic benefit bestowed upon a class when the benefit was not substantially tied to a legitimate public purpose. In *Haman v. Marsh*,[7] the Legislature authorized the Nebraska Department of Banking and Finance to guarantee deposits in industrial loan companies that had filed for bankruptcy or were in receivership. Only three companies satisfied the criteria for deposit insurance, so only depositors in those companies received the economic benefit. The legislation was enacted in response to the collapse of an industrial loan company and the resulting loss of assets by the private guaranty corporation established to insure deposits. The bill's purported purpose was to instill public confidence in the Legislature's financial institutions. We concluded, however, that the Legislature enacted the economic benefit clearly for depositors in three companies. We further decided that the economic benefit was not reasonably and substantially related to the act's stated purpose—instilling confidence in the state's financial institutions. We reasoned that payments to this class of depositors was more likely to instill fear that the state would make payments for every private injury, thereby causing the state's economic bankruptcy or economic suffocation through taxation.[8]

These cases show that for an economic benefit to a class to be upheld, three tests must be satisfied: (1) There must be a valid public purpose supporting the distinctive treatment; (2) the situation or characteristics of the class must be real and substantially different from other subjects of like general character; and (3) the distinctive treatment must bear a reasonable and substantial relation to the legitimate objectives and purposes of

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[6] See *Gourley, supra* note 1.

[7] *Haman, supra* note 1.

[8] *Id.*

the legislation.[9] The essential inquiry is whether the things or persons classified by the act form by themselves a proper and legitimate class relative to the act's purpose.[10]

Here, Omaha's smoking ban ordinance does not state the City's purpose for exempting stand-alone bars, keno establishments, horseracing operations, and tobacco retail outlets. But common sense dictates that exempted businesses will receive a significant economic benefit because smokers are more likely to patronize exempt businesses over those subject to the ban. The City may have intended to protect businesses more heavily dependent upon smokers until they could create other accommodations for their customers. But such purposes cannot save the exemptions from a special legislation challenge because the City would still fail to satisfy any of the criteria for creating a valid class economic benefit.

The ordinance does not state, nor does the City argue, that protecting the revenues of the exempt businesses and horseracing operations was intended to serve a public purpose. The ordinance's only stated purposes are to protect public health and the rights of citizens to breathe smoke-free air. Nor can the City show that the exempt businesses and horseracing operations have a real and substantial difference from businesses with like general characteristics that are subject to the ban. For example, other recreation or leisure businesses such as bowling alleys are also economically burdened by smoking bans,[11] but they are not exempt from the ban. Similarly, a stand-alone bar that provides full food service is subject to the ban, while a stand-alone bar that provides only limited food service is exempt. But most important, the City cannot satisfy the essential inquiry: whether the exemption's economic benefit bears a reasonable and substantial relationship to its stated purpose of protecting public health and the rights of citizens to breathe smoke-free air.

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[9] See, *Gourley, supra* note 1; *Haman, supra* note 1.

[10] *Gourley, supra* note 1; *Haman, supra* note 1; *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980).

[11] See, e.g., *EIC v. Tacoma-Pierce County Health Dept.*, 153 Wash. 2d 657, 105 P.3d 985 (2005).

The City's purpose was not to separate smokers and nonsmokers, nor to limit smoking in public places to designated smoking establishments. Instead, the City's ultimate goal or purpose is to ban smoking in public gathering places and places of employment, and to guarantee the right of employees, residents, and visitors to breathe smoke-free air. Under the ordinance, these businesses and horseracing operators have only a time-limited exemption. The exemption can only be explained as an economic benefit to offset the ban's financial impact for a limited class of businesses and horseracing operations. This benefit does not promote or have a substantial relation to the City's legislative purpose of protecting public health and citizens' right to breathe smoke-free air.

To sum up, the City's exemptions have sucked the air out of an otherwise constitutional ordinance.

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WILLIAM JACOB SITZ, APPELLANT AND CROSS-APPELLEE, V. ELLEN KATHERINE SITZ, APPELLEE AND CROSS-APPELLANT.

749 N.W.2d 470

Filed May 30, 2008. No. S-07-395.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
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. **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 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.
4. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.

5. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
6. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
7. **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.
8. **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 general equities of the case.

Appeal from the District Court for Loup County: KARIN L. NOAKES, Judge. Affirmed.

Barry D. Geweke, of Stowell, Kruml, Geweke & Cullers, P.C., L.L.O., for appellant.

Cheryl C. Guggenmos, of Guggenmos & Peterson, for appellee.

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

WRIGHT, J.

## NATURE OF CASE

After 10 years of marriage, William Jacob Sitz sought a dissolution of his marriage to Ellen Katherine Sitz and a division of the marital property. William and Ellen had a premarital agreement, and this appeal concerns the effect of such agreement upon the division of the property.

## SCOPE OF REVIEW

[1,2] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). 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.*

## FACTS

The premarital agreement stated that William and Ellen wanted to "set apart" the property that was accumulated by each of them prior to their marriage. The parties disclaimed any right of inheritance or any interest in the property of the other that was accumulated prior to the marriage. Each party represented that they had made full disclosure of all property they currently held. The agreement provided that property then held in the individual names of each party would remain their sole and separate property. The agreement, which was offered at trial, contained attachments that purportedly listed the property of the parties at the time of the marriage.

William and Ellen married on June 3, 1995. This was a second marriage for both, and no children were born of the marriage. Thereafter, William remained employed selling animal health supplies and Ellen continued to work as a family counselor. In November 2001, Ellen and a colleague opened their own business, Sandhills Center for Services, Inc. (Sandhills Services). An exhibit that purported to compare the parties' W-2 income showed that in 2005, Ellen earned $30,146 and William earned $122,242. The 2005 end-of-year balance sheet of Sandhills Services indicated that the business had a negative equity of $31,551.

At trial, Ellen claimed that the premarital agreement was not enforceable because it did not disclose the ranch owned by William, a Pfizer annuity, and a property settlement debt to William's first wife. The trial court found that even if William's property statement did not disclose ownership of the ranch, there was no doubt that Ellen was aware William owned the ranch. The court also concluded there was no evidence to suggest that Ellen would have refused to sign the agreement had she known the ranch was to be considered premarital property.

At the time of the marriage, William had a Pfizer annuity with a vested accrued monthly benefit of $1,269 that would commence when he turned age 65. William stated he was not aware of the annuity when the premarital agreement was

executed. The property settlement debt from William's previous marriage was approximately $33,750, which the trial court found to be a relatively small percentage of his premarital estate. Although the Pfizer annuity and the property settlement debt owed by William were not disclosed in the agreement, the court determined that the nondisclosure of these facts did not result in the agreement's being unenforceable.

The trial court awarded the ranch to William subject to all encumbrances. The court concluded that Ellen was not entitled to a share of the increased value of the ranch because it was premarital property and there was no evidence that her contributions to managing and operating the ranch resulted in an increased value.

Evidence was presented concerning improvements to the ranch that were made with assets earned through the effort of both parties during the marriage. The improvements were valued at approximately $32,500, and the trial court awarded Ellen a percentage of these improvements.

The trial court determined that the $1,269 monthly benefit from the Pfizer annuity was premarital property. However, during the marriage, William earned an additional monthly benefit of $2,549. The court awarded Ellen one-half of the benefit earned during the marriage ($1,274 per month) to begin when William turned 65. William was ordered to prepare a qualified domestic relations order to effectuate the above transfer of the annuity.

A Pfizer savings plan was included in William's property statement attached to the premarital agreement. The approximate value of the savings plan on the date of the marriage was $28,631. The trial court awarded William this amount and the interest on such amount as premarital property. Because the court had no evidence as to earnings on the investment, the court applied a rate of return of 6 percent per year and determined that the approximate earnings on that investment during the marriage were $52,563. The value of the savings plan as of December 1, 2005, was $371,817.

The record showed that during the marriage, contributions to the Pfizer savings plan were made by William's employer and through deductions from his paychecks. The trial court held that earnings and benefits earned through employment were marital

property. It deducted the above-described $52,563 to obtain the marital value of the savings plan, which the court found was $319,254. Ellen was awarded $159,627, or one-half the net value of the savings plan. William was ordered to prepare a qualified domestic relations order to reflect that division.

The other assets divided between the parties are not at issue, except for a Dodge truck. The parties were ordered to pay their individual debts incurred since December 1, 2005. Each party was ordered to indemnify and hold harmless the other party for such liabilities and all debts encumbering property received by each party.

William was ordered to pay $13,939 to the clerk of the court as a property settlement, to be payable to Ellen at $583 per month commencing on the first of each month beginning May 1, 2007, until paid. The trial court ordered William to pay alimony of $750 per month commencing May 1 for a period of 24 months. The alimony would terminate upon the death of either party or Ellen's remarriage. William was ordered to pay $5,000 in costs within 120 days of the entry of the decree, as well as $5,000 of Ellen's attorney fees in addition to any temporary allowance of such fees taxed as additional costs.

## ASSIGNMENTS OF ERROR

William claims the trial court erred (1) in awarding Ellen $159,627 of his Pfizer savings plan, (2) in awarding her a portion of his Pfizer annuity, (3) in finding that Ellen was entitled to one-half the value of the improvements to the ranch, (4) in finding that Sandhills Services had a "negative marital value" for purposes of asset division, (5) in ordering William to pay a property settlement judgment of $13,939, (6) in ordering him to pay $750 per month in alimony for 24 months, and (7) in ordering him to pay $5,000 of Ellen's attorney fees.

Ellen cross-appeals, claiming the trial court erred in failing to consider William's use of marital funds to pay his first wife a $33,750 property settlement award as a credit to Ellen's marital assets.

## ANALYSIS

[3] There are two principal issues for our resolution: What assets should the trial court have treated as marital property,

and did the court make a fair and equitable division of the marital property? 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 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. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). In the case at bar, the value of the assets is not in dispute.

### Division of Pfizer Savings Plan

William asserts that the intent of the premarital agreement was that Ellen would not share in the benefits of his Pfizer savings plan. He argues that because the savings plan was described in the premarital agreement and because the Uniform Premarital Agreement Act describes "property" as an interest, present or future in real or personal property, including income and earnings, all increases in value of the Pfizer savings plan should not be considered marital property. See Unif. Premarital Agreement Act, 9C U.L.A. 39 (2001). We disagree.

The definition of "property" in the Uniform Premarital Agreement Act is simply a definition of the term as it is used in the act. However, that definition was not incorporated into the parties' premarital agreement. The premarital agreement stated that the parties agreed to disclaim any right to or interest in property accumulated "prior to" the marriage. The agreement said nothing about property acquired during the marriage, and the record reflects that the parties combined their incomes in a joint account and acted as if both parties had a right to the money.

[4] As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). William's contributions to the savings plan were made with deductions from his Pfizer paycheck, which was marital property. Accordingly, the contributions to the savings plan made during the marriage and the returns earned during the marriage

were subject to division by the trial court. Thus, because the court merely awarded Ellen one-half of the benefits earned during the parties' marriage, we find no abuse of discretion.

### Division of Pfizer Annuity

William argues that the trial court erred in awarding Ellen a portion of the Pfizer annuity. He again relies upon his interpretation of the word "property" in the premarital agreement as meaning present or future property and argues that the annuity was his property at the time of the marriage and that any increase in value during the marriage should be his sole property. As pointed out above, the premarital agreement did not allow each party to keep the benefits earned through his or her employment during the marriage. Therefore, the general rule regarding the division of retirement plans applies.

Pursuant to Neb. Rev. Stat. § 42-366(8) (Reissue 2004), retirement plans are to be included in the marital estate. In the case at bar, the marital estate included only that portion of the pension plan earned during the marriage. (The amount of the pension plan that was earned prior to the marriage was set aside to William.) William earned an additional $2,549 in monthly benefits through his employment during the marriage, and this money was subject to division by the trial court in accordance with the same principles applied to the savings plan because it was marital property. The court awarded one-half of the additional $2,549 to Ellen. The court's division of this benefit was not an abuse of discretion.

### Value of Improvements Made to Ranch

William argues that the trial court erred in finding that Ellen was entitled to one-half the value of the well that was added to the ranch and one-third of the value of the improvements made to the home located on the ranch. He claims that because Ellen did not contribute any of her earnings toward these improvements to the ranch, she should not share in the value of the improvements to his premarital property. These improvements were paid for with funds earned during the course of the marriage and were therefore marital property that was subject to division. Ellen made no claim to the increase in value of the

ranch as a whole, and we cannot say that the trial court abused its discretion in making this small award regarding improvements to the ranch.

Evidence at trial showed that the ranch was worth approximately $332,000 in June 1993, and in December 2005, the value had increased to $800,000. Ellen did not seek a share of the increase in this value because it was basically an increase in the value of the land. She did, however, seek a share of the value of the improvements placed on the property during the marriage that were paid for with funds out of the parties' joint checking account. Included in these improvements were the cost of a new well at $10,000 and improvements to the home of $22,500, which included new carpet, linoleum, curtains, wallpaper, interior paint, a patio door, a bay window, a front door, a lower door, bathroom tile, kitchen cabinets, a deck, underground sprinklers, and landscaping. It was admitted at trial that the joint checking account was used to pay for these improvements and other assets, including a boat and trailer, an International tractor and dual loader, a Honda all-terrain vehicle, an antique John Deere tractor, a Harley-Davidson motorcycle, and a John Deere riding mower. The trial court did not abuse its discretion in awarding part of the value of the improvements to Ellen.

### Valuation of Sandhills Services

William argues that the trial court erred in finding that Sandhills Services had a "negative marital value" for purposes of the property division. The business was marital property, and the court did not abuse its discretion in considering the negative value of the property in making its distribution of marital assets between the parties. At trial, Ellen produced a balance sheet for Sandhills Services that showed a negative total equity of $31,551. This negative value was obtained from the corporation's accountant, who had been subpoenaed to testify. There was no evidence as to an alternate value for the corporation, and accordingly, the court used that as the value of this marital asset.

### General Property Division

William claims that the trial court erred in awarding the property settlement judgment of $13,939 to Ellen, because the court

included the value of improvements to the ranch at $32,500 and the negative value for Sandhills Services of $15,776, which we have decided above. William contends an additional error occurred when the court included the value of a 1996 Dodge Ram truck in dividing the marital estate. He claims that because the ranch purchased the truck, the truck should not be included as part of the marital estate.

However, the record reflects that Ellen assisted William in the operation of the ranch and that the parties' shared in the ranch's profits or losses. Accordingly, because the truck was purchased with money that otherwise would have been distributed to the parties through profits, it was within the trial court's discretion to consider the truck property acquired with marital assets and subject to the division of the marital estate.

## Alimony

[5,6] William argues that the trial court erred in ordering him to pay $750 per month in alimony for 24 months. This argument has no merit. In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.*

The record reflects that in 2005, Ellen earned $30,146 while William earned $122,242. Ellen had moved from Kearney, Nebraska, to Loup County to live on the ranch. She invested time in assisting with the ranch and supporting William's career. The substantial disparity in the parties' income, combined with the support Ellen provided to the ranch and William's career, demonstrate that the trial court's award of alimony was reasonable under the circumstances.

## Attorney Fees

[7,8] William argues that the trial court abused its discretion in awarding Ellen attorney fees. 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. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). 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 general equities of the case. *Id.* We conclude the trial court did not abuse its discretion in ordering William to pay $5,000 in attorney fees.

## Cross-Appeal

Ellen assigns on cross-appeal that the trial court erred in failing to credit her for William's premarital debt paid with marital funds. She asserts that although she brought debt into the marriage and that that debt was paid with marital funds, her debt was disclosed in the premarital agreement, thereby making payment of her premarital debt with marital funds significantly different than the payment of William's premarital debt.

Both parties had premarital liabilities that were paid from marital funds. The record shows that the trial court excluded all premarital debt from its calculations, regardless of the parties' disclosure. We conclude that the trial court did not abuse its discretion in not allowing Ellen to receive a credit in the amount of the marital funds used by William to pay his undisclosed premarital debt.

## CONCLUSION

Finding no merit to the errors assigned on appeal and cross-appeal, we affirm the judgment of the district court dissolving the marriage, dividing the property between the parties, and awarding alimony and attorney fees.

Affirmed.

# State of Florida ex rel. Department of Insurance of the State of Florida, receiver for United Southern Assurance Company, a Florida corporation authorized to transact an insurance business in Florida, appellee, v. Countrywide Truck Insurance Agency, Inc., a Florida corporation, appellee, and Countrywide Insurance Agency, Inc., a Nebraska corporation, and David L. Fulkerson, appellants.

749 N.W.2d 894

Filed June 6, 2008. No. S-06-1220.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Conveyances: Fraud.** The question whether a transfer of property was made with intent to defraud creditors is a question of fact.
3. **Debtors and Creditors: Conveyances: Fraud: Proof.** The burden is upon the creditor to prove by clear and convincing evidence that fraud existed in a questioned transaction.
4. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Reversed and vacated, and cause remanded for further proceedings.

William E. Gast and Michael D. McClellan, of Gast & McClellan, for appellants.

Robert F. Craig and Jenna B. Taub, of Robert F. Craig, P.C., for appellee State of Florida ex rel. Department of Insurance of the State of Florida.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

WRIGHT, J.

## NATURE OF CASE

The State of Florida (Florida), on the relation of the Department of Insurance of the State of Florida, as the receiver of United Southern Assurance Company (USAC), an insolvent insurance company, brought suit against Countrywide Truck Insurance Agency, Inc. (Truck); Countrywide Insurance Agency, Inc. (Agency); and David L. Fulkerson to recover money Truck allegedly owed USAC. Florida alleged that Agency was the "alter ego" of Truck and that Fulkerson was the operator, director, and "controlling person" of both Truck and Agency. Florida sought relief collectively against Truck, Agency, and Fulkerson.

At the conclusion of trial, the district court sustained Florida's motion for a directed verdict, finding Truck, Agency, and Fulkerson jointly and severally liable for fraudulently transferring $2,235,361.95 from Truck to Agency. Agency and Fulkerson appeal, asserting that the uncontroverted evidence shows that no such transfer occurred. The issue is whether the court erred in directing a verdict in favor of Florida.

## SCOPE OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

## FACTS

In 1989, USAC and Truck entered into a "General Agency Agreement," pursuant to which Truck functioned as an insurance agent on behalf of USAC in Nebraska and numerous other states. Truck collected premiums for insurance products provided by USAC. Truck's principal office was in Omaha, Nebraska. Fulkerson managed Truck, functioned as its president, and

was one of the five directors of the corporation. USAC was an insurance company that wrote and issued policies of insurance to truckdrivers. USAC and Truck were Florida corporations. USAC was regulated by the Florida Department of Insurance (the FDI) and owned Truck.

Truck collected monthly premiums from its insureds. Before procuring insurance, it would collect 2.4 times the amount of the monthly premium from the insured and place that amount in a customer deposit account. Each month, the insured paid the monthly premium into the customer deposit account and Truck withdrew the monthly premium as it came due. This procedure left an amount equal to 2.4 times the monthly premium in the customer deposit account. If an insured was late in paying the monthly premium, Truck used the funds in the customer deposit account to procure insurance on behalf of the insured. Because many insureds were out on the road and were not able to pay the monthly premiums on time, this process prevented gaps in coverage. The process continued until either the insured or Truck canceled the policy. Once the policy was canceled, any money belonging to the insured in the customer deposit account was returned.

Truck used this process to collect premiums and procure insurance for its customers from USAC. Truck transferred the insureds' monthly premiums into USAC's trust account as the premiums came due. USAC then issued insurance and paid Truck a commission of 18.5 percent. Fulkerson testified that from 1989 to 1991, this process "worked perfectly."

In 1991, Concord General Corporation (Concord), a corporation owned by Jeff Beresford-Wood, purchased USAC. Concord was a holding company that owned numerous insurance companies and agencies. At that time, USAC was in a poor financial position. As a condition for approval of the purchase and the continued licensure of USAC, the FDI required Concord to remove certain assets or subsidiaries owned by USAC and replace them with cash. Concord consequently took $2 million from Truck's customer deposit account and used that money to purchase Truck from USAC. Concord replaced the $2 million with a note receivable on Truck's balance sheet and extended the time for payment of premiums to USAC from 25 days to

90 days. This extension enabled Truck to use the premium money to replenish the $2 million taken from the customer deposit account. Concord retained Fulkerson as Truck's president, but he was instructed that Bruce Ricci, a board member of Concord, USAC, and Truck, would be his supervisor. Concord subsequently sold USAC to JBW Corporation, which was also owned by Beresford-Wood.

FDI regulations stated that an insurance company could write insurance for an amount up to three times the amount of its assets. The FDI informed USAC that because the value of two of its subsidiary companies had depreciated, it must reduce the amount of insurance it wrote. The reduction of USAC's insurance created problems for Truck because it relied on USAC to write insurance, and if USAC did not write insurance, Truck might go out of business. Other insurance companies were reluctant to provide coverage to Truck's insureds because it was known that Truck was affiliated with USAC and would likely return its business to USAC as soon as USAC's financial problems were solved.

Accordingly, Concord/JBW Corporation (the record does not always distinguish between the two companies) decided to sell Truck to a person or entity that could find another company to write insurance. Truck would not be able to find another company to write insurance if it was known that Concord/JBW Corporation owned Truck. Thus, Concord/JBW Corporation decided to sell Truck quickly before all of its insureds moved to other companies and Truck lost all of its value.

Fulkerson was asked to buy Truck. He agreed, with certain conditions. On June 1, 1995, Fulkerson entered into a "Stock Purchase Agreement" in which Concord/JBW Corporation agreed to sell Truck's stock. However, because Beresford-Wood had pledged Truck's stock as collateral, Concord/JBW Corporation could not deliver the stock and the deal was put on hold. The parties then entered into an "Interim Management Agreement." Fulkerson agreed to manage Truck until the parties could close the Stock Purchase Agreement or the "Asset Purchase Agreement" or until such time as the parties otherwise mutually agreed. Concord/JBW Corporation was unable to produce the stock, and the record does not show that the Stock Purchase

Agreement was completed. Instead, Fulkerson exercised his option to purchase Truck's assets and assigned this option to Agency, a Nebraska corporation that he and USA Insurance Group, Inc., owned in equal shares.

Subsequently, Truck's board of directors voted 3 to 2 to sell Truck's assets to Agency, and an Asset Purchase Agreement was signed on September 8, 1997, to be effective September 1, 1997. Agency acquired all of Truck's assets except (1) Truck's bank accounts and petty cash accounts, (2) Concord's $2 million promissory note owed to Truck, (3) the lawsuits pending in which Truck was a plaintiff, and (4) Truck's accounts receivable. The price consisted of $168,003.68 for furniture, fixtures, equipment, trade name, and telephone numbers, and also the balance of assets and $831,996.36 for Truck's "Book of Business." Fulkerson continued in a similar position at Agency as he had held at Truck.

The "Book of Business" included all of Truck's interest in insurance policies written by Truck and the customer deposit account, which on September 1, 1997, amounted to $2,480,431. To the extent there was a shortfall in such deposits, Agency was assigned an interest in Truck's receivables to collect any such shortfall until the above amount was collected.

Between September 8 and 18, 1997, Truck canceled all USAC's policies, and Agency rewrote most of the policies with Acceleration National Insurance Company (Acceleration). Fulkerson testified that all of the money held in the customer deposit account ($2,325,401) was either returned to the insureds or applied to new policies for the benefit of the insureds.

On September 22, 1997, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, placed USAC into receivership for the purpose of liquidation. The court appointed the FDI as receiver.

In January 1998, the State of Florida, on the relation of the FDI, filed a petition in the district court for Douglas County, alleging that Truck collected premiums for USAC but failed to remit them pursuant to the parties' agency agreement. The petition alleged that Agency was the alter ego of Truck and that Fulkerson was the operator, director, and controlling person of both Truck and Agency.

Florida alleged that in 1989, USAC and Truck entered into a "General Agency Agreement" in which Truck functioned as an insurance agent on behalf of USAC in Nebraska and numerous other states and collected premiums for insurance products provided by USAC. Florida alleged that during the months of May through August 1997, Truck collected and reported the collection of USAC premiums which, after deducting the 18.5-percent commission to which Truck was entitled, amounted to $3,171,817. Florida further alleged that "defendants" collected additional premium deposits totaling $2,325,401 and that "defendants" remitted only about $500,000, leaving a balance due and owing of at least $4,997,218.

Based upon these factual allegations, Florida sought relief against Truck, Agency, and Fulkerson on nine separately designated causes of action: conversion of trust funds, statutory obligation to remit premium, enforcement of security interest, fraudulent conveyance, receivership fraudulent conveyance, conversion, breach of contract, breach of fiduciary duty, and accounting. Each cause of action referred to Truck, Agency, and Fulkerson collectively as "defendants." Truck did not file a responsive pleading, and Florida moved for default judgment against Truck.

Agency and Fulkerson, who were not in default, moved to stay the entry of default judgment against Truck until after trial. Because Florida sought relief jointly against all named defendants, Agency and Fulkerson claimed the entry of a default judgment against Truck would prejudice them. The district court overruled the motion to stay and entered judgment against Truck.

Agency and Fulkerson appealed to this court, and we concluded that the district court erred in entering the default judgment. See *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999) (*Countrywide I*). We held that although Truck was in default, the district court should have deferred entry of judgment until the claims against Agency and Fulkerson were adjudicated. Florida sought to hold all three defendants jointly liable as a single entity. It alleged joint and collective action by the defendants as opposed to independent acts on the part of each named defendant. We

construed the operative petition to allege that the three named defendants were jointly liable as a single entity. We reversed and vacated the judgment and remanded the cause for further proceedings consistent with our opinion.

Thereafter, a jury trial commenced on August 14, 2006. Florida presented evidence as to the amount of premiums written and collected by Truck for the months of May through August 1997. It was undisputed that Truck had collected $3,171,817 ($809,384.04 for May, $781,421.71 for June, $790,490.83 for July, and $790,520.42 for August). Also undisputed were the credits given by Florida to the defendants in the total amount of $846,455.05, resulting in a net amount of $2,325,361.95 in collected premiums.

Agency and Fulkerson presented evidence that the parties had agreed that collected premium money was not to be remitted to Truck at the time it was collected, but was instead to be used as customer deposit account money for 90 days. The record reflects that as part of Concord's consideration for the $2 million from Truck, USAC was required to allow Truck 90 days to remit collected premiums. Agency and Fulkerson's evidence showed that 90 days' worth of premiums was roughly equivalent to the amount needed to replenish the $2 million taken from the customer deposit account.

When USAC stopped providing insurance, no additional premiums were paid to Truck. Agency and Fulkerson adduced evidence that Truck was forced to either use the money in the customer deposit account to procure insurance from a different company for its insureds or return the money to them. Instead of a $2 million deficit in the customer deposit account, there was a deficit in the premium account. Although Truck's records showed that it had collected monthly premiums of $2,325,361.95, nearly all of that money had been placed in the customer deposit account. This money was either returned to the insureds or used to procure insurance for the customers from a different company. This exhausted most, if not all, of the 90 days' worth of collected premiums. The only evidence of money transferred from Truck to Agency or Fulkerson was the transfer of $2,325,401 found within the customer deposit account. There was no evidence of any other transfer.

At the conclusion of the evidence, Florida moved for directed verdict of $2,325,361.95. It claimed that after applying all credits Truck asserted, the evidence was undisputed that Truck still owed earned premiums totaling $2,325,361.95 ($3,171,817 minus $846,455.05) for the months of May through August 1997.

Agency and Fulkerson objected to the motion. In opposition, they averred that although Truck had collected premiums over the previous 90 days, the parties had agreed that the most recent 90 days' worth of earned premiums would be transferred into the customer deposit account to replenish the $2 million deficit owed by Concord. They argued that the premiums became customer deposit account money, rather than earned premium money.

The district court entered judgment in favor of Florida and against Agency and Fulkerson in the amount of "$2,235,361.95." It concluded that "there was a fraudulent transfer by all Defendants of this amount from [Truck] to [Agency]." (The discrepancy in the amount appearing in the court's order was presumably a result of the court's transposing the "3" and "2" in error ($2,325,361.95 versus $2,235,361.95).) The court imposed prejudgment interest on the judgment in the amount of $2,442,584.70, for a total amount of $4,677,946.65. The court entered the judgment against all the defendants, jointly and severally.

Florida also moved for directed verdict in the amount of $2,325,401, which it claimed was money held in the customer deposit account. It claimed that the defendants had not proved that the money was returned to the policyholders or used to secure insurance for the policyholders with another insurance company. Florida claimed the law required that if that money went to the policyholders or to secure insurance on behalf of the policyholders, all the assets of Truck, including this money, must be collected and used to pay USAC's claimants in order of priority.

In opposition to this motion, Agency and Fulkerson asserted that the money was not an asset of USAC and that the evidence was undisputed that the customer deposit account money was used to secure insurance on behalf of the policyholders

or returned to the policyholders. Agency and Fulkerson referenced exhibit 136, which stated that Acceleration had informed Florida that Acceleration had rewritten 1,120 policies of former Truck policyholders and had received $1,793,526 from Agency after subtracting Agency's commission. Agency and Fulkerson averred that the difference between the $2,325,401 and the $1,793,526 was the commission on the 1,120 policies and money used to secure insurance for policyholders that Acceleration could not insure because it was not licensed in some states. They claimed that an additional $54,000 was returned directly to policyholders who did not wish to be insured through Agency.

As to Florida's second motion for directed verdict, the district court concluded that no factual question existed on this matter either, and it dismissed the jury. The court overruled this motion for directed verdict.

Agency and Fulkerson's motion for new trial was overruled, and they appeal.

## ASSIGNMENTS OF ERROR

Agency and Fulkerson assign nine errors, including that the district court erred (1) in finding that "[Truck] and [Agency] were the alter egos of . . . Fulkerson," (2) in finding there was a fraudulent transfer, and (3) in granting Florida's motion for directed verdict.

## ANALYSIS

Agency and Fulkerson claim the district court erred in directing a verdict in favor of Florida and in finding there was a fraudulent transfer of $2,235,361.95 from Truck to Agency. We agree. The record shows that Truck transferred to Agency $2,325,401. There was evidence presented that this money was in the customer deposit account and was used to purchase replacement insurance for the former clients of Truck. The record does not establish that any other transfer occurred.

In reviewing Florida's motion for a directed verdict, we treat the motion as an admission of the truth of all competent evidence submitted on behalf of Agency and Fulkerson, who are entitled to have every controverted fact resolved in their favor

and to have the benefit of every inference which can reasonably be deduced from the evidence. See *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005). Florida characterized the named defendants as a single entity. It alleged that Agency was the alter ego of Truck and referred to Fulkerson as the "controlling person" of both corporations. Based on these allegations, we concluded in *Countrywide I* that no one defendant could be liable unless all were liable.

USAC and Truck were owned by Concord or JBW Corporation at all times relevant. Concord and JBW Corporation were, in turn, owned and controlled by Beresford-Wood. Fulkerson was Truck's president, but he was supervised by Ricci, who was a board member of Concord, USAC, and Truck. Fulkerson did not own stock in any of these companies. He was one of five members of Truck's board of directors. In 1997, Truck's board of directors voted to sell Truck to Agency. As a part of the agreement, Agency was given the right to collect and use the premiums of Truck to fund Truck's customer deposit account up to $2,480,431.

The evidence introduced by Agency and Fulkerson supports the fact that the customer deposit account was in fact funded with premiums collected by Truck. There is evidence that the money from this account was either returned to the insureds or applied to new policies purchased for the benefit of such insureds. There was no evidence that Fulkerson used the funds from the premiums in this account for his own benefit. There was evidence that the only transfer that occurred from Truck to Agency was money in the customer deposit account that was used to purchase replacement insurance.

[2-4] The question whether a transfer of property was made with intent to defraud creditors is a question of fact. *First State Bank of Scottsbluff v. Bear*, 172 Neb. 504, 110 N.W.2d 83 (1961). The burden is upon the creditor to prove by clear and convincing evidence that fraud existed in a questioned transaction. See *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999). Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

Whether Agency or Fulkerson committed a fraudulent transfer was a question of fact for the jury. The district court erred in granting Florida's motion for directed verdict and in entering judgment in favor of Florida. Accordingly, we reverse and vacate the judgment of the district court.

## CONCLUSION

The district court erred in granting a directed verdict in favor of Florida. Giving all reasonable inferences to Agency and Fulkerson, there is a question of fact whether a fraudulent transfer occurred between Truck and Agency. There is evidence that the transfer of $2,235,401 represented the amount held in the customer deposit account on behalf of Truck's insureds and that Agency used this money to purchase insurance for Truck's insureds. There is no evidence of any other transfer.

For the reasons set forth herein, the judgment of the district court is reversed and vacated, and the cause is remanded for further proceedings. We decline to consider the remaining assignments of error.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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# IN RE APPLICATION OF MARK OLMER. MARK OLMER, APPELLANT, V. MADISON COUNTY BOARD OF COMMISSIONERS, APPELLEE.

752 N.W.2d 124

Filed June 6, 2008. No. S-07-247.

1. **Political Subdivisions: Appeal and Error.** A party may seek review of a decision regarding a conditional use or special exception permit either by appealing to the district court under Neb. Rev. Stat. § 23-114.01(5) (Cum. Supp. 2006) or by filing a petition in error under Neb. Rev. Stat. § 25-1901 (Supp. 2007).
2. **Political Subdivisions: Judgments: Appeal and Error.** When a decision regarding a conditional use or special exception permit is appealed under Neb. Rev. Stat. § 23-114.01(5) (Cum. Supp. 2006) and a trial is held de novo under Neb. Rev. Stat. § 25-1937 (Reissue 1995), the findings of the district court shall have the effect of a jury verdict and the court's judgment will not be set aside by an appellate court unless the court's factual findings are clearly erroneous or the court erred in its application of the law.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Reversed and remanded with directions.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, and James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellant.

Joseph M. Smith, Madison County Attorney, for appellee.

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

GERRARD, J.

This is an appeal from the judgment of the district court, which affirmed the decision of the Madison County Board of Commissioners (the Board) denying Mark Olmer's application for a conditional use permit. Olmer contends that the district court erred by reviewing his appeal from the Board's decision under the standard of review for error proceedings. Olmer argues that the district court should have conducted a trial de novo pursuant to Neb. Rev. Stat. § 25-1937 (Reissue 1995). As discussed below, we conclude that Olmer had the option of proceeding either by way of a petition in error or by filing an appeal under § 25-1937. Because Olmer chose to proceed under § 25-1937, the district court erred in treating his appeal as an error proceeding, and we reverse the judgment of the court and remand this cause with directions.

## FACTS

Olmer filed an application for a conditional use permit to allow a "swine finishing operation" on his property in Madison County, Nebraska. Olmer's proposed swine finishing operation would involve approximately 2,460 head of feeder pigs. After hearings before the Madison County Planning Commission, the planning commission recommended to the Board that Olmer's application be approved with certain conditions. On September 27 and October 7, 2005, the Board held hearings on Olmer's application. At the hearing on September 27, the Board received into evidence various exhibits and heard the testimony of several individuals, some testifying in favor of Olmer's application and

others testifying against it. Minutes from this hearing indicate that there was discussion about, among other things, the threat of increased nitrate levels in the ground water near Olmer's proposed operation, the procedures Olmer would adopt to control odor and dust, and the effect Olmer's operation would have on the health of neighboring landowners.

After all of the evidence was presented, the Board, on October 7, 2005, issued "Resolution #2005-77," setting forth in detail the Board's findings of fact and denying Olmer's application for a conditional use permit. On November 4, Olmer filed a "Notice of Appeal" with the county commissioners of Madison County, informing the county commissioners of his intent to appeal the Board's decision to the Madison County District Court. On November 21, Olmer filed a "Petition on Appeal" in the district court, setting forth his grounds for appeal. In his "Petition on Appeal," Olmer stated that he "has properly perfected his appeal under Section 25-1937."

On November 30, 2006, the district court held what appeared to be a trial on a joint stipulated record. The stipulated record received by the court included, among other things, the minutes of the hearings held before the Board and all of the exhibits offered and received by the Board. The stipulated record also included evidence that was not presented to the Board, including deposition testimony from Olmer's neighbor and attached exhibits. One of the issues presented to the district court was whether Olmer's appeal from the Board's decision is governed by Neb. Rev. Stat. § 25-1901 (Supp. 2007) and is therefore treated as a review on a petition in error or whether his appeal is governed by § 25-1937, which requires a trial de novo in the district court.

The district court found that the Board, in denying Olmer's conditional use permit, acted as a tribunal exercising judicial functions and that therefore, Olmer's appeal should be treated as a petition in error. Because Olmer's appeal was treated as a petition in error, the court explained that Olmer was not entitled to a trial de novo, nor could the court receive additional evidence that was not offered at the hearing before the Board. Accordingly, the court stated that, in making its decision, it did not consider any exhibits that were not offered and received by the Board.

The court determined that Olmer had met all of the jurisdictional requirements for filing a petition in error and that therefore, the court had jurisdiction to review the Board's decision denying Olmer's application. The court, relying on the standard of review for error proceedings, found that the Board acted within its jurisdiction and that the Board's findings were supported by some competent evidence in the record. Accordingly, the court affirmed the Board's decision denying Olmer's application. Olmer appealed.

## ASSIGNMENTS OF ERROR

Olmer assigns, consolidated, restated, and renumbered, that the district court erred in (1) reviewing the Board's decision under the standard of review applicable to a petition in error, as opposed to conducting a trial de novo as required under § 25-1937, and (2) affirming the decision of the Board denying his application for a conditional use permit.

## ANALYSIS

### Proper Method of Appeal and Standard of Review for District Court

The primary issue presented in this appeal is the proper procedure and standard of review for an appeal of a denial of a conditional use permit by a county board of commissioners. Olmer claims that the proper method of appeal and standard of review is set forth in § 25-1937, which requires the district court to conduct a trial "de novo upon the issues made up by the pleadings in the district court." The Board contends, however, that because it acted in a judicial manner in denying Olmer's application, Olmer's exclusive mode of appeal was through the filing of a petition in error under § 25-1901.

In *Mogensen v. Board of Supervisors*,[1] we were asked to determine the proper procedure for appealing a denial of a conditional use permit by a board of supervisors. In that case, the county board of supervisors denied an application for a conditional use permit. The applicant filed a petition in error

[1] *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

in the district court. The district court affirmed the board of supervisors' decision.

On appeal to this court, we concluded that the district court lacked jurisdiction because the applicant's filing of a petition in error did not properly perfect the appeal. In reaching this conclusion, we noted that the Nebraska Court of Appeals, in *Niewohner v. Antelope Cty. Bd. of Adjustment*,[2] had addressed a similar issue and had concluded that under Neb. Rev. Stat. § 23-168.03 (Reissue 1997), an appeal of a denial of a conditional use permit by the county board of supervisors must be made to the board of adjustment.

We agreed with the Court of Appeals and concluded that the appeal procedure in Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) foreclosed the ability to appeal a decision of the board of supervisors to the district court through a petition in error under § 25-1901.[3] We explained that "by adopting a specific method for appeal, the Legislature provided for an appeal specifically outside of the petition in error" and that therefore, "an appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with §§ 23-168.01 to 23-168.04 and not by a petition in error."[4] And because the applicant did not file an appeal with the board of adjustment, the district court did not have jurisdiction to hear his appeal on a petition in error.

In response to the circumstances presented in *Mogensen* and *Niewohner*, the Legislature, in 2004, amended Neb. Rev. Stat. § 23-114.01(5) (Reissue 1997) by adding the following language: "An appeal of a decision by the county planning commission or county board of commissioners or supervisors regarding a conditional use or special exception shall be made to the district court."[5] With the addition of this language, the statute is now clear that contrary to the Court of Appeals'

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[2] *Niewohner v. Antelope Cty. Bd. of Adjustment*, 12 Neb. App. 132, 668 N.W.2d 258 (2003).

[3] *Mogensen v. Board of Supervisors, supra* note 1.

[4] *Id.* at 32, 679 N.W.2d at 418. See, also, *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

[5] § 23-114.01(5) (Cum. Supp. 2006).

opinion in *Niewohner* and our decision in *Mogensen*, appeals from a planning commission, county board, or board of supervisors are not to be made to the board of adjustment. Instead, these appeals are now taken directly to the district court.

At issue in this case is the effect that this language now has on Olmer's mode of appeal and the district court's standard of review. Olmer argues that by amending § 23-114.01(5), the Legislature has conferred a right to appeal, but has failed to prescribe the proper procedure for doing so. As a result, Olmer claims that the method of appeal and standard of review is determined by § 25-1937. This section provides in relevant part that

> [w]hen the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court.

The Board, however, argues that § 25-1937 does not apply when a board or tribunal appealed from is exercising judicial functions. The Board claims that when a board or tribunal exercises judicial functions, a petition in error is the exclusive remedy for those seeking review of the board's decision. And because the Board in the instant case acted judicially, Olmer's only method of review was by way of a petition in error.

The procedures governing reviews on petitions in error are found in Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1995 & Supp. 2007). Section 25-1901 provides, in relevant part, that a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court." And § 25-1903 states that "[t]he proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error, filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of . . . ." In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its

jurisdiction and whether the decision rendered is supported by sufficient relevant evidence.[6] When making this determination, an appellate court is restricted to the record created before the lower tribunal.[7]

We agree with the Board that by receiving exhibits, hearing testimony, and reaching a decision based on that testimony, it exercised judicial functions.[8] We are not, however, persuaded by the Board's argument that because it exercised judicial functions, Olmer's sole method of appeal was through a petition in error. In a similar case, *Moser v. Turner*,[9] we addressed the question whether an appeal from a decision of the county superintendent must be made by a petition in error under § 25-1901, or whether an appeal could be had under § 25-1937. In that case, two petitions in error were filed in the district court seeking review of the decisions of two county superintendents regarding the dissolution and annexation of certain school districts. Separate trials were held in the district court, and the cases were combined for appeal.

On appeal to this court, the appellants argued that the district court did not have jurisdiction because proceedings in error could not be taken from the decision of the county superintendent. The appellants claimed that the exclusive method of appeal was under § 25-1937. We explained that the right to appeal was set forth in Neb. Rev. Stat. § 79-402 (Reissue 1966), which provided that "'any person adversely affected by the changes made by the county superintendent may *appeal* to the district court of any county in which the real estate, or any part thereof, involved in the dispute is located.'"[10] We noted, however, that § 79-402 did not provide a method of appeal. We explained that under § 25-1937, "where a statute provides

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[6] *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997).

[7] *Id.*

[8] See, *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007); *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002).

[9] *Moser v. Turner*, 180 Neb. 635, 144 N.W.2d 192 (1966).

[10] *Id.* at 639, 144 N.W.2d at 195 (emphasis in original).

for an appeal without setting forth the procedure therefor, the appeal shall be the same as appeals from county court to district court in civil actions."[11]

We also acknowledged that "[t]his court has repeatedly held that where the county superintendents of schools act in a quasi-judicial capacity, their decisions may be reviewed under section 25-1901 . . . by petition in error . . . ."[12] We reconciled these two procedures for acquiring review by explaining:

> There is nothing in section 79-402 . . . or in section 25-1937 . . . which purports to take away the right to proceed in error under section 25-1901 . . . . Any person adversely affected by the changes made by a county superintendent pursuant to section 79-402 . . . may proceed by appeal or by error pursuant to section 25-1901 . . . .[13]

Thus, we concluded that although the county superintendents performed quasi-judicial acts, review of their decisions could be had by petition in error under § 25-1901 or by appeal under § 25-1937.[14]

[1] Like the county superintendents in *Moser*, the Board in the present case, in denying Olmer's application, was exercising judicial functions which decisions are generally reviewed through the filing of a petition in error.[15] But § 23-114.01(5) clearly provides for a right of appeal to the district court from the Board's decision, without setting forth any procedure for prosecuting the appeal. Therefore, the appeal procedure in § 25-1937 is also implicated.[16] And there is nothing in § 23-114.01(5), or in § 25-1937, that purports to remove the right to proceed in error under § 25-1901. Thus, we conclude

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 639-40, 144 N.W.2d at 195.

[14] See, also, *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980); *Languis v. De Boer*, 181 Neb. 32, 146 N.W.2d 750 (1966).

[15] See *South Maple Street Assn. v. Board of Adjustment*, 194 Neb. 118, 230 N.W.2d 471 (1975).

[16] See *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000).

that under the circumstances presented here, Olmer had the option of filing either a petition in error under § 25-1901 or an appeal under § 25-1937.

Olmer, in his "Petition on Appeal" filed in the district court, specifically references § 25-1937 as his chosen method of appeal. Accordingly, the district court erred in treating Olmer's appeal as if it were a petition in error.

### District Court Has Jurisdiction

Having determined that an appeal under § 25-1937 is available to Olmer and that he has selected this mode of appeal, the next issue that we must address is whether Olmer has properly perfected his appeal to the district court. Section 25-1937 provides, in relevant part, that "the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions." The statute governing the procedure for appeals from county court to district court is Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2006). Section 25-2729(1)(a) requires, among other things, that in order to perfect an appeal from the county court, the appealing party must file a notice of appeal with the clerk of the county court within 30 days after the entry of the judgment or final order.

Olmer argues that he has complied with this statute by filing, on November 4, 2005, a "Notice of Appeal" with the county commissioners of Madison County. Clearly, § 25-2729(1)(a) was intended to apply to appeals from county court and, as a result, cannot be applied literally to the present case.[17] Thus, an application of this statutory provision to the circumstances presented in this case will be drawn by analogy. As applicable here, § 25-2729(1)(a), in essence, requires that the appealing party file a notice of appeal with the lower tribunal or decision-maker within 30 days after entry of the judgment.

The record establishes that Olmer has complied with this requirement. The Board issued its decision denying Olmer's application for a conditional use permit on October 7, 2005. Olmer filed a "Notice of Appeal" to the county commissioners that was file stamped by the Madison County clerk on

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[17] See *Stigge v. Graves*, 213 Neb. 847, 332 N.W.2d 49 (1983).

November 4, thus satisfying the 30-day time requirement. The record further establishes that the other requirements for appeal to the district court were met. Therefore, we conclude that Olmer has met the jurisdictional requirements for filing an appeal to the district court.

## Appellate Standard of Review

Next, we must determine what standard of review we apply for our review of the district court's decision. As already noted, Olmer has chosen to appeal the Board's decision under § 25-1937, which requires that the district court conduct a trial "de novo upon the issues made up by the pleadings in the district court." Section 25-1937 further provides that "[a]ppeals from the district court to the Court of Appeals shall be taken in the same manner provided by law for appeals from the district court in civil cases." This language speaks to the "manner" of appeal, but does not provide any guidance as to the appropriate standard of review to be used by an appellate court.

An appeal under § 25-1937 is comparable to the manner in which appeals have previously been taken to a district court from a decision of a small claims court. And in those cases, we have held that when reviewing the decision of a district court that has conducted a trial de novo upon appeal from a small claims court, the judgment of the district court has the effect of a jury verdict and should not be set aside unless clearly wrong.[18] The evidence must be considered in the light most favorable to the successful party, with evidentiary conflicts being resolved in favor of the successful party, who is entitled to every reasonable inference that may be drawn from the evidence.[19]

Because of the similarities between that procedure and an appeal under § 25-1937—in particular, that both cases involve the district court's conducting a trial de novo—we conclude that a comparable standard of review should be applied. We know that the procedure for appeals from small claims

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[18] See, *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980); *Reese v. Mayer*, 198 Neb. 499, 253 N.W.2d 317 (1977).

[19] See *Reese v. Mayer, supra* note 18.

court has recently been changed, but that does not affect our analysis here.[20]

[2] We disagree with Olmer's suggestion that our review of the district court's decision is de novo on the record, and to the extent *In re Dissolution of School Dist. No. 22*[21] holds otherwise, it is disapproved. It is apparent under § 25-1937 that the Legislature intended a trial de novo in the district court for these types of appeals. Given such circumstances, in determining our standard of review, we find no reason to deviate from the same deferential standard of review that we apply to appeals from the district court in other civil law actions. Thus, we conclude that when a decision regarding a conditional use or special exception permit is appealed under § 23-114.01(5) and a trial is held de novo under § 25-1937, the findings of the district court shall have the effect of a jury verdict and the court's judgment will not be set aside by an appellate court unless the court's factual findings are clearly erroneous or the court erred in its application of the law.

Because Olmer was entitled to a trial de novo under § 25-1937, the district court erred in reviewing Olmer's appeal under the standard of review applicable for error proceedings. The district court also erred in refusing to consider the new facts and evidence presented by Olmer that were not originally in the record before the Board. Given our deferential standard of review and the fact that we cannot, as a matter of law, determine whether Olmer is entitled to a conditional use permit, we remand this cause to the district court with directions to hold a trial de novo under § 25-1937 and to make the necessary findings of fact and conclusions of law.

We acknowledge, and in fact encourage, that in most instances, a trial de novo in the district court may be had by way of a stipulated record, as sensibly occurred in the present case. We also recognize the potential burden that may be placed on district courts, and we do not comment on the wisdom or efficacy of having a trial de novo on an appeal from a decision of the

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[20] See 2008 Neb. Laws, L.B. 1014.

[21] *In re Dissolution of School Dist. No. 22*, 216 Neb. 89, 341 N.W.2d 918 (1983).

county board regarding a conditional use or special exception permit. Nonetheless, we are not at liberty to ignore the clear mandate of § 23-114.01(5). If more efficient and effective procedures for review are to be implemented, the Legislature is the body that must make such a policy determination.

## CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause with directions to conduct a trial de novo under § 25-1937.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

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EDWARD POINDEXTER, APPELLANT, V.
ROBERT HOUSTON ET AL., APPELLEES.

750 N.W.2d 688

Filed June 13, 2008. No. S-07-089.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
3. ____. A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
4. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.
5. **Constitutional Law: Statutes.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed.
6. ____: ____. An ex post facto law applies to events that occurred before the law's enactment.
7. **Statutes: Constitutional Law: Sentences.** An ex post facto law disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.
8. ____: ____: ____. An ex post facto analysis applies when a statutory amendment changes the punishment of a crime.
9. **Board of Pardons: Sentences: Probation and Parole.** An inmate sentenced to life imprisonment for first degree murder is not eligible for parole until the Nebraska Board of Pardons commutes his or her sentence to a term of years.
10. **Board of Pardons: Sentences.** The Nebraska Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.

11. **Sentences.** The State has not created a liberty interest in sentence commutation other than the right to file an application for commutation.

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

Edward Poindexter, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellees.

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

CONNOLLY, J.

## I. SUMMARY

In 1971, a jury convicted Edward Poindexter of first degree murder. The district court sentenced him to life imprisonment. He seeks a writ of habeas corpus. He claims the State should immediately release him because his mandatory release date was April 1988. The district court quashed the writ and dismissed the case. We conclude that Poindexter did not have a mandatory release date of April 1988. We hold that an inmate serving a life sentence for first degree murder must have his or her sentence commuted to a term of years before he or she is eligible for parole. Because the Nebraska Board of Pardons has not commuted Poindexter's sentence, we affirm.

## II. BACKGROUND

The record shows that the Nebraska Board of Parole has denied Poindexter parole several times. The record also shows that the Board of Pardons has denied Poindexter a commutation hearing on at least two occasions—March 1987 and May 1993.

In May 2006, Poindexter petitioned for a writ of habeas corpus. In his petition, he requested that his "defacto [sic] mandatory minimum release date of April 17, 1988 be honored" and that he "be released immediately and unconditionally from imprisonment." He alleged that his imprisonment after April 17, 1988, was unconstitutional. The Lancaster County District Court ordered Robert Houston, Director of Correctional

Services for the State of Nebraska, to show cause why the writ of habeas corpus should not be issued. The State then moved to quash Poindexter's petition. The court entered an order quashing the writ of habeas corpus and dismissing the case. Poindexter appeals.

## III. ASSIGNMENTS OF ERROR

Poindexter assigns, restated and renumbered, that the district court erred by (1) sustaining the State's motion to quash and failing to rule on his habeas corpus petition on its merits, (2) failing to find that the State erroneously claimed he was serving a "minimum life" sentence, (3) failing to find that he had a liberty interest in being paroled and discharged from parole by April 17, 1988, and (4) failing to find that the appellees conspired to violate his constitutional rights "when they created their own reasons to deny [him] parole that did not exist at the time of his conviction and sentencing."

## IV. STANDARD OF REVIEW

[1] On appeal of a habeas petition, we review the trial court's factual findings for clear error and its conclusions of law de novo.[1]

## V. ANALYSIS

[2-4] Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.[2] A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[3] Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.[4]

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[1] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[2] *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

[3] See *id.*

[4] *Id.*

### 1. Poindexter Is Not Eligible for Parole Until the Board of Pardons Commutes His Sentence to a Term of Years

The first issue is whether Poindexter is, or has been, eligible for parole. The State contends that Poindexter's sentence carries a minimum term of life and that, therefore, he is not eligible for parole until the Board of Pardons commutes his sentence to a term of years. But Poindexter contends that when he was sentenced, the law did not require that his sentence be commuted before gaining parole eligibility. He argues he was eligible for parole "'at any time.'"[5] He asserts that applying any current statutes that are different from those in place when he was sentenced would violate ex post facto principles.

[5-8] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. An ex post facto law applies to events that occurred before the law's enactment.[6] It disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.[7] An ex post facto analysis applies when a statutory amendment changes the punishment of a crime.[8]

If Poindexter is correct that commutation is a prerequisite for parole eligibility under current statutes but was not required when he committed his offense, then we agree that requiring commutation under the current statutes could raise an ex post facto issue. But we conclude below that a commutation was required by statutes in effect when Poindexter committed the crime, just as it is required under the current statutes. Ex post facto principles are not implicated.

#### (a) The Statutes in Place When Poindexter Committed His Offense Require a Commutation Before He Is Eligible for Parole

We first address whether the statutes in place in 1970 when Poindexter committed his offense required a commutation to a term of years before inmates sentenced to life imprisonment

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[5] Reply brief for appellant at 8.

[6] See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[7] See *id*.

[8] *Id.*

for first degree murder could be eligible for parole. In 1970, Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 1969) provided, in relevant part: "(1) Every committed offender shall be eligible for release on parole upon completion of his minimum term less reductions granted in accordance with this act, or, if there is no minimum, at any time." Poindexter claims that his sentence did not have a minimum term because he was sentenced to prison "during life." So, Poindexter argues that under the 1969 statute, he was eligible for parole "at any time" and that commutation was unnecessary.

We understand Poindexter's argument to be that his sentence had no minimum term because it was a flat sentence of life imprisonment rather than an indeterminate sentence. We disagree.

In *State v. McMillian*[9] and *State v. Rhodes*,[10] we impliedly held that flat sentences do have minimum terms for purposes of the 1969 version of § 83-1,110. The appellants in those cases had received flat sentences of 5 years and 3 years respectively after pleading guilty. (In 1971, flat sentences were not converted to indeterminate sentences by operation of law.[11]) The appellants believed their flat sentences made them ineligible for parole. They sought postconviction relief, arguing that their pleas were involuntary because the court did not advise them they would be ineligible for parole. We affirmed the denial of postconviction relief. We decided that under the 1969 statute, "the [appellants] are eligible for release on parole upon completion of their minimum terms less reductions."[12]

Although the sentences in *McMillian* and *Rhodes* were flat sentences, we applied the 1969 version of § 83-1,110 to decide that the appellants were eligible for parole upon completion of their sentences less reductions granted to them. In other words, when a court imposed a flat sentence, we interpreted the

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[9] *State v. McMillian*, 186 Neb. 784, 186 N.W.2d 481 (1971).

[10] *State v. Rhodes*, 187 Neb. 332, 190 N.W.2d 623 (1971).

[11] Compare Neb. Rev. Stat. § 83-1,105 (Reissue 1971), with Neb. Rev. Stat. §§ 83-1,105.01(2) and 29-2204(1)(B) (Cum. Supp. 2006).

[12] *McMillian*, *supra* note 9, 186 Neb. at 785, 186 N.W.2d at 482. Accord *Rhodes, supra* note 10.

defendant's "minimum term" to mean the flat sentence imposed by the court. Thus, contrary to Poindexter's argument, a flat sentence did have a minimum term under the 1969 statute. In Poindexter's case, his sentence of life is the "minimum term" of his flat sentence. Under the 1969 version of § 83-1,110, Poindexter is parole eligible "upon completion of his [life imprisonment] term less reductions granted," and not "at any time" as he suggests.

Poindexter's life sentence is indefinite.[13] It is impossible to determine the number of years that Poindexter may live in serving his life sentence. His sentence has no term of years from which reductions can be taken.[14] We conclude that under § 83-1,110 (Cum. Supp. 1969), Poindexter is not eligible for parole until the Board of Pardons commutes his life sentence to a term of years.

(b) Current Statutes Require a Commutation Before Poindexter Is Eligible for Parole

We next compare Poindexter's parole eligibility under the current version of § 83-1,110,[15] which provides in pertinent part: "(1) Every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence . . . ." Like the 1969 statute, parole eligibility under the current version of § 83-1,110 depends on the offender's minimum term.

Having decided that Poindexter's minimum term is his life sentence, Poindexter is eligible for parole under the current statute once he has served one-half his life sentence. Because the sentence is indefinite, it is impossible to determine when Poindexter will have served one-half his life sentence. We conclude that under § 83-1,110 (Cum. Supp. 2006), Poindexter is not eligible for parole until the Board of Pardons commutes his life sentence to a term of years.[16]

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[13] See *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).

[14] See *id.*

[15] See § 83-1,110 (Cum. Supp. 2006).

[16] See, also, *Ditter v. Nebraska Bd. of Parole*, 11 Neb. App. 473, 655 N.W.2d 43 (2002).

(c) Summary of Commutation Issue

[9] We conclude that both the 1969 version and the current version of § 83-1,110 require commutation to a term of years before inmates sentenced to life imprisonment for first degree murder are eligible for parole. Therefore, no ex post facto issue is raised by our decision that Poindexter is not eligible for parole until the Board of Pardons commutes his sentence to a term of years.

[10] The Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.[17] The record shows that the Board of Pardons denied Poindexter a commutation hearing in March 1987 and again in May 1993. Because Poindexter has not yet received a commutation of his sentence to a term of years, he is not yet eligible for parole.

2. Poindexter Did Not Have a Liberty Interest in Commutation or a Mandatory Release Date of April 17, 1988

Poindexter contends that he had a "defacto [sic] mandatory release date of no later than . . . April 17, 1988."[18] He claims that he had a liberty interest in being released no later than that date. As evidence of this alleged liberty interest, he cites letters in the record and a self-created study showing the times other inmates with life sentences served before they were released on parole.

The letters, dating from the 1980's, were sent by the Secretary of State, the Department of Correctional Services, and the Board of Pardons. The letters explain that the *average* length of time served on a life sentence before the Board of Parole recommended a commutation to the Board of Pardons was 17 or 18 years.

Poindexter's study lists 22 Nebraska inmates who received life sentences for first degree murder and were later released on discretionary parole after their sentences were commuted. The inmates on Poindexter's list were sentenced between 1955

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[17] See, *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

[18] Brief for appellant at 22.

and 1974 and were released on discretionary parole by 1992. Poindexter calculated the "Mean Time Served" by these inmates before they were released on discretionary parole. According to Poindexter, the inmates served an average of 18.45 years before being released.

Poindexter relies on the 17- to 18-year averages in the letters and his study. By adding 17 years to his sentence date, April 17, 1971, he concludes that he had a liberty interest in his "defacto [sic] mandatory release date" of April 17, 1988. We understand Poindexter's argument to be that because other life inmates received commutations to terms of years and were released on parole after serving an average of 17 or 18 years, he had a liberty interest in similarly being released after 17 years. Because such a release would necessarily require a prior commutation,[19] we believe the more precise issue is whether Poindexter had a liberty interest in having his sentence commuted so that he could be eligible for parole after serving about 17 years, like the inmates in his study.

The U.S. Supreme Court has stated that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[20] The Court later applied this principle in a case involving commutation of life sentences, concluding that "an inmate has 'no constitutional or inherent right' to commutation of his sentence."[21]

Although an inmate has no constitutional or inherent right to commutation, we recognize that a state may under certain circumstances create a liberty interest that is subject to due process protection.[22] But such circumstances are not present here.

We have previously held that neither the Nebraska Constitution nor Nebraska's statutes create a liberty interest in

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[19] See discussion *supra* Part V.1(a) through (c).

[20] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

[21] *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

[22] See *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). See, also, *Greenholtz, supra* note 20.

commutation hearings other than the right to file an application for commutation.[23]

Nor did the Board of Pardons' commutation of sentences for the inmates in Poindexter's study create a protected liberty interest in commutation. The U.S. Supreme Court rejected a similar argument that a pardons board's practice of granting commutations to most life inmates created a protectable liberty interest.[24] There, the Connecticut Board of Pardons had granted about three-fourths of the applications for commutation of life sentences. Other life inmates, whose commutations had been denied, argued that the board's practice was sufficient to create a protectable liberty interest in commutation. The Court disagreed, concluding that a liberty interest could not be created simply by past actions of the pardons board:

> A constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." . . . No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution.[25]

This reasoning applies here. As mentioned, the Board of Pardons has the unfettered discretion to grant or deny a commutation of a lawfully imposed sentence for any reason or for no reason at all.[26] That the Board of Pardons has exercised this discretionary authority and granted commutations for other life inmates after they served, on average, 17 or 18 years does not create a protectable liberty interest.

[11] We reaffirm our previous conclusion that the State has not created a liberty interest in sentence commutation other than the right to file an application for commutation.[27] Therefore,

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[23] See *Otey, supra* note 17. See, also, *Dumschat, supra* note 21.

[24] *Dumschat, supra* note 21.

[25] *Dumschat, supra* note 21, 452 U.S. at 465 (emphasis in original) (citation omitted).

[26] See, *Marrs, supra* note 17; *Otey, supra* note 17.

[27] See *Otey, supra* note 17.

Poindexter did not have a liberty interest in having his sentence commuted for an April 17, 1988, release. His argument that April 17, 1988, was his "defacto [sic] mandatory release date" is without merit.

### 3. Poindexter's Additional Assignments of Error Are Without Merit

We have considered Poindexter's remaining assignments of error, and we conclude they are without merit.

## VI. CONCLUSION

We conclude that under both the statutes in place when Poindexter committed his crime and the current statutes, Poindexter is not eligible for parole until the Board of Pardons commutes his life sentence to a term of years. We further conclude that Poindexter did not have a liberty interest in having his sentence commuted to obtain an April 17, 1988, release. The district court did not err in quashing the writ of habeas corpus and dismissing Poindexter's case.

Affirmed.

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# County of Hitchcock, Nebraska, a political subdivision of the State of Nebraska, appellant, v. William M. Barger, also known as Bill Barger, et al., appellees.

750 N.W.2d 357

Filed June 13, 2008. No. S-07-105.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Actions: Foreclosure: Liens: Real Estate: Tax Sale: Time.** Under Neb. Rev. Stat. § 77-1902 (Reissue 2003), an action to foreclose a lien for taxes represented by a

tax sale certificate shall only be brought within 6 months after the expiration of 3 years from the date of sale of any real estate for taxes or special assessments.

5. **Bankruptcy: Service of Process: Notice: Time.** Neb. Rev. Stat. § 25-510.02(2) (Reissue 1995) is not relevant to whether a county is properly served with a bankruptcy dismissal notice for purposes of determining whether the 30-day period in 11 U.S.C. § 108(c)(2) (2000) is triggered.
6. **Bankruptcy: Notice: Time.** When deciding whether purported notice of a bankruptcy dismissal is sufficient to trigger the 30-day time limit in 11 U.S.C. § 108(c)(2) (2000), a court should determine whether the notice was reasonably calculated to apprise the claimant that the stay terminated or expired.

Appeal from the District Court for Hitchcock County: David Urbom, Judge. Affirmed.

D. Eugene Garner, Hitchcock County Attorney, for appellant.

George G. Vinton for appellees William M. Barger and RanDee L. Barger.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Connolly, J.

County of Hitchcock, Nebraska (the County), brought this action to foreclose two tax sale certificates issued for delinquent taxes on real estate owned by William M. Barger and RanDee L. Barger. After the Hitchcock County treasurer issued the certificates to the County, but before the County petitioned for foreclosure, the Bargers filed for chapter 13 bankruptcy. Under 11 U.S.C. § 362(a) (2000), the County was automatically stayed from enforcing its liens when the Bargers filed their bankruptcy petition. Under 11 U.S.C. § 108(c) (2000), the County had 30 days after receiving notice of the bankruptcy dismissal to file its petition in foreclosure. The Bargers argued that the County failed to timely file its petition. The district court agreed and granted the Bargers' motion for summary judgment.

The issue is, When did the County receive notice of the bankruptcy dismissal? The Bargers argue that the County received notice when the bankruptcy court sent notice to the County treasurer in March 2002. The County argues the treasurer was not the proper party to receive notice. The County contends that it did not receive notice until June 2002 when the Hitchcock

County Board of Commissioners received a letter from William Barger notifying the board of the bankruptcy dismissal. Because the notice to the treasurer was reasonably calculated to apprise the County that the bankruptcy court had dismissed the Bargers' case, we affirm.

## I. BACKGROUND

On July 27, 1998, the County treasurer issued to the County tax sale certificate No. 13-98 for delinquent taxes on real estate owned by the Bargers. This certificate covered property described as the west half of Section 9, Township 4 North, Range 32 West of the 6th P.M., Hitchcock County. On October 1, the treasurer issued to the County tax sale certificate No. 35-98 for delinquent taxes on other real estate the Bargers owned. This certificate covered property described as the northeast quarter of Section 8, Township 4 North, Range 32 West of the 6th P.M., Hitchcock County.

In December 2001, before the County petitioned to foreclose the tax certificates, the Bargers filed for chapter 13 bankruptcy. The U.S. Bankruptcy Court for the District of Nebraska dismissed the bankruptcy case in March 2002. The record reflects that on March 22, the bankruptcy court served a notice of dismissal by first class mail on "Hitchcock County Treasurer, P.O. Box 218, Trenton, NE 69044-0218." The record also contains William Barger's affidavit. The affidavit states that in "mid-June, 2002," he sent a certified letter to the board of commissioners verifying that the notice of dismissal had been received. The minutes of the July 1, 2002, board of commissioners meeting "acknowledged receipt of a 'Notice of Dismissal of Chapter 13 Bankruptcy' from William M. Barger, delivered by certified mail on June 13, 2002."

On July 15, 2002, the County filed its petition to foreclose on tax certificates Nos. 13-98 and 35-98. In their answer, the Bargers alleged that the certificates were void because the County failed to timely file the petition within the timeframe required under Neb. Rev. Stat. § 77-1902 (Reissue 2003), as extended by 11 U.S.C. § 108(c). The Bargers moved for summary judgment, which the district court granted. The County appeals.

## II. ASSIGNMENTS OF ERROR

The County assigns, restated and consolidated, that the district court erred in deciding the County's petition was untimely and in sustaining the Bargers' motion for summary judgment.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] We review questions of law independently of the lower court's conclusion.[3]

## IV. ANALYSIS

### 1. Time for Filing an Action to Foreclose Taxes Under Nebraska Law

[4] Under § 77-1902, an action to foreclose a lien for taxes represented by a tax sale certificate "shall only be brought within six months after the expiration of three years from the date of sale of any real estate for taxes or special assessments." Here, the treasurer issued certificate No. 13-98 to the County on July 27, 1998. The certificate expired on July 27, 2001. Under § 77-1902, the County had until 6 months later, January 27, 2002, to file its foreclosure petition on No. 13-98. The treasurer issued certificate No. 35-98 to the County on October 1, 1998. That certificate expired on October 1, 2001. Applying § 77-1902, the County had 6 months, until April 1, 2002, to file its foreclosure petition on No. 35-98. But the Bargers' filing for bankruptcy affected these time limits.

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[1] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[2] *Id.*

[3] See *id.*

### 2. The Bargers' Filing for Bankruptcy Extended the Time in Which the County Had to File the Foreclosure Petitions

The Bargers filed for bankruptcy in December 2001, triggering the automatic stay under 11 U.S.C. § 362(a). As a result, the County was unable to commence the actions to foreclose the tax liens. The stay continued until the bankruptcy court dismissed the Bargers' case on March 18, 2002. Under § 77-1902, the time for filing the foreclosure petition on No. 13-98 expired on January 27, during the automatic stay. The time for filing the petition on No. 35-98 expired on April 1, about 14 days after the stay terminated.

The bankruptcy code offers protection for claimants whose claims might otherwise expire during the pendency of a bankruptcy stay or before, or within a short time after, the claimant learns of the stay's termination. 11 U.S.C. § 108(c) provides, in relevant part:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . with respect to such claim.

When § 108(c) applies, "any time deadline for commencing and continuing the action is extended to 30 days after notice of termination of the stay, if the deadline would have occurred on an earlier date."[4] As mentioned, under § 77-1902, the period for filing the petition on No. 13-98 expired on January 27, 2002, before the stay terminated. The period for filing the petition on No. 35-98 expired on April 1, 2002, 14 days after the stay terminated. Therefore, January 27 and April 1 are the relevant dates for § 108(c)(1). Both dates occurred before the deadline

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[4] 2 Collier on Bankruptcy ¶ 108.04 at 108-13 (rev. 15th ed. 2008).

described in § 108(c)(2), so the extension in § 108(c)(2) applies. Under § 108(c)(2), the County had 30 days following notice of the stay's termination to file the foreclosure petition for Nos. 13-98 and 35-98. Therefore, in deciding if the County's petition was timely, we must determine when the County received notice of the bankruptcy dismissal.

### 3. The County Received Notice of the Bankruptcy Dismissal in March 2002

#### (a) To Trigger the 30-day Limit in § 108(c)(2), Notice Must Be Reasonably Calculated to Apprise the Claimant That the Stay Has Terminated or Expired

The County filed its foreclosure petition on July 15, 2002. The issue is whether July 15 was within 30 days of the County's receiving notice that the bankruptcy court had dismissed the Bargers' bankruptcy. The parties disagree about when the County received that notice. The Bargers contend that the County received notice when the bankruptcy court sent notice of the dismissal to the County treasurer in March. The County contends that it did not receive notice of dismissal when the treasurer received notice because the treasurer was not the proper party to receive the notice. Instead, the County contends that it did not receive notice until it received a letter from William Barger on June 13. Because July 13 fell on a Saturday, the County argues that the petition was timely filed Monday, July 15.

[5] The County relies on Neb. Rev. Stat. § 25-510.02(2) (Reissue 1995) to argue that the proper party to receive notice was the Hitchcock County clerk or chief executive officer. Section 25-510.02(2) provides, "Any county . . . of this state may be served by personal, residence, or certified mail service upon the chief executive officer, or clerk." The County's reliance on this section is misplaced. Section 25-510.02(2) falls within chapter 25, article 5, which is entitled "Commencement of Actions; Process." The statute is relevant for determining how to serve a county when commencing an action involving the county—service of process. But the County was not served with notice of the bankruptcy dismissal for purposes of commencing an action involving the County. Therefore, § 25-510.02(2) is irrelevant.

The County also argues that the County, acting by and through its board, was the "'holder'" of Nos. 13-98 and 35-98 and was the "'creditor'" for purposes of the bankruptcy proceeding.[5] Thus, according to the County, the board was the proper entity to receive notice of the bankruptcy dismissal, and the board did not receive notice until June 13, 2002.

[6] The Bargers argue that under a due process analysis, the proper standard for determining whether notice to the treasurer put the County on notice is whether that notice was "reasonably calculated" to apprise the County of the bankruptcy dismissal.[6] Generally, due process requires notice "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[7] Although we do not engage in a due process analysis here, we conclude that the "reasonably calculated" standard should apply when deciding whether purported notice is sufficient to trigger the 30-day time limit in § 108(c)(2).

The "reasonably calculated" standard helps further the purpose of § 108(c). Section 108(c) protects claimants by preventing a debtor from strategically filing for bankruptcy to shorten a limitations period and using the expiration of the limitations period as a defense.[8] But once a claimant receives proper notice that the stay has expired or terminated, that party has only 30 days under § 108(c)(2) to commence or continue an action. We believe the protection offered by § 108(c) would be undermined if the 30-day limit could be triggered by something less than notice reasonably calculated to apprise the claimant that the stay had terminated or expired. Therefore, we will consider whether notice to the treasurer was reasonably calculated to apprise the County that the automatic stay had terminated.

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[5] Brief for appellant at 14.

[6] Brief for appellees William Barger and RanDee Barger at 8.

[7] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). See, also, *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992).

[8] See *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999).

### (b) Notice to the Treasurer Was Reasonably Calculated to Apprise the County That the Automatic Stay Had Terminated

Another case addressing sufficiency of notice to an entity within a county system is *In re Riverchase Apartments, L.P.*[9] There, a county argued that it was not bound by the terms of a confirmed reorganization plan because it did not receive notice of the bankruptcy case until after the confirmation. Notice of the events leading up to the confirmation was sent to the county clerk's address. The county argued that the proper address for service of process was that of the county judge or county attorney. The issue was whether notice to the county clerk was reasonably calculated to apprise the county of the pendency of the bankruptcy. The court concluded that it was. According to the court, once the clerk received notice, "delivery to the appropriate person within the County system was the responsibility of the . . . Clerk's Office."[10] The court noted, "'A creditor may cho[o]se to organize its business by dividing activities into various departments, [but] it may not use that method of operation as a shield against notice properly sent to the creditor in its name and place of business.'"[11]

We find this reasoning persuasive, given the treasurer's duties regarding tax sale certificates. For instance, the treasurer issues the tax sale certificates.[12] The treasurer also keeps a sale book in which the details of the certificates are recorded.[13] Most important, when the county board is the purchaser, as it was here, the treasurer retains custody of the certificate.[14] And in such cases, the treasurer may assign the certificate to any person wishing to buy the certificate.[15] Clearly, the treasurer has many responsibilities relating to the tax sale certificates.

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[9] *In re Riverchase Apartments, L.P.*, 184 B.R. 35 (M.D. Tenn. 1993).

[10] *Id.* at 40.

[11] *Id.*, quoting *In re Worthing*, 24 B.R. 774 (D. Conn. 1982).

[12] Neb. Rev. Stat. §§ 77-1809 and 77-1818 (Reissue 2003).

[13] Neb. Rev. Stat. § 77-1812 (Reissue 2003).

[14] § 77-1809.

[15] *Id.*

Here, the bankruptcy dismissal notice was pertinent to the County's foreclosure actions: In effect, the notice announced the termination of the stay that had prevented the County from initiating the foreclosure of its tax sale certificates. We believe it is reasonable to conclude that once the treasurer received the dismissal notice, the treasurer had a responsibility to deliver the notice to the appropriate entity within the county system. Therefore, notice to the treasurer was reasonably calculated to apprise the board that the bankruptcy court had dismissed the case and that the County could initiate its foreclosure action.

In passing, we note that had a party other than the county acquired the tax sale certificates, notice to the treasurer would not have met the "reasonably calculated" standard. The linchpin of our analysis is that the treasurer retained the certificates issued to the County and the relevant parties here are all entities within the county system. It is not unreasonable to expect the treasurer to forward the notice to the proper entity within the county system. Moreover, the treasurer's office was the central clearinghouse for the tax sale certificates.

We conclude that the bankruptcy dismissal notice sent to the treasurer was reasonably calculated to apprise the County that the automatic stay was terminated. Therefore, we find that for purposes of § 108(c)(2), the County received notice of the stay's termination in March 2002, when the bankruptcy court sent the dismissal notice to the treasurer.

#### 4. The County's Foreclosure Petition Was Untimely

Under § 108(c)(2), the County had 30 days after notice of the automatic stay's termination to file its foreclosure petition. The County received notice in March 2002 but did not file the petition until July 2002. Therefore, the County's foreclosure petition was untimely. Thus, the district court did not err in granting summary judgment for the Bargers and dismissing the County's petition.

## V. CONCLUSION

We conclude that notice to the treasurer regarding the bankruptcy dismissal was notice reasonably calculated to apprise the County of the automatic stay's termination. Therefore, for

purposes of § 108(c)(2), the County received notice of the stay's termination in March 2002. Under § 108(c)(2), the County had 30 days to file its foreclosure petition, but the County did not file the petition until July 2002. Thus, the County's petition was untimely. The district court did not err in granting the Bargers' motion for summary judgment.

AFFIRMED.

HEAVICAN, C.J., not participating in the decision.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM L. SWITZER, JR., RESPONDENT.

750 N.W.2d 681

Filed June 13, 2008. No. S-07-182.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

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

William L. Switzer, Jr., pro se.

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

PER CURIAM.

## INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, William L. Switzer, Jr. After a formal hearing, the referee concluded that Switzer had violated the Code of Professional Responsibility, the Nebraska Rules of Professional Conduct, this court's disciplinary rules, and his oath of office as an attorney, and recommended a suspension of 1 year. While we adopt the findings of the referee, we do not accept the discipline recommended by the referee. We instead impose discipline as indicated below.

## FACTS

On February 22, 2007, formal charges were filed by the office of the Counsel for Discipline against Switzer, alleging that Switzer had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice), and DR 1-102(A)(6) (engaging in any other conduct adversely reflecting upon his fitness to practice law); Canon 6, DR 6-101(A)(3) (neglecting legal matter entrusted to him); Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment) and DR 7-101(A)(3) (prejudicing or damaging his client during course of professional relationship); DR 7-102(A)(3) (concealing or knowingly failing to disclose that which lawyer is required by law to reveal); Canon 9, DR 9-102(A)(1) and (2) (failing to preserve identity of client funds), DR 9-102(B)(3) (failing to maintain complete record of client funds and to render appropriate accounting), and DR 9-102(B)(4) (failing to promptly pay or deliver client funds to client). The formal charges also alleged that Switzer violated the following provisions of Neb. Ct. R. of Prof. Cond. (rev. 2005): rule 8.4(a) (violating or attempting to violate Nebraska

Rules of Professional Conduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to administration of justice), as well as his oath of office as an attorney.[1] In his answer, Switzer disputed these allegations.

A referee's hearing was held on August 30, 2007. Switzer, acting pro se, testified at the hearing. In addition, 42 exhibits were introduced. The record in this case reveals the following facts: Switzer was retained on or about March 23, 2005, by Lori Carney and Charles Daubs. The next day, March 24, Carney sent to Switzer a check for $500 as an advance fee payment. Switzer agreed to draw up and file the necessary paperwork to have Carney and Daubs appointed as coguardians and coconservators for their mother, Marion Daubs (Marion).

Meanwhile, on March 31, 2005, unbeknownst to Carney and Daubs, Marion signed a power of attorney naming Mark Milone as her attorney in fact. Previously, Carney had held Marion's power of attorney. Marion had a stroke on April 2, which apparently gave effect to the power of attorney.

Milone notified Carney on April 4, 2005, that her appointment had been revoked and that he now held Marion's power of attorney. On April 8, Milone notified Switzer by letter of Milone's appointment. In that letter, Milone indicated that he was aware that Switzer had been retained to commence a guardianship-conservatorship action. Milone requested that he be notified of the commencement of any such action.

On April 11, 2005, Carney and Daubs met with Switzer regarding the guardianship-conservatorship. Carney testified that as of that date, Switzer was aware that Milone held Marion's power of attorney. On April 12, Switzer filed an ex parte emergency petition for appointment of temporary coguardians and coconservators. This petition failed to list Milone as an interested party, nor was the judge notified of the power of attorney held by Milone. The petition was granted.

When Milone learned that the petition was filed and granted, he filed a petition to terminate the temporary coguardianship and coconservatorship. That petition was granted on April 15,

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[1] See Neb. Rev. Stat. § 7-104 (Reissue 1997).

2005. Switzer was notified that same day that the guardianship-conservatorship had been terminated; he failed to notify Carney or Daubs. Carney was notified of the termination on April 19.

Subsequent to this notification, Carney and Daubs unsuccessfully attempted to contact Switzer on at least four separate occasions. Carney testified that in one instance, she waited on the telephone line for an hour to allow Switzer to talk with her when he was free. At the hearing before the referee, Switzer acknowledged that he failed Carney and Daubs, stating that he "did not do what [he] was supposed to do" and that he realized that he "absolutely" should have communicated with them better than he did.

On May 3, 2005, Daubs wrote to Switzer to terminate the attorney-client relationship. In his letter, Daubs requested an accounting of services rendered, as well as the return of the unused portion of the $500 retainer. According to evidence presented at the hearing, an accounting was never provided nor did Switzer produce any evidence regarding any portion of the retainer.

Carney and Daubs then retained new counsel. On May 5, 2005, this counsel contacted Switzer and requested a copy of the file. Such was never provided to new counsel.

On December 13, 2005, the Counsel for Discipline received a letter from Carney regarding Switzer's representation. The Counsel for Discipline forwarded the letter to Switzer for his response. On January 10, 2006, Switzer responded to the letter, noting that the file was in storage, but that he would have it retrieved. In the letter, Switzer indicated the fact that Milone held Marion's power of attorney was never communicated to him. Switzer did not address his failure to communicate with Carney and Daubs after the guardianship-conservatorship was terminated.

Despite indicating that he would respond further once the file had been retrieved, and despite the fact that additional letters were sent to him from the Counsel for Discipline on February 22 and March 22, 2006, no additional response was received. The matter was upgraded to a formal grievance on April 13; Switzer's response was received on April 18.

The April 18, 2006, response read in full: "I have received your packet of documents and enclose in response my copies of letters to you. The last letter was dated March 30, 2006. I believe that I have responded to your inquiries. Please let me know if you need further information."

Enclosed with this letter was a letter dated March 30, 2006, addressed to the Counsel for Discipline. The letter stated in part that "[e]nclosed is a copy of the letter mentioned in my last communication to you." Enclosed was a letter from Carney and Daubs' new counsel requesting the file—Switzer had indicated in his January 10 letter that he would forward this letter. However, the Counsel for Discipline denied receiving any communication from Switzer dated March 30, 2006. In response to a question by the referee with regard to the March 30 and April 18 correspondence, Switzer admitted that the March 30 letter was a "fabrication."

The Counsel for Discipline again contacted Switzer on May 12, 2006, to ask a number of followup questions related to Switzer's failure to communicate with Carney and Daubs and his failure to provide a copy of the relevant file to new counsel, as well as questions related to his billing with regard to the Carney/Daubs representation. A followup letter was sent on June 7. Switzer was eventually reached by telephone on June 20. Switzer stated that he had not received the May and June letters because they had been sent to an incorrect address. The record shows that the address was, in fact, incorrect, but that all previous correspondence had also been sent to the technically incorrect address and had been received. The Counsel for Discipline indicated that neither the May 12 letter nor the June 7 letter was returned as undeliverable.

In any event, the May and June 2006 letters were faxed to Switzer, who still failed to respond. The Counsel for Discipline again telephoned Switzer on August 3; Switzer indicated that a response letter had been written, but not yet sent. The Counsel for Discipline received a letter from Switzer on August 8. The letter was postmarked August 7.

In that letter, Switzer again stated that at the time he filed the petition for guardianship-conservatorship, he was not aware that Milone held Marion's power of attorney. Switzer failed

to provide any evidence that he had deposited or withdrawn Carney's check. Switzer also claimed that a computer malfunction had prevented him from retrieving the billing statement prepared in the matter.

The referee issued his report on October 11, 2007. In that report, the referee noted that "Switzer's unwillingness to respond properly and adequately carried on following the appointment of the undersigned as Referee." The referee stated that he had asked Switzer to file a "proper Answer, which . . . Switzer promised to do, but didn't do. Also . . . Switzer indicated that he would conduct discovery, which he never did." The referee then concluded Switzer's conduct was in violation of DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 7-101(A)(2) and (3); DR 7-102(A)(3); DR 9-102(A)(1) and (2), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility; rule 8.4 of the Nebraska Rules of Professional Conduct; Neb. Ct. R. of Discipline 9(E) (rev. 2001); and his oath of office as an attorney. The referee recommended that Switzer be temporarily suspended from the practice of law for a period of 1 year. No exceptions to this report were filed. On October 29, the Counsel for Discipline filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon.

## ANALYSIS

As an initial matter, we note that some of Switzer's conduct now at issue occurred prior to September 1, 2005, and is governed by the now-superseded Code of Professional Responsibility, while other conduct occurred on or after September 1, the effective date of the Nebraska Rules of Professional Conduct, and is therefore governed by those rules.

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[2] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and

[2] *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

convincing evidence.[3] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[4]

[4] As noted, neither party filed any written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Counsel for Discipline filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.[5] Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence. We specifically conclude that Switzer has violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 7-101(A)(2) and (3); DR 7-102(A)(3); DR 9-102(A)(1) and (2), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility; rule 8.4 of the Nebraska Rules of Professional Conduct; and his oath of office as an attorney. Accordingly, we grant in part the Counsel for Discipline's motion for judgment on the pleadings.

[5] We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[6] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or

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[3] *Id.*

[4] *Id.*

[5] *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007).

[6] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.[7]

[6,7] With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[8] 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.[9] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[10]

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence and the applicable law. In his report, the referee recommended that with respect to the discipline to be imposed, Switzer should be suspended from the practice of law for 1 year. We disagree with the referee's recommendation, and to the extent that the Counsel for Discipline's motion for judgment on the pleadings requests that this court accept the referee's recommendation with respect to discipline, we overrule that motion.

The formal charges in this case allege that Switzer failed to reveal to the county court the fact that Milone held Marion's power of attorney. When this failure was discovered, the guardianship-conservatorship was terminated. Switzer was notified of this termination, but did not inform his clients. Switzer's clients were eventually notified after service by the sheriff. Each client attempted to contact Switzer, but was unable to do so. Switzer was later asked to turn over the file to the clients'

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[7] See, also, disciplinary rule 10(N).

[8] *State ex rel. Counsel for Dis. v. Wickenkamp, supra* note 5.

[9] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

[10] *Id.*

new counsel and to provide a detailed accounting, but failed to do either.

We are concerned by Switzer's failure to reveal the information regarding Milone's holding of Marion's power of attorney. We also express concern over Switzer's lack of communication with his clients,[11] particularly given the lengths that Carney took to speak with him.

We are also troubled by Switzer's failure to respond to the Counsel for Discipline's inquiries. We have held that an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[12]

Switzer's failure to cooperate is only compounded in this case in that Switzer admitted to fabricating a document during the course of the Counsel for Discipline's investigation. We consider this fabrication to move beyond failing to cooperate with the Counsel for Discipline; instead, such action directly interfered with the investigation. While there is no indication from the Counsel for Discipline that the fabricated letter impeded its investigation in any meaningful way, this court cannot and will not overlook Switzer's behavior on this point.

In his report, the referee noted as an aggravating factor Switzer's two prior private reprimands. And the referee further indicated that Switzer was not particularly cooperative throughout the disciplinary process following the filing of formal charges. With respect to this finding, the referee first referenced Switzer's answer to the formal charges. In that answer, Switzer alleged that the Counsel for Discipline had "mixed up and concocted events and allegations, taken events out of context, and reached conclusions which are based upon innuendo of [the Counsel for Discipline's] own choosing. The behavior and

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[11] See, e.g., *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004); *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004).

[12] *State ex rel. Counsel for Dis. v. Zendejas*, 274 Neb. 829, 743 N.W.2d 765 (2008); *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005).

conduct and attitude which [the Counsel for Discipline] continues to exhibit results in allegations which are frivolous and misguided." In his report, the referee indicated that he felt this answer was improper. The referee also indicated that Switzer had agreed to file a new answer, but had failed to do so. Aside from Switzer's failing to file a new answer, the referee noted that Switzer was not cooperative in that Switzer indicated he would conduct discovery, but never did so.

Based upon our consideration of the record in this case, this court finds that Switzer should be and hereby is suspended from the practice of law for a period of 18 months, effective immediately. Switzer shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004) and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of the 18-month suspension period, Switzer may apply to be reinstated to the practice of law, provided that Switzer has demonstrated his compliance with rule 16 and further provided that the Counsel for Discipline has not notified this court that Switzer has violated any disciplinary rule during his suspension. We also direct Switzer to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

## CONCLUSION

The motion of the Counsel for Discipline is sustained in part and in part overruled. We adopt the referee's findings of fact and conclude that Switzer has violated the Code of Professional Responsibility, the Nebraska Rules of Professional Conduct, and his oath of office as an attorney.

It is the judgment of this court that Switzer should be and hereby is suspended from the practice of law for 18 months, effective immediately.

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

# Mark Steven Pestal and Kimberly Ann Pestal, appellees, v. John J. Malone, Sr., and Karen Malone, appellants, and all persons whether natural or artificial, having or claiming any interest in and to: Lot 7, the Hilltop of Oak Hills Highlands, a subdivision in Douglas County, Nebraska, real names unknown, appellees.

750 N.W.2d 350

Filed June 13, 2008. No. S-07-216.

1. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
3. **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.
4. **Parties: Jurisdiction.** If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
5. **Parties: Words and Phrases.** An indispensable or necessary party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the necessary party's interest or which is such that not to address the interest of the necessary party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
6. **Easements.** An easement that is recorded and continues in favor of future owners is appurtenant to and runs with the land.

Appeal from the District Court for Douglas County: Sandra L. Dougherty, Judge. Vacated and dismissed.

Philip J. Lee for appellants.

James B. McVay and John S. Kampfe, of Tiedeman, Lynch, Kampfe & McVay, for appellees Mark Steven Pestal and Kimberly Ann Pestal.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, and Miller-Lerman, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

This equity action involves a dispute among neighbors over four parcels of property. The disputed parcels are either part of or adjacent to a common driveway serving three lots, 6, 7, and 8, in the Hilltop of Oak Hills Highlands subdivision in Douglas County, Nebraska. The owners of Lot 8, Mark Steven Pestal and Kimberly Ann Pestal, appellees, brought this action in the district court for Douglas County against the owners of Lot 7, John J. Malone, Sr., and Karen Malone, appellants. The owners of Lot 6, Steven and Elizabeth Gleason, also affected by this action, were not made parties.

Following trial, the district court granted relief in favor of the Pestals. The court determined that the Pestals were owners in fee simple of two of the disputed parcels and that the Pestals were entitled to prescriptive easements with specified terms over the two other parcels. The district court enjoined the Malones from interfering with the Pestals' interests in the disputed parcels and dismissed with prejudice the Malones' counterclaim in which they had sought to quiet title to the disputed parcels in their name. The Malones appeal.

We conclude that because the record reflects the absence of parties who have an interest in the property that is the subject of this action and whose rights to such property may be affected by this action, the district court was without jurisdiction to resolve this controversy. Accordingly, we vacate the district court's order and dismiss the appeal.

## FACTS

Lots 6, 7, and 8 border on Washington Circle in the Hilltop of Oak Hills Highlands subdivision. The owners of Lots 6, 7, and 8 share a common driveway. The Pestals own Lot 8. The Malones own Lot 7. The Gleasons own Lot 6. Lot 7 is situated between Lots 6 and 8. The record shows the existence of a driveway easement, which is a recorded, perpetual, nonexclusive easement, over a portion of Lot 7 "to the present and future owners, occupants and invitees of Lots 6 and 8." According to its terms, the purpose of the driveway easement is to provide "vehicular and pedestrian access from Washington Circle to Lot[s] 6 and 8"

as well as to Lot 7. The easement is recorded with the Douglas County register of deeds.

The Pestals brought the instant action against the Malones, and, according to the caption of their amended complaint, all persons claiming an interest in Lot 7, "Real Names Unknown." The Gleasons were not named as parties. The amended complaint was filed March 10, 2004. Based upon a representation to the court that the real names of persons having an interest in the disputed parcels could not be determined after diligent investigation, the Pestals were granted permission to serve the unnamed parties by publication.

The Pestals claimed title to four parcels of property, two in fee by adverse possession and two by prescriptive easement. The district court in its order filed after trial described these four disputed parcels as follows:

> Parcel A, the driveway property, is an irregular shaped section of a brick and concrete drive and adjacent bricked area that exclusively serves [the Pestals'] lot but lies entirely within the legal boundaries of [appellants'] lot. . . . Parcel B, the roadway easement, is an asphalted area that abuts [the Pestals'] driveway and is located entirely within [appellants'] lot. . . . Parcel C, the landscaping property, is a long and narrow area consisting mainly of landscaping and a small section of the brick and concrete driveway . . . . Parcel D, the parking easement, is a rectangular section of the asphalted roadway that is entirely within the perpetual nonexclusive easement granted to the owners of Lot[s] 8 and 6.

The record reflects that parcels C and D lie within the driveway easement. The Pestals sought a fee simple interest in parcel C and a prescriptive easement in parcel D.

In their answer, the Malones denied the Pestals' allegations that the Pestals were entitled to title by adverse possession and to prescriptive easements over the disputed parcels. The Malones attached a copy of a recorded driveway easement to their answer. The Malones filed a counterclaim that sought to have title to the disputed parcels quieted in their names.

On November 13 and 14, 2006, the district court conducted a bench trial. A total of eight witnesses, including Steven

Gleason, testified. During his testimony, Steven Gleason stated that he and his wife were the owners of Lot 6. He also generally described his use of the driveway easement and the property that made up the disputed parcels. Over 50 exhibits were admitted into evidence during trial, including a copy of the driveway easement.

On January 29, 2007, the district court entered its order. The court determined that the Pestals had met their burden of proof as to all four parcels. By virtue of the Pestals' establishing their claims of adverse possession to parcels A and C, the court awarded A and C in fee simple to the Pestals. The court also awarded prescriptive easements to the Pestals as to parcels B and D. The prescriptive easement as to parcel C was for the purposes of ingress and egress and as to parcel D was for the purpose of occasional parking. The district court entered a permanent injunction prohibiting the Malones from interfering with the Pestals' property rights. Finally, the district court dismissed the Malones' counterclaim with prejudice. The Malones appeal.

## ASSIGNMENTS OF ERROR

On appeal, the Malones raise seven assignments of error. Because we conclude that the district court erred in failing to require the presence of all necessary parties, we discuss only the assignment of error that claims that the district court lacked jurisdiction.

## STANDARDS OF REVIEW

[1,2] The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court. See *id*.

## ANALYSIS

On appeal, the Malones assert that the district court lacked jurisdiction because the Pestals failed to join necessary parties

as required by Neb. Rev. Stat. § 25-323 (Cum. Supp. 2006), which grants the district court authority to determine disputes when the proper parties are before it. Section 25-323 is entitled "Necessary parties; brought into suit; procedure." Section 25-323 provides, inter alia, as follows:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

The Malones note that by virtue of the driveway easement, the Gleasons held perpetual easements over parcels C and D, and, in addition, the evidence shows that the Gleasons used parcels A and B. As a result, the Malones argue that the Gleasons were necessary parties in the action filed by the Pestals. Because the Gleasons were not parties to this action, the Malones claim the district court erred when it failed to order the Gleasons to be brought in. The Malones further argue that because of the absence of necessary parties, the district court lacked jurisdiction to enter the relief it granted in this case.

[3,4] The Malones admit that they did not raise the necessary party argument before the district court. As a general rule, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. See *Clark v. Clark, ante* p. 276, 746 N.W.2d 132 (2008). However, the presence of necessary parties is jurisdictional and cannot be waived by the parties. *Ruzicka v. Ruzicka, supra*. If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. See *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000). We therefore address the merits of this argument.

[5] We have stated that an indispensable or necessary party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the necessary party's interest or which is such that not to address the interest of the necessary party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

See *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007). We have also stated that the presence of necessary parties is jurisdictional and that the absence of necessary parties deprives the district court of jurisdiction. *Ruzicka v. Ruzicka, supra*; *Langemeier v. Urwiler Oil & Fertilizer, supra*.

We have long recognized in adverse possession and easement actions the importance of naming as parties all persons or entities who have or may have an interest in the property that is the subject of the action. In *Whitaker v. Gering Irr. Dist.*, 183 Neb. 290, 160 N.W.2d 186 (1968), we set aside the judgment and remanded the cause for a new trial when we determined on appeal that persons who had an interest in the real property that was the subject of the action had not been brought in as parties. In *Whitaker*, we stated that "[t]he defendant's claim of adverse possession . . . whether it be limited to an easement or not, certainly could not be established as against [persons who] are not parties to the action" and that "[w]hen it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, [an appellate court] will remand the cause for the purpose of having such parties brought in." *Id.* at 294-95, 160 N.W.2d at 188-89.

A determination of the present controversy will necessarily prejudice the rights of all persons who have or claim to have an interest in the disputed parcels. The evidence showed that the Gleasons used parcels A and B. More significantly, the Gleasons have a recorded interest in the driveway easement, parcels C and D, and the district court awarded the Pestals title in fee simple to parcel C and a prescriptive easement to parcel D, thereby affecting the Gleasons' interests.

[6] As for parcel C, from the record available to us, it appears that the Gleasons' easement in the driveway, which is recorded and continues in favor of future owners of Lot 6, is not a mere personal right and therefore is appurtenant to the land. See *Spilker v. First Nat. Bank & Trust Co.*, 211 Neb. 540, 319 N.W.2d 429 (1982). Although parcel C was awarded to the Pestals in fee simple, the Gleasons' easement interest, as appurtenant thereto, passed with the award of title without having been expressly mentioned by the district court. See *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d

889 (1996). Because the Gleasons' interest in parcel C ran with the land, see *id*. (quoting *Broadhead v. Terpening*, 611 So. 2d 949, 954 (Miss. 1992), stating "'[e]asements by necessity and by implication are appurtenant to the dominant estate and run with land'"), the impact on the Gleasons' interest in parcel C by virtue of the district court's award to the Pestals of parcel C was de minimis. However, as to parcel D, in which the Gleasons had a recorded prescriptive easement for the purpose of access to their Lot 6, the district court's award of a prescriptive easement to parcel D to the Pestals for their parking purposes had an adverse effect on the Gleasons' ability to exercise their easement right of access. Thus, the Gleasons' interests are affected by the controversy and the Gleasons were necessary parties to this action. The district court erred in not sua sponte requiring that the Gleasons be made parties. See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

The Pestals as the successful parties do not dispute the Gleasons' status as necessary parties, at least with regard to the driveway easement, parcels C and D. The Pestals claim, however, that because they named "All Persons . . . Real Names Unknown" as defendants in the caption of their amended complaint and constructively served such defendants, the Gleasons had constructive notice of the litigation and were thus converted into parties. We do not agree with the Pestals' assessment of the record or the applicable law.

Contrary to the Pestals' assertion, the Gleasons were not unknown persons. Compare Neb. Rev. Stat. § 25-321 (Cum. Supp. 2006) (providing that when names of persons having interest in real estate do not appear of record, plaintiff may in complaint designate such persons as "'all persons having or claiming any interest in'" such real estate, followed by words, "'real names unknown'"). The driveway easement as a public record was readily available, and, in any event, a copy of the easement was attached to the Malones' answer. Under these circumstances, the Gleasons' interest in the disputed parcels was readily apparent. The Gleasons should have been joined as named parties.

The Pestals also argue that because Steven Gleason appeared as a witness at trial, the Gleasons had actual notice of the

proceedings and need not be named as parties. We reject this argument. Even ignoring the fact that Elizabeth Gleason was not a witness, it is axiomatic that being a witness does not make one a party to an action. Compare *Bank of Vernal v. Uintah County et al. (Two Cases)*, 122 Utah 410, 250 P.2d 581 (1952) (stating generally that individual who took no part in proceedings other than as witness and who did not agree to become party to lawsuit was not party and that such individual's interest in property that was subject of lawsuit was unaffected by litigation). The Gleasons' rights cannot be properly resolved or ruled upon unless they are added as necessary parties.

For completeness, we note that the Malones claim on appeal that there exist other entities with interests in the disputed parcels whose presence is required for a final determination of the subject matter of the action. We cannot determine from the record on appeal the validity of the Malones' contention, although we note there is an indication that the subdivision homeowners' association may have easement rights over all or some of the disputed parcels.

We conclude that this controversy involving potential interests in real property cannot be properly resolved without the proper participation of all necessary parties in the suit. See *Ruzicka v. Ruzicka, supra*. Because the presence of necessary parties is jurisdictional, we conclude the district court lacked jurisdiction in this matter. See *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000).

## CONCLUSION

In an action involving real estate for adverse possession and prescriptive easements, it is fundamental that all persons or entities having an interest in the property that is the subject of the action be made parties to the lawsuit. In the absence of a necessary party, the district court is without jurisdiction to determine the controversy. Because a determination of the controversy would prejudice the rights of the Gleasons, who were not named as parties, we vacate the district court's order and dismiss the appeal.

VACATED AND DISMISSED.

McCORMACK, J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. DONELL KING, APPELLANT.

750 N.W.2d 674

Filed June 13, 2008. No. S-07-458.

1. **Sentences: Due Process: Appeal and Error.** Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.
2. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
3. **Sentences: Judges.** Under the U.S. Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), a judge who originally sentenced a defendant cannot impose a more severe punishment upon resentencing unless (1) the new sentence is based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding and (2) the factual basis establishing such conduct is included in the record.
4. **Sentences: Presumptions.** The presumption of vindictiveness can apply to a remand for resentencing after a defendant has successfully challenged the sentence itself and not the conviction.
5. **Due Process: Presumptions.** The due process presumption of vindictiveness applies only in cases in which a reasonable likelihood of vindictiveness exists.
6. **Sentences.** In Nebraska, unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other.

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

James J. Regan for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CONNOLLY, J.

## SUMMARY

In *North Carolina v. Pearce*,[1] the U.S. Supreme Court held that due process imposes a presumption of vindictiveness when,

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[1] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

following a defendant's successful appeal, a sentencing judge orders a more severe sentence that is not justified by objective evidence in the record since the original sentencing. Appellant, Donell King, contends that because he had successfully appealed his habitual criminal status in a previous appeal, the district court was presumptively vindictive when it resentenced him on remand to a greater aggregate minimum term.

King's three felony sentences were originally subject to 10-year mandatory minimum terms under the habitual criminal statutes. Because the district court imposed consecutive sentences, King's aggregate mandatory minimum term was 30 years. On remand, the district court resentenced King to consecutive terms of 20 to 25 years' imprisonment. It reasoned that without the mandatory minimum requirement, King would still be eligible for parole in 30 years and would serve the same time in prison.

We affirm because the *Pearce* presumption does not apply. The district court's sentences on remand reflect a calculated effort to craft sentences functionally equivalent to its original sentencing intent. The sentences do not increase King's prison time. The enlarged minimum term is neither more severe in effect nor a sentencing circumstance that raises a reasonable likelihood of vindictiveness.

## BACKGROUND

This is King's third appeal from the district court's original sentences for first degree sexual assault, kidnapping, and robbery. The district court originally sentenced King to three consecutive sentences of 10 to 25 years' imprisonment. In both King's first and second appeals, we held that the State had failed to prove King's habitual criminal status.[2] In each appeal, we vacated the enhanced sentences and remanded for resentencing.

At King's third enhancement hearing, the district court concluded that the State had again failed to prove King's habitual criminal status. Commenting on why the sentences it was about to impose did not increase King's original sentences, the court stated:

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[2] See, *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

> The [e]ffect on the actual time that . . . King is going to serve is going to be non-existent. [King] was sentenced . . . for the harm that was caused and the danger that he posed to public safety. . . . [T]he habitual criminal designation simply shifted the range of possible sentences that could be imposed. And because all three of the convictions here were already Class III felonies, it doesn't have an impact on the time that he would be required to serve, as it might have in a Class IV or a Class III(a) felony.

The court then proceeded to sentencing and stated that it intended "to impose the same amount of actual prison time." King objected to any increase in his three consecutive terms because there was no new evidence to justify an increase in his sentences. The prosecutor argued that King's offenses had been extremely violent and that to impose the same consecutive terms without the mandatory minimum terms under the habitual criminal statutes would give King an earlier parole eligibility date.

In response to these arguments, the court calculated that under King's original three consecutive terms of 10 to 25 years, he would have served at least 30 years' imprisonment. The court based its calculation on the habitual criminal statutes, which mandate a minimum sentence of 10 years for each felony conviction. The court further calculated that under the original sentences, if King did not lose good time credit, he would have reached his mandatory release date in 37½ years, or one-half of his 75-year aggregate maximum term. The court concluded that King's original sentences imposed 30 to 37½ years in actual prison time.

The court then stated: "So my task then is to replicate the sentence. And I've done that by signing a sentencing order on each of the three counts that . . . King be incarcerated for an indeterminate period of 20 to 25 years." The court reasoned that without the mandatory minimum sentences, King would still be eligible for parole in 30 years. Under the new consecutive terms, the court also concluded that he would still reach his mandatory release date in 37½ years, assuming he did not lose good time credit. The court stated that "the consecutive sentences of 20 to 25 years replicate the earlier sentence[s] in real time."

## ASSIGNMENT OF ERROR

King assigns that the district court denied him due process when it imposed greater sentences after his successful appeal of the court's earlier sentences.

## STANDARD OF REVIEW

[1,2] Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.[3] When we review questions of law, we resolve the questions independently of the lower court's conclusions.[4]

## ANALYSIS

King contends that the sentences he received after he successfully appealed his habitual criminal enhancement were effectively harsher sentences. He claims these sentences triggered the presumption of vindictiveness under the U.S. Supreme Court's decision in *Pearce*.[5]

### Presumption of Vindictiveness Under *Pearce*

[3] In *Pearce*, the U.S. Supreme Court held that due process prohibits imposing a more severe sentence at retrial if it is motivated by vindictiveness toward a defendant for having successfully attacked his conviction.[6] The U.S. Supreme Court has characterized its decision in *Pearce* as applying "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence."[7] Yet *Pearce* is not an absolute bar against a trial judge's imposing an increased sentence following a successful appeal; a sentencing judge has wide discretion in determining an appropriate

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[3] See, *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997); *State v. Bruna*, 14 Neb. App. 408, 710 N.W.2d 329 (2006), *affirmed* 272 Neb. 313, 721 N.W.2d 362.

[4] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[5] *Pearce, supra* note 1.

[6] See *Wilson, supra* note 3 (discussing *Pearce, supra* note 1).

[7] *United States v. Goodwin*, 457 U.S. 368, 374, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

sentence.[8] But the *Pearce* Court held that a judge who had originally sentenced a defendant could not impose a more severe punishment upon resentencing unless certain conditions were present: (1) The new sentence must be based upon objective information concerning the defendant's identifiable conduct occurring after the time of the original sentencing proceeding, and (2) the factual basis establishing such conduct must be included in the record.[9]

[4] The presumption of vindictiveness under *Pearce* can also apply to a remand for resentencing after a defendant has successfully challenged the sentence itself and not the conviction.[10] It does not apply if a different judge resentences the defendant after the defendant successfully appeals the first sentence.[11] But here the same judge resentenced King.

[5] The *Pearce* presumption is directed at the "vindictiveness of a sentencing judge," not simply enlarged sentences.[12] Because of the presumption's severity, "the Court has [presumed an improper vindictive motive] only in cases in which a reasonable likelihood of vindictiveness exists."[13] Obviously, the presumption does not apply if the circumstances do not present a reasonable likelihood of vindictiveness. For example, the presumption does not apply when a court vacates its own erroneous sentence under a sentencing statute and resentences the defendant to an arguably harsher sentence to comply with the statute.[14] A court must "look to the need, under the circumstances, to 'guard against vindictiveness in the resentencing process.'"[15] "Where the prophylactic rule of *Pearce* does not apply, the defendant

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[8] See *Wilson, supra* note 3.

[9] See, *id.*; *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994).

[10] See *State v. Lopez*, 217 Neb. 719, 350 N.W.2d 563 (1984).

[11] See *Bruna, supra* note 3.

[12] See *Texas v. McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).

[13] *Goodwin, supra* note 7, 457 U.S. at 373.

[14] See *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976). See, also, *State v. Egger*, 237 Neb. 688, 467 N.W.2d 411 (1991).

[15] *McCullough, supra* note 12, 475 U.S. at 138.

may still obtain relief if he can show actual vindictiveness upon resentencing."[16] King, however, does not argue that the record reflects proof of actual vindictiveness.

### Nebraska Case Law Applying *Pearce* Presumption

In a habitual criminal proceeding, *Pearce* requires reversal of an increase in the aggregate maximum sentence after a successful appeal of an unlawful sentence.[17] To avoid reversal, the district court must justify such an increase with new evidence at the resentencing hearing about the offense or the defendant.[18]

We have also held that an increase in the aggregate minimum term on remand violated *Pearce*. In *State v. McArthur*,[19] the defendant pleaded guilty to two Class IV felony offenses and one Class III felony offense. The district court sentenced him to three consecutive terms of imprisonment: 1 to 5 years for each Class IV felony and 6 to 20 years for the Class III felony. On appeal, we vacated the judgment and sentences because the court failed to advise the defendant that one of his sentences must be served consecutively. We remanded for further proceedings. On remand, the State dismissed one of the Class IV charges. For the two remaining offenses, the district court increased the terms of the consecutive sentences: 20 months to 5 years for the remaining Class IV felony and 80 months to 20 years for the Class III felony.

In his second appeal, the defendant assigned as error the court's increase in the minimum sentences for the two remaining felonies. The aggregate maximum sentence for the two offenses was the same. We stated that the sentencing court had increased the defendant's combined minimum sentence for the two offenses by 16 months. Applying *Pearce*, we concluded that "the record is devoid of any explanation for the increase in the minimum sentences. Therefore, the increased minimum

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[16] *Id.*

[17] See *Lopez, supra* note 10.

[18] See *id.*

[19] *State v. McArthur*, 230 Neb. 653, 432 N.W.2d 839 (1988).

sentences cannot withstand constitutional due process scrutiny and must be modified."[20]

We believe *McArthur* is distinguishable. The increase in the defendant's aggregate minimum sentence would have lengthened the time he served in prison before being eligible for parole. That is not so here.

### Other Courts' Application of *Pearce*

Other courts have held that *Pearce* does not apply when the sentencing court on remand, after a habitual criminal enhancement is vacated, imposes the same or nearly the same sentence.[21] The Florida Court of Appeal in *Thomas v. State*[22] held that a sentencing court's increase in the maximum term was not more severe when the court imposed the same prison time after the appellate court had vacated a mandatory minimum sentence.

In *Thomas*, the sentencing court originally sentenced the defendant to 40 years' imprisonment as a habitual violent offender with a 15-year mandatory minimum. After the appellate court vacated this sentence in a postconviction proceeding, the sentencing court resentenced him as a habitual felony offender to a term of 50 years with no mandatory minimum. The court stated that it intended to have the defendant serve the same time. It determined that the new sentence would result in the same prison time because there was no longer a mandatory minimum term. The Florida Court of Appeal held that the defendant failed to show his new sentence was more severe or had been motivated by vindictiveness.[23]

### Resolution

We have similarly questioned whether a greater maximum sentence was a more severe sentence when the defendant would

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[20] *Id.* at 655, 432 N.W.2d at 841.

[21] See, e.g., *Thomas v. State*, 638 So. 2d 169 (Fla. App. 1994); *Gray v. State*, 871 N.E.2d 408 (Ind. App. 2007); *State v. Freeman*, 577 So. 2d 216 (La. App. 1991). But see *Raines v. State*, 562 So. 2d 530 (Ala. App. 1988).

[22] *Thomas, supra* note 21.

[23] See *id.* See, also, *Walker v. State*, 499 So. 2d 884 (Fla. App. 1st Dist. 1986); *Trasti v. State*, 487 So. 2d 428 (Fla. App. 5th Dist. 1986). But see *Parker v. State*, 977 So. 2d 671 (Fla. App. 4th Dist. 2008).

reach his parole eligibility date sooner under the new sentence.[24] Here, the district court intended and correctly calculated that its new sentences would impose the same prison time as its original sentences. Other courts have reasoned that the resentencing, after one of a defendant's multicount convictions has been reversed, does not signal retaliatory animus when it does not increase the actual time served and only reflects the judge's original sentencing intent:

> [W]hen a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan. When the conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both crime and criminal.[25]

This reasoning applies here.

First, under both the district court's original and new sentences, King's mandatory release and parole eligibility dates were the same. King would reach his mandatory release date in 37½ years under either set of sentences.[26] The court also correctly determined that King would reach parole eligibility in 30 years under his original mandatory minimum sentences. We have held that a mandatory minimum 10-year sentence under the habitual criminal statutes cannot be reduced by good time credit.[27] The Legislature has codified this requirement.[28] Likewise, the court correctly determined that under its new sentences, King would

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[24] See *Blankenship, supra* note 14.

[25] *U.S. v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989). Accord *U.S. v. Shue*, 825 F.2d 1111 (7th Cir. 1987). See, also, *Kelly v. Neubert*, 898 F.2d 15 (3d Cir. 1990); *Paul v. United States*, 734 F.2d 1064 (5th Cir. 1984).

[26] See, Neb. Rev. Stat. § 83-1,107(2) and (3) (Reissue 1999 & Cum. Supp. 2006); Neb. Rev. Stat. § 83-1,110(2) (Reissue 1999 & Cum. Supp. 2006).

[27] See *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[28] See § 83-1,110(1).

still be eligible for parole in 30 years, or when he had served one-half of the new 60-year aggregate minimum term.[29] King conceded at oral argument that the new minimum and maximum terms are functionally the same as the original terms.

[6] Second, the new sentences reflected the court's original sentencing intent, which was not simply tied to mandatory minimums under the habitual criminal statutes. The court was required to impose mandatory minimum terms of 10 years for each felony conviction once it had found King to be a habitual criminal. But it was not required to impose consecutive sentences for these offenses.[30] In Nebraska, unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other.[31] But at King's original sentencing, the court rejected a request for concurrent sentences because of the seriousness of these crimes. As the court stated at the third resentencing hearing, "[King] was [originally] sentenced . . . for the harm that was caused and the danger that he posed to public safety. The . . . habitual criminal designation simply shifted the range of possible sentences that could be imposed."

The resentencing circumstances here reflect neither more severe sentences nor a reasonable likelihood of vindictiveness. Instead, the record reflects the district court's carefully calculated determination to ensure that its new sentences, which are not subject to mandatory minimum terms, would be functionally equivalent to its original sentences. The *Pearce*[32] presumption of vindictiveness does not apply.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[29] See § 83-1,110(2).

[30] See, generally, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[31] See, *id.*; *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995).

[32] *Pearce, supra* note 1.

# In re Interest of Markice M., a child under 18 years of age. State of Nebraska, appellee, v. Markice M., appellant.

750 N.W.2d 345

Filed June 13, 2008. No. S-07-572.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.
2. **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. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 2004) provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited appeal process specified therein.
4. ____: ____. A two-part test must be applied to determine whether an expedited review is required under Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 2004). First, the order must implement a different plan than that proposed by the Department of Health and Human Services. Second, there must exist a belief that the court-ordered plan is not in the best interests of the juvenile.
5. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286 (Reissue 2004) does not allow a juvenile court to place a juvenile on probation or exercise any of its other options for disposition and at the same time continue the dispositional hearing.
6. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Petition for further review from the Court of Appeals, Inbody, Chief Judge, and Irwin and Cassel, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, Elizabeth Crnkovich, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Nicole L. Cavanaugh for appellant.

Donald W. Kleine, Douglas County Attorney, and Eric W. Wells for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

STEPHAN, J.

In this appeal, Markice M. contends that the separate juvenile court of Douglas County committed plain error when it did not follow applicable statutory procedures in changing the terms of his probation. A threshold jurisdictional issue is whether the appeal is subject to the expedited review procedures set forth in Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 2004), which require submission to a juvenile review panel. We conclude that appellate jurisdiction exists and that there is plain error which requires reversal.

## BACKGROUND

Based upon a plea of admission, the separate juvenile court of Douglas County adjudicated Markice M. as a child within the provisions of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006) on November 6, 2006. Following a disposition hearing held on February 1, 2007, the juvenile court entered an order placing Markice under the supervision of a probation officer, but allowing him to remain in his home. The court imposed specific terms of probation requiring Markice to, inter alia, (1) write a letter of apology, (2) complete 20 hours of community service, (3) write a 500-word essay on the importance of respecting law enforcement authorities, (4) attend an 8-hour anger management course, and (5) participate in tutoring at his high school. The order included an admonition that failure to abide by the terms of probation "COULD RESULT IN YOUR DETENTION IN A SECURE DETENTION FACILITY AND/OR A REVOCATION OF YOUR PROBATION AND REMOVAL FROM YOUR PARENTS' HOME." A review hearing was scheduled for August 1, 2007.

On March 13, 2007, the court held a hearing on a "Motion for Immediate Custody," which was apparently filed by the State but does not appear in our record. In an order entered the following day "[b]y agreement of the parties," the juvenile court ordered Markice to be released from the Douglas County Youth Center to his parent and further ordered him to be placed in the temporary custody of the Department of Health and Human Services, Office of Juvenile Services (OJS), "for purposes of obtaining

a community based evaluation." The record does not disclose when or why Markice was detained at the youth center.

On April 30, 2007, the juvenile court conducted an "evaluation hearing," at which hearing an evaluation report completed by OJS was made a part of the record. In the report, OJS recommended that Markice remain in the parental home subject to intensive supervision probation and that he be required to participate in individual and family therapy. During the hearing, the juvenile probation officer informed the court that she was concerned about Markice's safety and recommended that he be placed in a group home. The deputy county attorney concurred. Markice, through counsel, agreed with the intensive supervision probation recommendation in the OJS evaluation and argued that group home placement was not warranted and that he should be allowed to remain in the parental home. The juvenile court entered an order on May 1 requiring the probation officer to make application for group home placement.

Markice filed a timely notice of appeal. On the State's motion, the Court of Appeals on December 27, 2007, summarily dismissed the appeal for lack of jurisdiction, concluding that it should have been filed with the juvenile review panel pursuant to §§ 43-287.01 to 43-287.06. We granted the petition for further review filed by Markice.

## ASSIGNMENTS OF ERROR

In his petition for further review, Markice assigns (1) that the Court of Appeals erred in dismissing his appeal on the ground that it should have been taken to a juvenile review panel and (2) that the separate juvenile court committed plain error in changing the terms of his probation without complying with applicable statutory procedures.

## STANDARD OF REVIEW

[1,2] A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.[1] To the extent an appeal calls for

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[1] *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[2]

## ANALYSIS

### Jurisdiction

[3,4] Sections 43-287.01 to 43-287.06 provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited appeal process specified therein.[3] Section 43-287.03 provides:

> A juvenile review panel shall review a disposition of a court when the court makes an order directing the implementation of a plan different from the plan prepared by the Department of Health and Human Services concerning the care, placement, or services to be provided to the juvenile and the department or any other party believes that the court's order is not in the best interests of the juvenile.

Under this statute, a two-part test must be applied to determine whether an expedited review is required.[4] First, the order must implement a different plan than that proposed by the department.[5] Second, there must exist a belief that the court-ordered plan is not in the best interests of the juvenile.[6]

The issue in this appeal is not which of two alternatives—parental home placement recommended by OJS or group home placement ordered by the juvenile court—is in the best interests of the juvenile. Rather, Markice contends that the juvenile court did not follow applicable statutory procedures in effecting what he characterizes as a change in the original disposition ordered by the court. Because the second part of the two-part test clearly is not met, we conclude that this appeal is not subject to the expedited review procedures set forth in §§ 43-287.01

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[2] *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

[3] See, *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996); *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995).

[4] See, *In re Interest of Jeffrey R., supra* note 3; *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993).

[5] *Id.*

[6] *Id.*

to 43-287.06, and the Court of Appeals erred in dismissing the appeal for lack of jurisdiction.

## Merits

Markice contends that the juvenile court erred in changing the terms of his probation from in-home placement to group home placement without following the procedures specified in Neb. Rev. Stat. § 43-286(4) (Reissue 2004). He acknowledges that he did not raise this issue in the juvenile court, but urges that we reach the issue as plain error. The State contends that § 43-286(4) is inapplicable because the hearing which led to the change was a "continued dispositional hearing" and the order requiring group home placement was thus a part of the original dispositional phase of the juvenile proceeding, not a subsequent modification.[7] We disagree with the State's position.

[5] Disposition of juveniles adjudicated under § 43-247(1) is governed by § 43-286. Section 43-286(1)(a) permits a court to continue a dispositional hearing "from time to time upon such terms and conditions as the court may prescribe." It also authorizes specific alternative dispositions, one of which is to "[p]ermit the juvenile to remain in his or her own home . . . subject to the supervision of the probation officer."[8] We agree with the Nebraska Court of Appeals that § 43-286 "does not allow the juvenile court to place a juvenile on probation or exercise any of its other options [for disposition], and at the same time continue the dispositional hearing."[9] The juvenile court did not purport to do so in its dispositional order of February 13, 2007. Rather, it placed Markice on probation while permitting him to remain in his home, and scheduled a "probation review hearing" for August 1. The disposition was complete upon entry of this order.

The subsequent order requiring group home placement therefore constituted a change in the terms of probation specified in the dispositional order. When the State contends that a juvenile

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[7] Brief for appellee at 4.

[8] § 43-286(1)(a)(ii).

[9] *In re Interest of Torrey B.*, 6 Neb. App. 658, 666, 577 N.W.2d 310, 316 (1998).

placed on probation has violated a term of probation or an order of the court, it is required to file a motion to revoke or change the disposition.[10] The motion "shall set forth specific factual allegations of the alleged violations" and a copy must be served on all persons entitled to service.[11] The juvenile is entitled to a hearing to determine the validity of the allegations.[12] At the hearing,

> [t]he juvenile shall also be entitled to speak and present documents, witnesses, or other evidence on his or her own behalf. He or she may confront persons who have given adverse information concerning the alleged violations, may cross-examine such persons, and may show that he or she did not violate the conditions of his or her probation or, if he or she did, that mitigating circumstances suggest that the violation does not warrant revocation.[13]

These procedures were not followed in this case. The record does not include a motion containing factual allegations that Markice violated a term of his probation or an order of the court. The hearing at which the court decided to change its original disposition was for the purpose of reviewing the evaluation previously ordered by the court. The probation officer recommended group home placement due to safety concerns, not probation violations. The State does not contend that the hearing complied with § 43-286(4); it argues, incorrectly, that the hearing was a continuation of the original disposition and that the statute therefore did not apply.

[6] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[14] Under similar circumstances, the Court of Appeals found plain error where a juvenile who had been placed on probation

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[10] *Id.*; § 43-286(4)(b).

[11] § 43-286(4)(b)(i).

[12] § 43-286(4)(b)(ii).

[13] *Id.*

[14] *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

but allowed to remain in his parents' home was subsequently ordered committed to OJS for placement at a youth rehabilitation and training center without compliance with the procedures specified in § 43-286(4).[15] We reach the same conclusion here. The order requiring Markice to be placed in a group home had the effect of changing a term of his previously ordered probation without following the applicable statutory procedure.

## CONCLUSION

For the reasons discussed, we reverse the order of dismissal entered by the Court of Appeals and remand the cause to that court with directions to vacate the order entered May 1, 2007, by the separate juvenile court of Douglas County, and to remand the cause to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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[15] *In re Interest of Torrey B., supra* note 9.

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TIMOTHY B. BARNES, RESPONDENT.

750 N.W.2d 668

Filed June 13, 2008. No. S-07-709.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. ____: ____. When credible evidence in an attorney discipline proceeding is in conflict on material issues of fact, the Nebraska Supreme Court considers and gives weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 4 (rev. 2004), the Nebraska Supreme Court may consider and impose the following public sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the

maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

5. ____. The Nebraska Supreme Court evaluates each attorney discipline case individually, in light of its particular facts and circumstances.
6. ____. In attorney discipline cases, the Nebraska Supreme Court considers (1) aggravating and mitigating circumstances, (2) the attorney's conduct underlying the charges and throughout the proceeding, and (3) the propriety of a sanction with the sanctions imposed in similar cases.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court charged respondent, Timothy B. Barnes, with violating his oath of office under Neb. Rev. Stat. § 7-104 (Reissue 1997) and the following provisions of the Nebraska Rules of Professional Conduct: rule 1.3 (duty to act with reasonable diligence and promptness in representing client), rule 1.4 (duty to promptly communicate with client about means of accomplishing client's goals, status of matter undertaken, and client's reasonable requests for information), and rule 1.16 (duty to protect client's interest upon termination of representation). The charges stemmed from Barnes' negligent handling of his client's legal matter and his failure to communicate with the client.

Barnes was retained by an animal welfare group, Hi Plains Animal Welfare Society (HiPAWS), to help it obtain nonprofit corporation status. After HiPAWS retained Barnes, he failed to complete the matter and failed to notify HiPAWS that he was unable to do so. He did not return any of the money HiPAWS paid for his fee and expenses until after the Counsel for Discipline had filed formal charges against him. The evidence does not show that he has repaid the full amount of his unearned fee.

The referee found clear and convincing evidence to support the formal charges. He recommended that Barnes be publicly censured and reprimanded. We agree with the referee's findings that the formal charges are supported by clear and convincing evidence. But we conclude that the recommendation of a public reprimand is not an appropriate sanction under these facts. We suspend Barnes from the practice of law for 30 days, subject to the conditions stated below.

## BACKGROUND

Barnes was admitted to practice law in Nebraska in August 2003. From July 2003 to March 2005, he worked for a law firm in Mitchell, Nebraska. After March 2005, he was a solo practitioner in Scottsbluff, Nebraska. His practice primarily involved domestic relations, criminal law, and serving as a guardian ad litem. At some point, he was hired part time as a deputy Kimball County Attorney.

Most of these events regarding the formal charges took place in 2006 while Barnes was a solo practitioner in Scottsbluff. The referee found that in February 2006, HiPAWS retained Barnes and paid him a flat fee of $1,500 and $500 for expenses to obtain tax-exempt status for HiPAWS under I.R.C. § 501(c)(3) (2000). Barnes put the $500 in his trust account and the $1,500 in his business account. He had never completed a § 501(c)(3) application by himself. He helped with an application while working for the Mitchell law firm, but his work was limited to proofreading. He knew that he would also need to file articles of incorporation for HiPAWS, and both parties understood that his professional fee covered this filing.

HiPAWS sent documentation to Barnes about its group when it paid him $2,000 in February 2006, but he did not initially request any further documentation. In May, after HiPAWS attempted to contact Barnes, he e-mailed HiPAWS to set up a meeting. He did not, however, attend that meeting. He also failed to attend a rescheduled meeting in July after learning that he was required to be at a court hearing instead. Barnes finally met with HiPAWS members on July 20. He requested further documentation, which the members later sent to him. He also stated that he would need several more weeks to complete

the § 501(c)(3) application but did not specify a reason for the delay. At the end of July, Barnes closed his office, terminated his e-mail account, and moved to Utah. He moved there with his family to take advantage of a special education program in Salt Lake City for his 9-year-old daughter. In August, he was offered a job in Utah; he currently works there as a prosecutor. He did not inform HiPAWS of his move.

In September 2006, Barnes sent HiPAWS a partially completed § 501(c)(3) application and requested further information. He did not send paperwork for filing articles of incorporation. HiPAWS did not immediately respond to Barnes' request for more information because HiPAWS wanted clarification. A member attempted to contact Barnes by e-mail and telephone and finally obtained his new contact information through the bar association. In November, after speaking to Barnes, a HiPAWS member sent him the additional information he had requested by mail. Barnes, however, never completed the application despite many e-mails from HiPAWS.

After moving to Utah, Barnes and his family began to have health problems, and he put the HiPAWS application "on the backburner." Barnes testified that from late 2006 until March 2007, he was having unexplained, debilitating headaches. He stated that he underwent extensive testing, including MRI's, CT scans, and even a spinal tap, to ensure he did not have an aneurysm. In 2007, his wife was dealing with mental health problems when she became unexpectedly pregnant with their fourth child, who was born in September 2007. Besides his oldest daughter's special needs, his 5-year-old daughter was having growth problems and was undergoing chromosome testing for genetic disorders. Barnes also underwent surgery for an undisclosed reason in August 2007. But despite these health problems, he never informed HiPAWS that he could not do the work, because he still believed that he could.

In December 2006 and January 2007, a HiPAWS member contacted the Counsel for Discipline. Afterward, in January, the member informed Barnes that HiPAWS would proceed with its complaint unless he finished the project or refunded its payment of fees and expenses. The Counsel for Discipline filed formal charges against Barnes in June 2007. In August, Barnes

refunded to HiPAWS $1,000 of the money it paid him for his fee and the $500 it paid him for expenses; he also promised to repay the remaining $500 of his unearned fee. But he had not done so when the referee hearing occurred in October.

At the referee's hearing, Barnes testified that he had initially contacted a couple of attorneys about the § 501(c)(3) application but that their responses did not help him. He did not attempt to contact a tax professional; nor did he contact anyone at his former law firm because he did not feel comfortable calling anyone there. He believed that he could learn the process on his own.

Barnes testified that he did not refund the $500 for expenses immediately in January 2007 because he was planning to write one check to HiPAWS for the full amount. He also stated that he had not yet repaid the remaining $500 because his finances were "strapped" following his surgery and the birth of his fourth child. But he testified that he planned to repay the $500 within a couple of months.

The referee found Barnes had fully cooperated with the Counsel for Discipline, had admitted most of the allegations, had expressed remorse over his failure to complete the application, and intended to repay the remaining $500. The referee further found that there was clear and convincing evidence to support the formal charges. The referee specifically found that Barnes had failed to take reasonable steps to protect his client's interest, such as giving reasonable notice of his termination of representation, allowing time for employment of other counsel, and refunding all advanced payment of fees or expenses that he had not earned or incurred.

Regarding mitigating considerations, the referee found that Barnes had made a good faith effort to do the work because the application was two-thirds completed. He also found that Barnes had returned the documentation HiPAWS had provided. Finally, he found that Barnes had left Nebraska for personal and family issues and was now employed as a prosecutor within the realm of his experience and training. But the referee characterized Barnes as "an unfortunate example of an inexperienced solo practitioner entering into a project and representation which was beyond his legal experience and training" who had failed to seek the assistance of attorneys who could have helped him.

The referee recommended that this court publicly censure and reprimand Barnes.

## ASSIGNMENT OF ERROR

The Counsel for Discipline takes exception to the referee's recommendation of a public censure and reprimand under these facts.

## STANDARD OF REVIEW

[1,2] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[1] When credible evidence is in conflict on material issues of fact, however, we consider and give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[2]

## ANALYSIS

Barnes has not filed exceptions to the referee's report. Besides its exception to the referee's recommendation, the Counsel for Discipline also takes exception to a minor misstatement in the referee's findings of fact. We agree the record clearly shows the statement was an error and have corrected it. We find clear and convincing evidence in the record that Barnes has violated his oath of office as an attorney under § 7-104 and the following provisions of the Nebraska Rules of Professional Conduct: rules 1.3, 1.4, and 1.16.

[3,4] Under Neb. Ct. R. of Discipline 4 (rev. 2004), we may consider and impose the following public sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.[3] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the

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[1] *State ex rel. NSBA v. Kinney*, 274 Neb. 412, 740 N.W.2d 607 (2007).

[2] *Id.*

[3] See *State ex rel. Counsel for Dis. v. Wadman, ante* p. 357, 746 N.W.2d 681 (2008).

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]

[5,6] We evaluate each attorney discipline case individually, in light of its particular facts and circumstances.[5] We consider aggravating and mitigating circumstances, as well as the attorney's conduct underlying the charges and throughout the proceeding.[6] In addition, we consider the propriety of a sanction with the sanctions imposed in similar cases.[7]

The evidence shows that Barnes seriously neglected and failed to complete a matter entrusted to him and that his failure to promptly pursue the matter adversely affected his client's interests. A HiPAWS member testified that the group decided not to pursue the § 501(c)(3) application after its money was refunded because another animal welfare society had since been organized in the county. In addition, we note that although Barnes did not appear before this court, the Counsel for Discipline reported that Barnes has still not repaid the remaining $500 of his unearned fee.

As mitigating factors, we recognize that during some of the time Barnes neglected his client's legal matter, he was contending with a series of personal and family health issues that undoubtedly caused him mental and financial stress. We note that he cooperated with the Counsel for Discipline, admitted most of the allegations in the formal charges, and acknowledged responsibility for his actions. There is also no record of other complaints against Barnes, and he is no longer engaged in the private practice of law.

Despite Barnes' personal problems, however, we find troubling his failure to seek assistance on a matter about which he had little experience. This failure occurred before the bulk

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[4] *Id.*

[5] See *id.*

[6] See *id.*

[7] See *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

of his personal and family health problems began, and those problems were not so severe as to totally excuse his failure to promptly communicate with his client. Finally, in a similar case, we suspended an attorney who failed to return an unearned portion of a client's fee until after the client filed a complaint against him.[8]

After a de novo review, it is the judgment of this court that Barnes be suspended from the practice of law for 30 days, beginning immediately. Barnes' license to practice law shall be reinstated at the end of the 30-day suspension, provided that he has complied with Neb. Ct. R. of Discipline 16 (rev. 2004) and further provided that he has repaid to HiPAWS the remaining portion of his unearned fee. Barnes 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 SUSPENSION.

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[8] See *State ex rel. Counsel for Dis. v. Hynes*, 262 Neb. 307, 631 N.W.2d 499 (2001).

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ALAN DEAN JENSEN, APPELLEE, V.
KATHLEEN A. JENSEN, NOW KNOWN AS
KATHLEEN A. KERRIGAN, APPELLANT.

750 N.W.2d 335

Filed June 13, 2008. No. S-07-728.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Judgments: Final Orders.** Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not necessarily operate as "judgments" and may be wholly ineffective and void as such.
3. ____: ____. A conditional judgment may be wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
4. ____: ____. While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in

conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made.

5. **Judgments: Equity.** The void conditional judgment rule does not extend to actions in equity.
6. ____: ____. Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged to properly devise a remedy to meet the situation.
7. ____: ____. Where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature.
8. **Property Settlement Agreements.** Where a property division is made pursuant to a voluntary agreement by the parties, a further equitable consideration arises as to the need to protect the parties' bargaining power and the benefit of a bargain once made.
9. **Property Settlement Agreements: Presumptions.** Where parties have forgone their opportunity to litigate disputes and have chosen instead to enter into an agreement, their reliance on the agreement may be presumed.
10. **Property Settlement Agreements: Equity.** Inequity may result if a court adopts a policy of less than full enforcement of mutually agreed-upon property and support agreements.
11. **Property Settlement Agreements: Child Support: Public Policy.** Public policy forbids enforcement of a private agreement that purports to discharge a parent's liability for child support, if the agreement does not adequately provide for the child.
12. **Child Support.** When overpayments of child support are voluntarily made outside the terms of a court order, the general rule is that no credit is given for those payments, because such a credit would be tantamount to allowing one party to unilaterally modify the court's order, which could result in the deprivation of future support benefits.
13. **Child Support: Equity.** A credit against child support can be granted where equity requires it.
14. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
15. **Res Judicata.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
16. **Courts: Judgments.** A district court has the inherent power to determine the status of its judgments.
17. ____: ____. The district court may, on motion and satisfactory proof that a judgment has been paid and satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Stephanie Weber Milone for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

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

GERRARD, J.

The parties to this appeal entered into an agreement, incorporated into a court order, by which the father of a minor child agreed to pay the mother $14,000. If the mother ever sought and received child support, however, the order provided that the father was to receive $14,000 credit against the child support award. The primary issue presented in this appeal is whether such a provision is enforceable. We conclude that on the facts of this case, the agreement is enforceable, and we affirm the judgment of the district court.

## BACKGROUND

Alan Dean Jensen and Kathleen A. Jensen, now known as Kathleen A. Kerrigan, are the parents of a minor child whose paternity was adjudicated in a decree entered on December 29, 1999. That decree established joint legal and physical custody, and because Alan and Kathleen were living together at the time, no child support was awarded.

The decree of paternity was modified on March 14, 2000. The modification established a schedule for the parties' physical custody of the child. The 2000 modification did not order ongoing child support, but provided that

> [Alan] has delivered to [Kathleen], the sum of $14,000.00, which amount is considered toward any future child support that [Kathleen] may request from the Court. In the event [Kathleen] does request child support in the future, the $14,000.00 shall be used toward the payment of that child support each month, before [Alan] shall be required to make any actual payments to the Court. In the event

> [Kathleen] never requests child support during the minority of the child, she shall not be required to repay or credit this money to [Alan].

Alan testified that the $14,000 payment had been made at Kathleen's request. Alan explained that Kathleen "didn't want to get an apartment. She wanted [the child] to have a house with a backyard. And I told her that I would help her in that regard in as much as that would provide shelter for my son." Kathleen conceded that she received the $14,000 payment and used it to make a downpayment on a house.

On January 12, 2001, Kathleen filed an application for another modification of the decree. Kathleen alleged that the joint custody arrangement was not working and prayed that she be awarded sole custody. Alan cross-petitioned for custody and child support. The parties then, through mediation, entered into a "parenting plan" reestablishing a schedule for joint custody. The parenting plan was not memorialized by the court at that time, nor was the decree modified.

On October 14, 2003, Alan petitioned to modify the decree, alleging, for a number of reasons, that circumstances had changed since the parenting plan and previous court orders and that he should be awarded sole custody and child support. On November 19, the court modified the decree to reflect the previous parenting plan. On November 21, Kathleen cross-petitioned for sole custody and child support.

The case was not tried until September and October 2005. On March 7, 2006, the court entered an order modifying the decree, awarding Kathleen sole custody, and establishing a visitation schedule. The court ordered Alan to pay child support "in the amount of $1,100 per month commencing the first month after the signing and entry of this Order and continuing until the minor child reaches majority, marries, is emancipated, dies, or until further order of the Court." The order did not address a credit against the child support award, and there is no indication in the record that Alan raised the issue of a credit at that time. Alan appealed from the March 7 order, assigning error only to the district court's failure to award him sole custody. In a memorandum opinion filed December 12, the Court of Appeals affirmed the district court's custody award.

On March 29, 2007, Alan filed a declaratory judgment action in the district court, seeking a declaration with respect to the $14,000 credit provision of the March 14, 2000, order. In response, Kathleen alleged that the credit provision was (1) void as a conditional order, (2) void as against public policy, (3) void as impermissibly contracting away the right of the child to receive child support, and (4) barred by res judicata. Kathleen also alleged that the $14,000 payment "has been expended in maintaining and supporting the parties' minor child" and that she was unable to return it. At trial, Kathleen testified that she had cut back her work hours, "because I thought I was going to have this money coming in. And now that it's not in, we're struggling."

The district court rejected each of Kathleen's arguments. The court reasoned that the credit provision had not bargained away the right to receive child support, but was in effect a negotiated settlement provision in which Alan had agreed to pay a sum of money that was to be used in supporting the child. The court concluded that the March 14, 2000, order was valid and enforceable, and declared that Alan was entitled to a credit of $14,000 to be applied to the March 7, 2006, child support award.

## ASSIGNMENTS OF ERROR

Kathleen assigns that the district court erred in declaring the $14,000 credit provision enforceable and in granting Alan such credit against his child support obligation.

## 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 conclusion reached by the trial court.[1]

## ANALYSIS

Kathleen offers three arguments in support of her assignments of error: that the credit provision was a void conditional order, that it is unenforceable as against public policy, and that

[1] *Law Offices of Ronald J. Palagi v. Howard, ante* p. 334, 747 N.W.2d 1 (2008).

Alan's enforcement of the provision is barred by res judicata. We will address each argument in turn.

### Conditional Order

[2,3] Kathleen argues that the credit provision is a void conditional judgment. Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not necessarily operate as "judgments" and may be wholly ineffective and void as such.[2] We have explained that a conditional judgment may be wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.[3]

[4-7] But we have also explained that while conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made.[4] And more importantly, we held in *Strunk v. Chromy-Strunk* that the void conditional judgment rule does not extend to actions in equity.[5] Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged to properly devise a remedy to meet the situation. Therefore, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature.[6]

[8-10] Instead, certain conditional judgments may be considered erroneous or an abuse of discretion, be set aside where procured by fraud, or be considered void as contrary to statute or public policy.[7] There is no evidence of fraud in this case, and we will consider public policy more completely in the context of Kathleen's next argument. We have also said that where a

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[2] See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[3] See *id*.

[4] *Id*.

[5] *Id*.

[6] See *id*.

[7] *Id*.

property division is made pursuant to a voluntary agreement by the parties, a further equitable consideration arises as to the need to protect the parties' bargaining power and the benefit of a bargain once made.[8] Where parties have forgone their opportunity to litigate disputes and have chosen instead to enter into an agreement, their reliance on the agreement may be presumed. Inequity may result if the court adopts a policy of less than full enforcement of mutually agreed-upon property and support agreements.[9] That would be the case here. We note, in particular, that although Kathleen argues the March 14, 2000, order was void, she has made no offer to return the $14,000 payment she received as a result of the order.

The credit provision at issue here was the product of negotiation and agreement by the parties, and was incorporated by the court into what was implicitly a fair and reasonable modification of the paternity decree. Even assuming it was subject to collateral attack, it was not so indefinite as to be unenforceable. And the evidence suggests that the provision was an appropriate exercise of the court's equitable powers, because it made possible a settlement provision that, at the time, was apparently in the child's best interests. We reject Kathleen's claim that the provision was an impermissible conditional order.

### Public Policy

[11] Kathleen also argues that the credit provision is unenforceable as against public policy. We have explained that public policy forbids enforcement of a private agreement that purports to discharge a parent's liability for child support, if the agreement does not adequately provide for the child.[10] But the agreement at issue here did not *discharge* Alan's liability for child support. Instead, it expressly provided Alan with credit for a payment that the parties agreed would constitute prepayment of any subsequent child support award. We conclude that on the facts of this case, the agreement is enforceable.

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[8] *Id.*

[9] *Id.*

[10] See *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007).

[12,13] When overpayments of child support are voluntarily made *outside* the terms of a court order, the general rule is that no credit is given for those payments.[11] The principle behind this rule is that such a credit would be tantamount to allowing one party to unilaterally modify the court's order, which could result in the deprivation of future support benefits.[12] Nonetheless, even then, a credit against child support can be granted where equity requires it.[13]

But Alan does not need equitable relief in the present case, because this case does not involve a voluntary *overpayment*. Rather, it involves a payment that was actually incorporated into the court's order. Alan is not seeking relief from the provisions of the decree, as modified by the March 14, 2000, order—he is asking the court to enforce the modified decree's express terms. Alan's $14,000 payment was neither "voluntary" nor an "overpayment," because it *was* the payment specified in the court's order.

Instead, the question here is whether principles of equity demand that the credit provision of the March 14, 2000, order be set aside. The few courts to have considered comparable circumstances have concluded that giving such credit is appropriate.[14] Such a credit clause does not violate public policy because it is regarded as a lump-sum payment of child support, not a waiver of child support altogether.[15] And the agreement still provides regular support for the children, because it is the custodial

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[11] See, *Jameson v. Jameson*, 13 Neb. App. 703, 700 N.W.2d 638 (2005); *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001); *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000).

[12] See *Griess, supra* note 11.

[13] See *id.* See, e.g., *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990); *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986).

[14] See, *Hewson v. Hewson*, 708 N.W.2d 889 (N.D. 2006); *Picht v. Henry*, 252 Iowa 559, 107 N.W.2d 441 (1961); *Blume v. Stewart*, 715 N.E.2d 913 (Ind. App. 1999); *Marriage of Babbitt*, 50 Wash. App. 190, 747 P.2d 507 (1987).

[15] See *Marriage of Babbitt, supra* note 14. See, also, *Hewson, supra* note 14.

parent's responsibility, being aware of the credit provision, to budget the payment accordingly.[16]

Kathleen relies on *Gibson v. Gibson*,[17] in which this court reversed a trial court's entry of a lump-sum child support award. But *Gibson* is distinguishable. The judgment in *Gibson* did not involve a credit provision. Rather, the trial court attempted to award, in advance, all the child support to be paid for the following 13 years. We held that it was

> improper under the law to make a final, definite, and positive entry of such a judgment for the support of a minor child, for the amount to be paid must vary with the several needs of the child . . . and the court may also consider such changes in the financial condition of the father as are shown by the testimony. Therefore, the law has provided that the monthly payments can be changed from time to time as the evidence warrants.[18]

The problem in *Gibson* was not, as Kathleen suggests, an order for a lump-sum payment. Instead, we found error in the trial court's attempt to order, without the agreement of the parties, that all the child support be paid in advance. That error is not present here, because the March 14, 2000, order was the product of a settlement agreement and does not preclude a future child support award or adjustment of that award. In fact, the order expressly acknowledges that possibility—it simply directs that Alan be credited for a substantial payment that he has already made.

Kathleen also argues that the March 14, 2000, order was not accompanied by a child support worksheet. It is true that all orders for child support, including modifications, should include the appropriate child support worksheets.[19] And in the event of a deviation from the Nebraska Child Support Guidelines, the trial court should state the amount of support that would have been required under the guidelines absent the deviation and include

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[16] See *Blume, supra* note 14.

[17] *Gibson v. Gibson*, 147 Neb. 991, 26 N.W.2d 6 (1947).

[18] *Id.* at 1000, 26 N.W.2d at 10.

[19] See, e.g., Nebraska Child Support Guidelines, paragraph C; *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file.[20]

But it is not clear that a worksheet would have been necessary or appropriate for the March 14, 2000, modification of the decree, given that no ongoing child support award was entered in that order. And the basis for the order—both the $14,000 payment and the credit provision—was apparent from the record. In any event, we have never held that the absence of a child support worksheet provides a basis for a collateral attack on a final judgment. Once the March 14 order became final, even without a worksheet, it was enforceable.

Finally, Kathleen argues that Alan did not prove that giving him a credit against child support is in the best interests of the child. But Kathleen's argument misses the point. The record establishes that the $14,000 payment was originally made so Kathleen could make a downpayment on a house, for her benefit and the child's. Presumably, without the credit provision, no such payment would have been made.

Although the March 14, 2000, order was entered by agreement of the parties, determination of the best interests of a child includes a judicial decision based upon evidence and is not governed exclusively by a parental stipulation.[21] This principle imposed upon the trial court, in entering the March 14 order, an obligation to independently consider whether the order was in the best interests of the child.[22] There is no evidence in the record to suggest that it did not do so, and we reject Kathleen's collateral attack to the contrary. Because the March 14 order was presumably in the child's best interests when it was entered, it was not Alan's burden to prove it was *still* in the best interests of the child in order to have it enforced.

Kathleen was seeking relief from the terms of the modified decree, not Alan. Essentially, Kathleen sought to modify the

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[20] *Gress, supra* note 19.

[21] See, *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). See, also, *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001).

[22] See *id*.

decree again to set aside the credit provision. But the March 14, 2000, modification to the decree was the product of negotiation and settlement between the parties. And Kathleen presented no evidence of particular hardship to the child, or any other evidence that would justify setting the stipulated settlement aside. Without such evidence, we find no equitable basis for reversing the trial court's decision to enforce the modified decree that was agreed to by the parties and approved by the court.

### Res Judicata

Kathleen's final argument is that Alan's claim for credit against the 2006 child support award was barred by res judicata. Kathleen argues that Alan should have asked for credit in the last modification proceeding, and not after the child support award was entered. Therefore, Kathleen asserts that his declaratory judgment action should be barred by res judicata.

[14,15] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[23] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[24]

But Alan's claim for credit against his child support obligation was not before the court, expressly or implicitly, in the last modification proceeding. Rather, it had been conclusively settled in the March 14, 2000, modification, from which Kathleen did not appeal. Alan was entitled to rely on the provisions of the March 14 order, at least until it became clear that he and Kathleen disagreed about its effectiveness. There is nothing in the record to suggest that Alan knew, in the last modification proceeding, that it would be necessary to seek a declaratory

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[23] *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[24] *Id.*

judgment to enforce the provisions of the March 14 order.[25] He was not required, in the later proceedings, to anticipate a collateral attack on the credit provision.

[16,17] Instead, Alan's declaratory judgment action sought to establish, insofar as the $14,000 credit was concerned, that a portion of Alan's liability for child support had already been discharged. We have previously noted, in the context of approving credit against child support judgments, that a district court has the inherent power to determine the status of its judgments.[26] The district court may, on motion and satisfactory proof that a judgment has been paid and satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.[27] While the 2006 child support award set a date upon which Alan's obligation to pay child support would commence, that did not preclude the court from finding, pursuant to the March 14, 2000, order, that part of the March 7, 2006, award had already been satisfied by Alan's $14,000 payment.

## CONCLUSION

The credit provision was not void as a conditional order or as against public policy. Alan's declaratory judgment action to enforce the provision was not barred by res judicata. Therefore, Kathleen's assignments of error lack merit, and we affirm the judgment of the district court.

AFFIRMED.

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[25] See *id*.

[26] *Cotton, supra* note 13. See, also, *Berg, supra* note 13; *Petersen, supra* note 13.

[27] *Berg, supra* note 13; *Cotton, supra* note 13.

# Cass County Bank, a Nebraska banking corporation, appellee, v. Dana Partnership, a Nebraska general partnership, et al., appellants.

750 N.W.2d 701

Filed June 20, 2008. No. S-07-431.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Forbearance: Estoppel.** Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
3. **Estoppel.** Promissory estoppel requires that reliance be reasonable and foreseeable.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Cass County: Randall L. Rehmeier, Judge. Affirmed.

Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellants.

Steven J. Woolley and Alan E. Pedersen, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Gerrard, J.

## NATURE OF CASE

In this case, Cass County Bank (Bank) seeks reimbursement from the appellants for money it paid to Upland Construction Company (Upland) pursuant to a letter of credit. The Bank contends that the appellants are liable for the Bank's extension and payment of the letter of credit because they promised to sign a promissory note guaranteeing the letter. The appellants claim, in essence, that they are not liable because they never signed the note. The district court found in favor of the Bank. The primary

issues presented in this appeal are whether the Bank was authorized to issue the letter of credit and whether the Bank is entitled to reimbursement from the appellants.

## FACTS

Anil K. Agarwal and Sudha Agarwal, husband and wife, are the parents of three children, one of whom is Arun Agarwal. At all times relevant to this case, the children were co-owners of Dana Partnership, which in turn owns 90 percent of Reliant Construction, L.L.C. (Reliant). Sudha was Dana Partnership's managing agent until 2001, when the partnership agreement was amended and Arun became the managing agent. Arun is also Reliant's managing agent.

Although Sudha was no longer Dana Partnership's managing agent, she remained involved with the operation of the company. Douglas Rasmussen, vice president of the Bank and the loan officer responsible for overseeing loans made to Dana Partnership, testified that Arun had directed Rasmussen to speak to Sudha regarding business dealings that involved Dana Partnership.

In 2003 and 2004, the Bank made various loans and issued multiple letters of credit to Dana Partnership, all of which were signed by Arun in his capacity as Dana Partnership's managing agent. Anil and Sudha cosigned on a number of these loans. The record reflects that, with regard to the loans and letters of credit issued by the Bank at Dana Partnership's request, it was the Bank's general practice to take the loan documents to Dana Partnership's office, where the documents would be signed. And the Bank would not advance any money or issue a letter of credit without first acquiring the necessary signatures.

On June 6, 2003, Reliant entered into a subcontract agreement with Upland to perform roofing work on a project to build a waste disposal facility. Pursuant to the subcontract agreement, Reliant was required to post a performance bond. In place of a performance bond, however, Upland agreed to accept a letter of credit from Reliant, listing Upland as the beneficiary.

On August 8, 2003, the Bank, at Arun's request, issued irrevocable standby letter of credit No. 41558 (original letter of credit), naming Upland as the beneficiary. The amount of the original letter of credit was $90,228 and had a stated expiration date of

June 1, 2004. June 1 was chosen as the expiration date because Arun and Upland believed that Reliant's roofing job would be completed by this date. In conjunction with the issuance of the original letter of credit, Dana Partnership, as borrower, and Anil and Sudha, as cosigners, signed and gave the Bank commercial promissory note No. 41558 dated August 8, 2003. This commercial promissory note was for the same amount as the original letter of credit, $90,228, and had a maturity date of June 1, 2004, which corresponded with the expiration date on the original letter of credit.

The commercial promissory note provided that it was "further governed by the Commercial Loan Agreement," which was signed by Anil and Sudha and dated August 8, 2003. The commercial loan agreement, under the section entitled "ADDITIONAL TERMS," provided, in bold and capital letters, that

> oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower) and us (lender) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it. By signing this agreement, the parties affirm that no unwritten oral agreement exists between them.

Anil and Sudha also signed, on August 8, a personal guaranty for "each and every debt, of every type and description, that [Dana Partnership] may now or at any time in the future owe [the Bank]."

In May 2004, it became apparent that Reliant would not be able to complete the contracted work before the original letter of credit expired on June 1. As a result, Paul Sum, Upland's owner and president, contacted Arun and told Arun that the expiration date on the original letter of credit needed to be extended. Sum testified that he specifically instructed Arun to extend the expiration date on the original letter of credit to October 31, because Reliant should have been able to complete the project by that

date. According to Sum, Arun assured him that he would get a new letter of credit with an expiration date of October 31.

Following his conversation with Sum, Arun attempted to contact Rasmussen at the Bank. However, Arun was not able to reach Rasmussen personally, so Arun left Rasmussen two or three voice mail messages. Rasmussen testified that Arun indicated in his messages that the original letter of credit was expiring and that Reliant needed a new letter of credit because the project had been delayed. According to Rasmussen, Arun also indicated that he would be going out of town. Rasmussen testified that, due to pressing matters at the Bank, he was unable to return Arun's calls.

Because of the delay in hearing back from Rasmussen, Arun instructed Sudha to try and contact Rasmussen, which she did. Rasmussen had conversations with Sudha on two or three occasions toward the later part of May 2004. Rasmussen testified that he and Sudha discussed the expiration date of the original letter of credit and that Sudha was "anxious" because the expiration date was approaching. Rasmussen testified that Sudha instructed him to contact Sum in order to determine how long the project was going to be delayed and to determine how long the original letter of credit needed to be extended. Sudha, however, testified that she did not discuss extending the original letter of credit with Rasmussen. She claimed instead that her conversation with Rasmussen was merely to inform Rasmussen that Arun was trying to contact him.

During the final week of May 2004, Rasmussen contacted Sum, who informed Rasmussen that the original letter of credit should be extended to October 31. Rasmussen testified that on May 27, he called Sudha and told her that, after talking with Sum, it had been determined that the original letter of credit's expiration date should be extended to October 31. Rasmussen testified that Sudha indicated to him that "it needed to be done" because the original letter of credit was expiring. According to Rasmussen, Sudha instructed him to send the new letter of credit to Upland before the original letter of credit expired on June 1.

Rasmussen testified that he told Sudha, on May 27, 2004, that the Bank would need the appropriate signatures on an

amendment to the promissory note that would correspond with the issuance of the new letter of credit. Rasmussen testified that Sudha told him to "[g]o ahead, and that she would see that it got signed." Rasmussen told Sudha that he was not going to be back in his office until June 1 and that he would prepare and mail the new loan documents to her on that day.

On May 27, 2004, after talking with Sudha, Rasmussen prepared irrevocable standby letter of credit No. 41558A (replacement letter of credit). This replacement letter of credit contained the same terms as the original letter of credit except that the expiration date on the replacement letter of credit had been extended to October 31. On the same day, Rasmussen faxed a copy of the replacement letter of credit to Sum and placed the original in the mail.

Rasmussen admitted that it was not his general practice to advance money to a Bank customer without first receiving a signature. Nevertheless, Rasmussen testified that he did so in this instance because the Bank "had a longstanding relationship with the Agarwals and they've always done what they said they would do." Rasmussen explained that the Bank was "doing a favor to a good loan customer" who was in "distress." Rasmussen testified that he would not have issued the replacement letter of credit without having received Sudha's verbal assurance that the amendment to the promissory note would be signed.

When he returned to work on June 1, 2004, Rasmussen prepared the amendment to the promissory note. The amendment was dated June 1, 2004; was for the same amount as the original promissory note, $90,228; and had a maturity date corresponding with the replacement letter of credit, October 31. Rasmussen testified that he mailed the amendment and a copy of the replacement letter of credit to Sudha on June 1.

"A few weeks" after Rasmussen mailed the loan documents to Sudha, Rasmussen realized that the amendment to the promissory note had not been signed and returned to the Bank. Rasmussen testified that he contacted both Sudha and Arun, each assured him that he or she would "look into it and get back to [him]," and neither one of them indicated that the amendment would not be signed. Both Arun and Sudha, however, claimed that they have never received an amendment or modification to

the original letter of credit. Arun testified that the first time he realized that the original letter of credit had been amended or modified was not until the second week of August 2004.

During the summer of 2004, Upland apparently became dissatisfied with Reliant's work and, on various occasions, sent letters to Arun threatening to exercise its rights under the replacement letter of credit. On June 8, Sum faxed a letter to Arun in which Sum directed Arun "to complete the roof installation . . . no later than Tuesday, June 15, 2004 or Upland will enforce all remedies against [Reliant] per our subcontract agreement, including cashing in your Irrevocable Stand by Letter of Credit #41558A at the . . . Bank." Arun never questioned Upland's reference to the replacement letter of credit, nor did Arun contact the Bank or Upland and claim that the original letter of credit had already expired on June 1.

In another letter from Sum to Arun, dated June 25, 2004, Sum stated that "[b]ecause of [Reliant's] failure to perform we have held payments to protect our interests and at the present time we are seriously considering exercising our demand on your letter of credit with the . . . Bank." On August 18, Sum faxed a letter to Arun, notifying him that "[a]s a result of [Reliant's] continued failure to perform Upland has no choice but to declare [Reliant] in default of [the] subcontract and replace [Arun's] firm."

The following day, Arun faxed a letter to Sum in which he discussed, among other things, the efforts Reliant was making toward completing the project and the estimated completion dates for certain tasks. At the close of the letter, Arun stated that "we hope that you [Upland] can hold your intention of accessing our Letter of Credit until next week when you will see progress towards our plan." Despite Arun's letter, Sum went to the Bank on August 19, 2004, and informed Rasmussen that Reliant was in default and that Upland was making a demand on the replacement letter of credit. Sum presented to Rasmussen the necessary documentation, including the replacement letter of credit. The Bank did not pay Sum the funds at that time.

Later that day, Arun faxed a letter to the Bank. In this letter, Arun claimed that Reliant had complied with each of Upland's requests. Arun stated that "our company [Reliant] had agreed to extend [Upland's] letter of credit till August 1, 2004, and

we have never received a copy of that letter of credit extending any further from original date." Arun ended this letter by claiming that Reliant "never executed a subcontract agreement with Upland . . . on this project." Both Rasmussen and Sum testified that Arun's letter was the first time that they had ever heard of August 1, 2004, as being the expiration date. Arun acknowledged that this was the first time he had raised any concerns with regard to the expiration date on the replacement letter of credit.

On August 23, 2004, Reliant filed a complaint for a temporary restraining order and preliminary injunction in the Douglas County District Court, against Upland and the Bank. In its complaint, Reliant sought to prevent Upland from receiving and the Bank from paying any funds under the replacement letter of credit. In its complaint, Reliant made the following admission:

> Letter of Credit No 41558 had an expiration date of June 1, 2004. Due to a number of circumstances beyond the control of the parties hereto, work [o]n the [Reliant] subcontract did not commence until January of this year. As such, it it [sic] became necessary to push back the above referenced completion date for same by several months. As a result Letter of Credit 41558 was replaced by Letter of Credit No 41558A, effective May 27, 2004, in the amount of $90,2[2]8.00, with an expiration date of October 31, 2004 . . . .

The district court denied Reliant's request for a temporary restraining order and preliminary injunction. On August 24, as payment under the replacement letter of credit, the Bank issued a check to Upland in the amount of $90,228.

The Bank filed a complaint against Dana Partnership, Reliant, and Anil and Sudha (collectively appellants) after the appellants refused to reimburse the Bank for its $90,228 payment to Upland. Following a bench trial, the court found that Dana Partnership, on behalf of Reliant, requested the expiration date on the original letter of credit be extended and that Dana Partnership was aware that an amendment to the promissory note would need to be signed. The court further determined, applying principles of promissory estoppel, that Sudha's "promise to complete the necessary loan documentation . . . induced the [Bank] to issue the

Replacement Letter of Credit, and the failure to enforce the . . . agreement to sign said documentation would act as an injustice in this case." Accordingly, the court entered judgment in favor of the Bank and against the appellants.

## ASSIGNMENTS OF ERROR

The appellants contend, renumbered, that the district court erred in (1) finding that the original letter of credit had been validly extended, (2) applying promissory estoppel to modify the terms of the original letter of credit, (3) determining that a third-party beneficiary could modify the terms of a letter of credit that by its terms could not be modified, and (4) finding an implied contract.

## STANDARD OF REVIEW

[1] Given the nature of the relief requested, this action sounds in equity.[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[2]

## ANALYSIS

### Dana Partnership Requested That Original Letter of Credit Be Extended and Promised to Sign Promissory Note

The appellants contend that the district court erred in finding that they reached an agreement with the Bank to issue the replacement letter of credit and to sign the amendment to the promissory note. Although Arun's and Sudha's testimony differed in certain respects from that given by Rasmussen and Sum, the trial court, based on its observation and judgement, clearly gave greater weight to Rasmussen's and Sum's testimony. And in reaching our conclusion de novo, we consider the fact that the trial court saw and heard the witnesses and observed their

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[1] See *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

[2] *Id.*

demeanor while testifying, and we give significant weight to the trial court's judgement as to credibility.

We agree with the district court's factual finding. The various correspondence sent between Sum, Arun, and the Bank, and the complaint for a temporary restraining order and preliminary injunction filed by Reliance, supports Rasmussen's and Sum's versions of the facts. After the original letter of credit had expired on June 1, 2004, Sum sent multiple letters to Arun threatening to make a demand on the replacement letter of credit. Yet Arun never questioned Sum's references to the replacement letter of credit, nor did Arun contact the Bank or Sum and claim that the original letter of credit had already expired. Instead, in a letter faxed to Sum on August 19, Arun requested that Upland not exercise "our Letter of Credit until next week."

Furthermore, in a letter faxed to the Bank on this same day, Arun expressly stated that Reliant "had agreed to extend [Upland's] letter of credit." And finally, in its complaint for a temporary restraining order and preliminary injunction against the Bank, Reliant admitted that "Letter of Credit 41558 was replaced by Letter of Credit No 41558A . . . with an expiration date of October 31, 2004." Simply stated, in light of this evidence, and giving weight to the district court's evaluation of the witnesses' credibility, we agree with the district court and find that Sudha, on behalf of Dana Partnership, requested that the original letter of credit be extended, agreed to October 31, 2004, as the expiration date, and assured the Bank that the amendment to the promissory note would be signed.

### Promissory Estoppel

The appellants next argue that, even if Sudha asked the Bank to issue a replacement letter of credit and then promised to sign the corresponding amendment to the promissory note, this type of oral agreement is prohibited by the original promissory note and is therefore unenforceable. The provision in the original promissory note upon which the appellants rely provides that

> oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower) and us (lender)

> from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it. By signing this agreement, the parties affirm that no unwritten oral agreement exists between them.

The Bank argues, however, that under the principles of promissory estoppel, the appellants cannot rely on the above provision as a way of avoiding liability in this case. We agree. In discussing a contractual provision similar to the one at issue in this case, we have held that "[i]t is well-established that the parties to a contract may avoid such a provision where . . . the party claiming the benefit of the provision is estopped to rely on it."[3]

[2,3] Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[4] Promissory estoppel requires that reliance be reasonable and foreseeable.[5] In the present case, given the particular circumstances and the appellants' conduct, we conclude that the appellants are estopped from relying on the contractual provision at issue as a defense to their liability.

The appellants claim, in essence, that the Bank's reliance on Sudha's promise that the amendment to the promissory note would be signed was neither reasonable nor foreseeable, because the original promissory note prohibited modification by oral agreement. The appellants also contend that the Bank's reliance was not reasonable or foreseeable, because the Bank's decision to issue the replacement letter of credit without first having the necessary signatures on the amendment to the promissory note

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[3] *Griffin v. Geneva Industries, Inc.*, 193 Neb. 694, 696-97, 228 N.W.2d 880, 882 (1975). See, also, *Shreves v. D. R. Anderson Constructors, Inc.*, 206 Neb. 433, 293 N.W.2d 106 (1980).

[4] *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[5] *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994).

was contrary to the customary way in which the Bank and the appellants had interacted in the past.

Notwithstanding the parties' previous dealings and the language in the original promissory note, we are not persuaded by the appellants' argument. Sudha's promise did not form an oral agreement to modify the promissory note. It was a promise to sign a written modification. The Bank does not claim the promise modified the note—the Bank claims it was injured by its reliance on Sudha's promise to modify the note. We agree with the district court and find that, under the particular circumstances of this case, the Bank's reliance on Sudha's promise was both reasonable and foreseeable.

According to Rasmussen, Sudha assured him that the amendment to the promissory note corresponding to the replacement letter of credit would be signed and returned to the Bank. Although it was not the Bank's general practice to issue a letter of credit without first receiving a signature, Rasmussen testified that he did so in this instance because the Bank and the appellants had a longstanding relationship with each other and the appellants had "always done what they said they would do." Rasmussen explained that the Bank was assisting a good loan customer who was in "distress" and that he would not have issued the replacement letter of credit without first receiving Sudha's promise that the amendment to the promissory note would be signed. Accordingly, in direct reliance on Sudha's promise, the Bank issued the replacement letter of credit and shortly thereafter sent Sudha the amendment to the promissory note to be signed.

Given the circumstances under which the promise was made—in particular, the short amount of time remaining with which to extend the original letter of credit before the original letter of credit expired—it was both reasonable and foreseeable that Sudha's promise would induce the Bank to act in reliance upon it. And to refuse to enforce Sudha's promise would work an injustice on the Bank. Accordingly, we conclude that, under the doctrine of promissory estoppel, the appellants are precluded from denying their obligation to reimburse the Bank for the payment made to Upland under the replacement letter of credit.

## Remaining Assignments of Error

[4] Our conclusion that Sudha, on behalf of Dana Partnership, requested the replacement letter of credit be issued and that the appellants are estopped from denying their obligation to reimburse the Bank, is dispositive of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[6] Therefore, we need not address the appellants' remaining assignments of error.

## CONCLUSION

We conclude the district court did not err in finding that the Bank issued the replacement letter of credit pursuant to Dana Partnership's request and that the appellants, under the doctrine of promissory estoppel, are precluded from denying their liability for lack of a signature on the amendment to the promissory note. Accordingly, the judgment of the district court is affirmed.

Affirmed.

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[6] *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

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# Mary Kay Davis, appellant, v. Henry A. Davis, appellee.

750 N.W.2d 696

Filed June 20, 2008. No. S-07-529.

1. **Judgments.** A court has discretion to require reasonable security for an obligor's current or delinquent support obligations when compelling circumstances require it.
2. **Divorce: Judgments: Appeal and Error.** An appellate court reviews a district court's postdissolution order regarding security for a support obligation de novo on the record to determine whether the trial court has abused its discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
5. **Insurance: Contracts.** Neb. Rev. Stat. § 44-704 (Reissue 2004) specifically requires adult insureds to consent to insurance policies on their lives unless they or their spouses are the owners of the policies.

6. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare the state's law and public policy.
7. **Courts: Legislature.** A court is not free to ignore a legislative requirement of affirmative consent.

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

William G. Dittrick and Kirk S. Blecha, of Baird Holm, L.L.P., for appellant.

John S. Slowiaczek and Virginia A. Albers, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

## SUMMARY

Appellant, Mary Kay Davis, appeals the district court's order denying her postdissolution motion. The motion requested an order directing her former spouse, Henry A. Davis, to submit to a physical examination so she could obtain a $1 million insurance policy on his life, naming herself as the beneficiary. She alleged that if Henry died, the policy was necessary as security for his substantial alimony and child support obligations. We conclude that Neb. Rev. Stat. § 44-704 (Reissue 2004) prohibited the district court from granting Mary Kay's request absent Henry's consent to her ownership of an insurance policy on his life.

## BACKGROUND

### PARTIES DISMISS 2001 DISSOLUTION ACTION AND ENTER INTO POSTMARITAL AGREEMENTS

The parties' marriage was dissolved in December 2006. They had two children: a daughter, born in 1991, and a son, born in 1994. The parties have significant assets. They agreed to dismiss their 2001 dissolution proceeding after entering into a postmarital agreement, dividing their property for specific occurrences: continuation of the marriage, death, legal separation, or divorce. But in 2002, after Mary Kay sought a declaration that the

postmarital agreement was invalid, they signed an amendment to the postmarital agreement (collectively the agreements). In the agreements, Henry promised to transfer property to Mary Kay and she agreed that his business interests would be his separate property.

In paragraph XII of the amendment, Henry agreed that upon the dismissal of all pending litigation, he would execute the Henry A. Davis Irrevocable Trust, which was attached. He also agreed to obtain a life insurance policy with a death benefit of at least $1 million, naming the trust as the beneficiary. The trust was for the benefit of the parties' children. The trust also required the trustee to pay the children's legal guardian up to $5,000 a month for reasonable household expenses, subject to the trustee's sole and absolute discretion. A trust provision stated that Henry had conveyed $10 to it but anticipated conveying additional property.

After these agreements were made, the district court approved them, dismissed Mary Kay's declaratory judgment action with prejudice, and dismissed the parties' 2001 dissolution action without prejudice.

### 2003 Dissolution Action

In 2003, Mary Kay filed a second dissolution action. The district court incorporated the parties' postmarital agreements into its December 2006 decree. Under those agreements, it ordered Henry (1) to pay $5,000 child support a month for both children and $3,000 a month for one child and (2) to pay $12,500 alimony a month for 106 months, to terminate upon either party's death or Mary Kay's remarriage.

### Mary Kay Moves for Order Directing Henry to Submit to Physical Examination for Insurance Policy

Later, in March 2007, Mary Kay moved for an order directing Henry to submit to a physical medical examination so she could obtain a life insurance policy on his life. At the hearing, Mary Kay's attorney argued that Henry's child support and alimony obligations exceeded $1.5 million and that a policy on Henry's life would protect her if he died. He further argued that there was no proof that Henry had funded the trust for the children. But Henry's counsel argued that there was a $1 million policy

in place and that he had provided proof to Mary Kay during discovery. The record does not show that the policy was offered.

The court stated that security for Henry's support obligations was a matter that could have been anticipated when the parties made the agreements; it overruled the motion.

## ASSIGNMENT OF ERROR

Mary Kay assigns as error that the district court erred in refusing to order Henry to submit to a physical examination so she could obtain an insurance policy on his life.

## STANDARD OF REVIEW

[1,2] A court has discretion to require reasonable security for an obligor's current or delinquent support obligations when compelling circumstances require it.[1] We will review a district court's postdissolution order regarding security for a support obligation de novo on the record to determine whether the trial court has abused its discretion.[2]

[3,4] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3] Questions of law and statutory interpretation require us to reach a conclusion independent of the decision made by the court below.[4]

## ANALYSIS

Mary Kay contends that she has an insurable interest in Henry's life. She argues that the district court erred in failing to require Henry to secure his support obligations by submitting to a physical examination so she could obtain an insurance policy

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[1] See, Neb. Rev. Stat. § 42-371(6) (Cum. Supp. 2006); *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), citing *Lacey v. Lacey*, 215 Neb. 162, 337 N.W.2d 740 (1983).

[2] See, *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006); *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002); *Klinginsmith, supra* note 1; *Lacey, supra* note 1.

[3] See *Schwartz v. Schwartz, ante* p. 492, 747 N.W.2d 400 (2008).

[4] *Zahl, supra* note 2.

on his life. In her brief, she contends compelling circumstances justified requiring security because Henry's total support obligations exceeded $1.6 million. At oral argument, however, she contended that she was not required to show compelling circumstances. She claims she is not asking Henry to pay for the insurance coverage or to do anything for security other than to submit to a physical examination.

Initially, we clarify what this case is not about. We are not dealing with a contempt proceeding. Mary Kay is not attempting to enforce the parties' dissolution decree, which incorporated the parties' agreement that Henry would fund the trust for their children through a life insurance policy. Instead of seeking to compel Henry to obtain insurance to fund the trust for their children, Mary Kay is seeking to own a separate policy on Henry's life to secure his support obligations. Thus, we interpret her motion as primarily seeking security for Henry's alimony obligations.

[5] We do not reach the issue of whether Mary Kay has an insurable interest in Henry's life. We assume for this analysis that she does.[5] But an insurable interest does not give her the right to *own* a policy on Henry's life without his consent. Section 44-704 specifically requires adult insureds to consent to insurance policies on their lives unless they or their spouses are the owners of the policies. Mary Kay is not Henry's spouse, and Henry would not be the owner of the policy.

Section 44-704, in relevant part, provides:

> (1) Except as provided in subsection (2) of this section, no policy of insurance shall be issued upon the person of any individual except upon the application of the individual insured *or with the written consent of the individual insured.* Nothing in this section shall be deemed to prohibit the immediate transfer or assignment of a life insurance policy or annuity contract so issued.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, (a) a husband or wife may effectuate a policy of insurance upon the person of the other . . . .

[5] See, Neb. Rev. Stat. § 44-103(13)(b) (Reissue 2004); 3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 43:2 (2005).

> (3) The term policy of insurance as used in this section shall include any life insurance policy . . . .

(Emphasis supplied.)

In arguing that § 44-704 does not apply, Mary Kay relies on cases in which a district court—as part of a dissolution decree—ordered an obligor to maintain a life insurance policy as security for a support obligation. But Mary Kay misses the critical distinction in these cases: The obligor, not the former spouse, was the owner of the policy.[6] These cases fail to support Mary Kay's contention that a district court can compel obligors to consent to their former spouses' owning policies on their lives.

[6] It is the Legislature's function through the enactment of statutes to declare the state's law and public policy.[7] Allowing courts to compel an obligor's consent to a former spouse's ownership of a policy on the obligor's life would violate the Legislature's express policy preference in § 44-704.

The Maryland Court of Appeals addressed this public policy issue in *Hopkins v. Hopkins*.[8] Before the trial court issued its decree, the wife in *Hopkins* asked her husband to cooperate in obtaining a $1 million insurance policy on his life to insure her alimony. The court later ordered him to pay her permanent alimony of $4,000 per month, and she was purportedly concerned about his health. She had agreed to pay the premiums and only wanted him to submit to a physical examination for the coverage. When he refused to cooperate, she filed a motion to compel his cooperation. The trial court overruled the motion.

On appeal, the Maryland Court of Appeals agreed that a former spouse has an insurable interest in an indefinite support obligation that terminated upon either party's death. But Maryland had a statute similar to Nebraska's § 44-704 requiring the insured's consent as a predicate to a valid life insurance contract. The court stated that the consent requirement serves two purposes: (1) It prevents wagering on human lives and (2) it protects human lives by removing the temptations and risks associated

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[6] See, *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988); *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

[7] See *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[8] *Hopkins v. Hopkins*, 328 Md. 263, 614 A.2d 96 (1992).

with other persons' having an interest in both the insured's life and death. "Policies issued in violation of this rule 'are not dangerous because they are illegal: they are illegal because they are dangerous.'"[9] The court noted that for these reasons, courts in states with similar statutes have held that permitting a person to insure the life of another without that person's knowledge or consent is against public policy. It concluded:

> A court order requiring the proposed insured to cooperate with the efforts of a party with an insurable interest to obtain a policy of insurance on his life can not [sic] effect the consent contemplated by [the statute]. Cooperating, pursuant to a court order enforceable by contempt, with the appellant's efforts to obtain a policy of insurance on his life, is not the appellee's voluntary act. On the contrary, it is, by its very nature and by definition, coercive.[10]

[7] We agree with this reasoning. We recognize that courts often compel parties in a marital dissolution action to perform acts that would otherwise require their consent. But a court is not free to ignore a legislative requirement of affirmative consent.[11] Aside from the consent issue, and although we do not rely on privacy concerns in our analysis, another court has concluded that a state court order compelling an obligor to comply with a physical examination would violate his right of privacy.[12] We conclude the district court did not err in overruling Mary Kay's motion.

## CONCLUSION

We conclude that the district court did not have authority to compel Henry to complete a physical examination so Mary Kay could obtain a life insurance policy on his life, naming herself

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[9] *Id.* at 272, 614 A.2d at 100.

[10] *Id.* at 275, 614 A.2d at 102.

[11] See, e.g., *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995); *Douglas County v. Keller*, 43 Neb. 635, 62 N.W. 60 (1895). See, also, *Metters v. Ralphs Grocery Co.*, 161 Cal. App. 4th 696, 74 Cal. Rptr. 3d 210 (2008); *Grove v. Northeast Ohio Nephrology Assoc.*, 164 Ohio App. 3d 829, 844 N.E.2d 400 (2005).

[12] *Meerwarth v. Meerwarth*, 128 N.J. Super. 285, 319 A.2d 779 (1974).

as the beneficiary. Such an order would have violated this state's public policy of requiring an insured's consent to a policy on his or her life. Although public policy concerns were not the reason the district court overruled Mary Kay's motion to compel Henry to submit to a physical examination, a proper result will not be reversed merely because it was reached for a different reason.[13] The district court's order is affirmed.

AFFIRMED.

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[13] *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

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NEW TEK MANUFACTURING, INC., A NEBRASKA CORPORATION, APPELLANT, V. JOHN A. BEEHNER ET AL., APPELLEES.

751 N.W.2d 135

Filed June 27, 2008. No. S-06-783.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
4. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for the purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
5. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage.
6. ____: ____. When an appellate court remands a case to an inferior tribunal, the law-of-the-case doctrine prevents that court from taking action inconsistent with the judgment of the appellate court.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Roger P. Cox and Gregory D. Barton, of Harding & Shultz, P.C., L.L.O., and Roger D. Greer and Steven P. Fallon, of Greer, Burns & Crain, Ltd., for appellant.

William H. Selde, of Sodoro, Daly & Sodoro, P.C., for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Stephan, J.

This case is before us for the second time. It is a professional negligence action in which the plaintiff's damage claim is dependent upon the resolution of a hypothetical third-party patent infringement claim. New Tek Manufacturing, Inc. (New Tek), alleged that its former attorney, the late John H. Beehner, negligently allowed its patent on a device to lapse and that it was damaged when a third party, Orthman Manufacturing, Inc., manufactured and sold a device which would have infringed upon the patent under the doctrine of equivalents had the patent remained in effect. In *New Tek Mfg. v. Beehner* (*New Tek I*),[1] we reversed a summary judgment entered in favor of Beehner's estate (the Estate) and remanded the cause to the district court for Douglas County for further proceedings, based upon our determination that the estate had not presented a prima facie case of noninfringement under the doctrine of equivalents. Following remand, the district court again entered summary judgment in favor of the estate, determining as a matter of law that the all-elements rule and prosecution history estoppel precluded the application of the doctrine of equivalents. We conclude that the district court did not err in determining that prosecution history estoppel would have barred the hypothetical patent infringement case and, therefore, affirm.

## I. BACKGROUND

### 1. Facts and Procedural History

We set forth the following summary of pertinent facts and procedural history in *New Tek I*:

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[1] *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

The patented device at issue in this case is a "row following guidance device for a tractor-drawn row crop implement," designed to help operators of farm equipment guide implements through a crop field without accidentally deviating from the crop row and destroying planted crops. As the patent explains, tractor-drawn farm implements may carry groundworking tools spaced as close as 4 inches apart, and a tractor operator is generally situated in a cab located several feet above and forward of the implement, so it can be difficult to view the actual engagement of the tools with the ground. In an operation such as cultivating, only a slight misalignment of the tractor with the crop row may cause the implement to uproot several rows.

The patented device was intended, generally, to be a "row following guidance device" that connects the left and right sides of the forward end of an implement to the tractor, and adjusts the length of each left and right connection so that the implement will follow a crop row independently, even if the tractor deviates from the crop row. A wheel, following the crop row, signals a steering valve upon any deviation from the alignment of the implement with the crop row, and the steering valve corrects the deviation by lengthening one of the connections between the implement and the tractor and shortening the other connection.

Eugene Schmidt invented this "row following guidance device" and assigned his rights to Sunco Systems, Inc. (Sunco). A patent application was filed with the U.S. Patent and Trademark Office (the Patent Office) on April 24, 1985, and patent No. 4,640,365 (the '365 patent) was issued on February 3, 1987. After Schmidt saw a potentially infringing device at a farm equipment show, Sunco decided to broaden the patent by filing a reissue patent application on December 14, 1987.

In 1988, while the reissue patent application was pending, Sunco's counsel retired from the practice of law and recommended that Sunco retain Beehner. In 1989, New Tek was formed to assemble farm equipment based on

Sunco parts, and the rights for the ’365 patent and the reissue patent application were assigned to New Tek.

For purposes of this appeal, New Tek’s allegations of Beehner’s duties, and breach thereof, are not at issue. New Tek alleged that Beehner was responsible for pursuing the reissue patent application and maintaining the ’365 patent, in part by ensuring that the maintenance fees for the ’365 patent were filed. However, Beehner did not diligently prosecute the reissue patent application, nor did he pay the maintenance fees for the ’365 patent, which became due in August 1990. Beehner revived the reissue patent application pursuant to a petition filed on December 18, 1990, but did not take action with respect to the ’365 maintenance fee before the end of the maintenance fee grace period, which expired on February 3, 1991. Although this resulted in the expiration of the ’365 patent and rendered the reissue patent application defective, Beehner continued prosecution of the reissue patent application. Eventually, New Tek lost patience with Beehner’s prosecution of the reissue patent application and retained new counsel.

The reissue patent application was eventually allowed, and reissue patent No. 34,080 (the ’080 patent) was issued on September 29, 1992. However, the ’080 patent was defective because of the expiration of the ’365 patent, of which New Tek was still unaware. On November 16, 1994, New Tek’s counsel submitted the maintenance fee for the ’080 patent to the Patent Office but, on December 19, was informed that the maintenance fee would not be accepted because the ’080 patent had expired due to the failure to timely pay the maintenance fee for the ’365 patent.

Ultimately, the Patent Office accepted New Tek’s petition for late payment of the ’365 maintenance fee, and the ’365 patent was revived. However, New Tek lost the benefit of the expanded scope of the ’080 patent—specifically, claim 22 of the ’080 patent, which was not contained in the ’365 patent, and will be explained in more detail below. Furthermore, the revival of the ’365 patent did not afford New Tek protection from infringing uses that began

between the expiration of the patent and the acceptance of the late maintenance fee.[2] . . .

New Tek filed suit against Beehner and his law office in the district court on December 12, 1995, alleging professional negligence. Beehner died during the pendency of the suit, and [the E]state was substituted . . . . After proceedings unrelated to the issues presented in this appeal, the district court held a "*Markman* hearing" pursuant to *Markman v. Westview Instruments, Inc.*[3] . . . and entered an order construing the '080 patent for purposes of this litigation.

The [Estate] then filed a motion for summary judgment, which the court sustained. The parties had narrowed their inquiry to a particular device made by Orthman Manufacturing, Inc. (the Orthman device). The court determined as a matter of law that the Orthman device would not have been found to infringe on the '080 patent. . . . New Tek's claim was dismissed to the extent that it relied on allegations of hypothetical third-party infringement on the '080 patent, and New Tek voluntarily dismissed its remaining claims so that it could proceed with this appeal on the issue of infringement.[4]

### 2. *New Tek I*

In *New Tek I*, we first rejected the Estate's contention that we lacked subject matter jurisdiction. We concluded that the case did not arise under federal patent law within the meaning of 28 U.S.C. § 1338(a) (2000), but, rather, was a professional negligence action arising entirely under state law. We noted that "the precise question is not whether Orthman Manufacturing infringed on the '080 patent," but, rather, "whether, absent

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[2] See 35 U.S.C. § 41(c)(2) at 754 (2000) ("[a] patent, the term of which has been maintained as a result of the acceptance of a payment of a maintenance fee . . . shall not abridge or affect the right of any person . . . who made, purchased, offered to sell, or used anything protected by the patent . . . after the 6-month grace period but prior to the acceptance of a maintenance fee").

[3] *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995), *affirmed* 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996).

[4] *New Tek I, supra* note 1, 270 Neb. at 267-69, 702 N.W.2d at 342-44.

Beehner's negligence, New Tek would have been successful in an infringement action against Orthman."[5]

Next, we rejected New Tek's contention that the district court erred in holding a "*Markman* hearing," pursuant to *Markman v. Westview Instruments, Inc.*,[6] for the purpose of construing the patent. We concluded that it was "well established that claim construction is a question of law for a court to decide."[7] We also determined that the district court did not err in construing element 4, claim 22, of patent No. 34,080 (the '080 patent) as a means-plus-function element. And, we rejected New Tek's argument that the patent had intrinsic value recoverable even in the absence of damages resulting from the loss of a potential infringement action.

We then addressed the dispositive issue of whether the district court erred in concluding as a matter of law that New Tek could not establish infringement under the doctrine of equivalents, which doctrine prevents a copyist from evading patent claims with insubstantial changes.[8] We stated that "[t]he doctrine of equivalents does not require a one-to-one correspondence of components"[9] and that "[t]he vantage point of one of ordinary skill in the relevant art provides the perspective for assessing the substantiality of the differences between the claimed invention and the accused device."[10] We noted that the district court had

> determined that a substantial difference existed and that the Orthman device did not infringe on claim 22. The court noted that claim 22 specifically described a "pivotal connection" between each hydraulic cylinder in element 4 and

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[5] *Id.* at 272, 702 N.W.2d at 346.

[6] *Markman v. Westview Instruments, Inc., supra* note 3.

[7] *New Tek I, supra* note 1, 270 Neb. at 274, 702 N.W.2d at 347.

[8] *Valmont Industries, Inc. v. Reinke Mfg. Co., Inc.*, 983 F.2d 1039 (Fed. Cir. 1993).

[9] *New Tek I, supra* note 1, 270 Neb. at 281-82, 702 N.W.2d at 352, citing *Wiener v. NEC Electronics, Inc.*, 102 F.3d 534 (Fed. Cir. 1996), *abrogated on other grounds, Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998).

[10] *Id.* at 282, 702 N.W.2d at 352, citing *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354 (Fed. Cir. 2004).

> the elongated member and respective lever. The Orthman device, on the other hand, employs a single hydraulic cylinder, directly mounted on the elongated member without employing a pivotal connection. The court did not address whether the single hydraulic cylinder of the Orthman device was equivalent to the two hydraulic cylinders recited in claim 22 of the '080 patent; rather, the court concluded that the difference between a pivotal connection and direct mount to the end of the hydraulic cylinder on the elongated member was substantial.[11]

We concluded that determination of infringement under the doctrine of equivalents is an issue of fact and that as the party moving for summary judgment, the Estate had not met its prima facie burden to show that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law. We noted that the Estate's expert provided "no . . . basis for a finding of noninfringement" and that aside from the conclusory opinion of New Tek's expert that the device made by Orthman Manufacturing (the Orthman device) infringed on the '080 patent, there was

> no evidence that would permit a trier of fact to conclude, one way or the other, whether one of ordinary skill in the pertinent art would consider the difference between element 4, claim 22, of the '080 patent and the corresponding structure of the Orthman device to be substantial, or whether the different structure of the Orthman device is merely an insubstantial change which adds nothing of significance to the structure disclosed in the '080 patent specification.[12]

We concluded that "[t]he defect in the [Estate's] motion for summary judgment was its failure to present evidence regarding the perspective of one of ordinary skill in the relevant art."[13] We also determined that "[t]he district court erred in construing

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[11] *New Tek I, supra* note 1, 270 Neb. at 282, 702 N.W.2d at 352-53.

[12] *Id.* at 283-84, 702 N.W.2d at 353-54, citing *Ishida Co., Ltd. v. Taylor*, 221 F.3d 1310 (Fed. Cir. 2000).

[13] *Id.* at 284, 702 N.W.2d at 354, citing *Lighting World, Inc. v. Birchwood Lighting, Inc., supra* note 10.

the pivotal connection as a 'limitation,' instead of determining whether the structure of the Orthman device was equivalent . . . to the overall structure corresponding to the function recited in element 4."[14] We therefore reversed the judgment of the district court and remanded the cause for further proceedings consistent with our opinion. We overruled the Estate's motion for rehearing and issued our mandate.

### 3. Proceedings on Remand

#### (a) Motion for Summary Judgment

After our mandate was entered on the record of the district court, the Estate filed another motion for summary judgment "on the issue of Non-infringement and/or damages," asserting that on the basis of the pleadings, evidence, and admissions in the record and the district court's *Markman* order, there was no genuine issue of material fact "as to any issue of Infringement" and that the Estate was entitled to judgment as a matter of law. At a hearing on the motion, the Estate reoffered and the court received certain evidence which was included in the *New Tek I* record, including the depositions of Richard L. Wood and William Orthman, prosecution history records for the '080 patent and patent No. 4,640,365 (the '365 patent), and certain drawings pertaining to the patents. Counsel for the Estate argued that the court should determine as a matter of law that the patent on the Orthman device could not have infringed upon the '080 patent because of certain limitations upon the doctrine of equivalents, including the all-elements rule, prosecution history estoppel, and the related disclosure dedication rule. In response, New Tek argued that the grounds advanced for the motion conflicted with our opinion in *New Tek I* and consisted of an attempt to reassert arguments unsuccessfully advanced in that case.

After the hearing, the district court on its own motion requested "affidavits regarding prosecution history estoppel limited to the patent prosecution record." The court conducted another hearing at which it received the affidavits of James L. Young, a patent attorney appearing as an expert for the Estate, and Wood, a patent attorney who served as an expert for New Tek.

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[14] *Id.* at 284, 702 N.W.2d at 354.

(b) Order Sustaining Motion for Summary Judgment

The district court subsequently entered an order granting the Estate's motion for summary judgment. It first determined that it was not precluded from doing so by our opinion in *New Tek I*. It reasoned this court had concluded that the evidentiary record failed to establish a prima facie case of noninfringement under the doctrine of equivalents, but had not addressed the issues of law raised by the motion for summary judgment filed following remand; namely, whether the all-elements rule or prosecution history estoppel precluded an infringement analysis under the doctrine of equivalents. The district court determined as a matter of law that New Tek could not have prevailed on a patent infringement claim for two reasons. First, because under the all-elements rule, its theory "would vitiate the claim language in New Tek's '080 patent" and, second, because prosecution history estoppel barred New Tek's attempt to recapture a purported equivalent that was disclaimed during the prosecution of its underlying '365 patent.

New Tek perfected a timely appeal from this order.

## II. ASSIGNMENTS OF ERROR

New Tek assigns, consolidated and restated, that the trial court erred in (1) ignoring the law of the case established by *New Tek I*; (2) misapplying the all-elements rule; (3) misapplying prosecution history estoppel; (4) misapplying 35 U.S.C. § 112, ¶ 6 (2000), by not considering the full range of equivalents to which New Tek was statutorily entitled; and (5) denying New Tek a jury trial on contested issues of fact.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[15] In reviewing a summary judgment, an appellate court views the evidence in a light most

[15] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[16]

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[17]

## IV. ANALYSIS

### 1. Subject Matter Jurisdiction

After this court's decision in *New Tek I* and the submission of briefs in the present appeal, the U.S. Court of Appeals for the Federal Circuit decided two cases that addressed the issue of whether federal jurisdiction exists under 28 U.S.C. § 1338(a) with respect to legal malpractice actions presenting issues of patent law.[18] In light of those cases, we ordered supplemental briefing from the parties to address whether Nebraska state courts have jurisdiction over the subject matter of this action. We reiterate our determination in *New Tek I*, that this professional malpractice case arises entirely under state law, and conclude that we do have subject matter jurisdiction over the claim.

### 2. Doctrine of Equivalents and Its Limitations

A device may infringe on a patent either literally or under the doctrine of equivalents.[19] New Tek contends that had its patent not lapsed, the Orthman device would have infringed under the doctrine of equivalents. Under this judicially created doctrine, "a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the

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[16] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[17] *Coffey v. County of Otoe*, 274 Neb. 796, 743 N.W.2d 632 (2008); *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

[18] *Air Measurement Tech. v. Akin Gump Strauss Hauer*, 504 F.3d 1262 (Fed. Cir. 2007); *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007).

[19] See, *Chiuminatta Concrete Concepts v. Cardinal Industries*, 145 F.3d 1303 (Fed. Cir. 1998); *Valmont Industries, Inc. v. Reinke Mfg. Co., Inc., supra* note 8.

patented invention."[20] As we noted in *New Tek I*, the doctrine of equivalents prevents a copyist from making "unimportant and insubstantial changes and substitutions in a patent which, though adding nothing, would be enough to take the copied matter outside the claim."[21]

In reaffirming the modern viability of the doctrine of equivalents as a means of establishing patent infringement, the U.S. Supreme Court, in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*,[22] recognized the danger that broad application of the doctrine would "conflict . . . with the definitional and public-notice functions of the statutory claiming requirement" under federal patent law. The Court stated that "[i]t is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety."[23]

The determination of infringement under the doctrine of equivalents is limited by two primary legal doctrines: (1) prosecution history estoppel and (2) the all-elements rule.[24] Prosecution history "constitutes a public record of the patentee's representations concerning the scope and meaning of the claims, and competitors are entitled to rely on those representations when ascertaining the degree of lawful conduct, such as designing around the claimed invention."[25] Prosecution history estoppel, also known as "'file wrapper estoppel,'" is a defense to infringement under which a patent holder who amends a patent

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[20] *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 21, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997), citing *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097 (1950).

[21] *New Tek I, supra* note 1, 270 Neb. at 280, 702 N.W.2d at 351, citing *Valmont Industries, Inc. v. Reinke Mfg. Co., Inc., supra* note 8.

[22] *Warner-Jenkinson Co. v. Hilton Davis Chemical Co., supra* note 20, 520 U.S. at 29.

[23] *Id.*

[24] *Seachange Intern., Inc. v. C-COR, Inc.*, 413 F.3d 1361 (Fed. Cir. 2005); *Lockheed Martin Corp. v. Space Systems/Loral, Inc.*, 324 F.3d 1308 (Fed. Cir. 2003).

[25] *Hockerson-Halberstadt v. Avia Group Intern.*, 222 F.3d 951, 957 (Fed. Cir. 2000).

application has no claim of infringement on patent claims not made in the final patent.[26] The all-elements rule prevents application of the doctrine of equivalents if applying the doctrine would vitiate an entire claim limitation.[27] According to this rule, an accused product does not infringe "unless it contains each limitation of the claim, either literally or by an equivalent."[28] Determination of both literal infringement and infringement under the doctrine of equivalents is a question of fact.[29] But the application of the legal limitations imposed by prosecution history estoppel and the all-elements rule is a question of law which an appellate court reviews de novo.[30]

### 3. Prosecution History Estoppel

#### (a) Law-of-the-Case Doctrine Inapplicable

[4-6] New Tek argues that by entering summary judgment in favor of the Estate following remand, the district court violated the law-of-the-case doctrine by ignoring our holding in *New Tek I* that there were genuine issues of material fact which precluded summary judgment on the record as it was then presented. Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for the purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.[31] The doctrine reflects the principle that "'"[a]n issue which has been

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[26] *Warner-Jenkinson Co. v. Hilton Davis Chemical Co., supra* note 20, 520 U.S. at 30.

[27] *Seachange Intern., Inc. v. C-COR, Inc., supra* note 24; *Asyst Technologies, Inc. v. Emtrak, Inc.*, 402 F.3d 1188 (Fed. Cir. 2005).

[28] *Freedman Seating Co. v. American Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005).

[29] *Lockheed Martin Corp. v. Space Systems/Loral, Inc., supra* note 24; *Insituform Technologies v. Cat Contracting*, 161 F.3d 688 (Fed. Cir. 1998).

[30] *Seachange Intern., Inc. v. C-COR, Inc., supra* note 24; *Lockheed Martin Corp. v. Space Systems/Loral, Inc., supra* note 24; *Bell Atlantic Network Serv v. Covad Communications*, 262 F.3d 1258 (Fed. Cir. 2001).

[31] See, *Money v. Tyrrell Flowers, ante* p. 602, 748 N.W.2d 49 (2008); *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004).

litigated and decided in one stage of a case should not be relitigated in a later stage.'''"[32] When an appellate court remands a case to an inferior tribunal, the law-of-the-case doctrine prevents that court from taking action inconsistent with the judgment of the appellate court.[33]

Our opinion in *New Tek I* addressed the merits of the infringement claim under the doctrine of equivalents. We did not discuss or decide the legal issue of prosecution history estoppel, which was raised for the first time following our remand in *New Tek I.* Accordingly, the law-of-the-case doctrine did not preclude the district court from addressing this issue.

(b) Additional Facts

Certain additional facts reflected by the prosecution history files for the '365 patent and the '080 patent are pertinent to our de novo review of this issue.

Federal patent law requires an applicant to "particularly [point] out and distinctly [claim] the subject matter which the applicant regards as his invention."[34] Eugene Schmidt's initial application for what became the '365 patent listed 22 separate claims for the "row following guidance device" for a tractor-drawn row crop implement. Two of these claims described "lever-pivoting means" utilized in the guidance device. Claim 3 described a lever-pivoting means which utilized a single two-way hydraulic cylinder. Claim 4 described a lever-pivoting means which consisted of two hydraulic cylinders.

Federal patent law, at 35 U.S.C. § 102(e) (1994), as then in effect, provided that a person shall be entitled to a patent unless

> the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled

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[32] *Money v. Tyrrell Flowers, supra* note 31, *ante* at 613, 748 N.W.2d at 60, quoting *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

[33] See, *id.*; *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).

[34] 35 U.S.C. § 112.

> the requirements of [federal patent law] before the invention thereof by the applicant for patent[.]

The patent examiner rejected Schmidt's claim 3 under this provision "as being anticipated by" an existing patent. The examiner stated that claim 4 would be allowable if rewritten to overcome certain objections not based on prior art. Finally, the examiner objected to the drawings included in the application, stating in part that "[t]he drawings must show every feature of the invention specified in the claims. Therefore, the two-way hydraulic cylinder of claim 3 must be shown or the feature should be cancelled from the claim. No new matter should be entered."

In response, Schmidt requested cancellation of claim 3 of the original application. Original claim 4, describing the two-cylinder lever-pivoting means, was incorporated into Schmidt's amended patent application as claim 1.

The two-hydraulic-cylinder limitation in the '365 patent was carried forward into claim 22 of the '080 patent. This reissue patent is the basis of New Tek's hypothetical infringement claim. In its *Markman* order, which we discussed but did not disturb in *New Tek I*, the district court construed claim 22, element 4, of the '080 patent as written in a means-plus function format with corresponding structures consisting of

> a first and second hydraulic cylinder, one at each end of the elongated member, and a tie rod. Element 4 also claims that the first hydraulic cylinder must be pivotally connected at one end to the free end of the first articulated member's lever and pivotally connected at the other end to said elongated member at a point spaced away from the pivotal connection of the respective lever and elongated member. The *second hydraulic cylinder* must be pivotally connected at one end to said elongated member and pivotally connected at the other end to the second articulated member's lever at a point spaced away from the pivotal connection of the lever and elongated member.

(Emphasis supplied.)

The Orthman device, which New Tek alleges would have infringed on its patent but for Beehner's negligence in allowing it to lapse, claimed a "hydraulic means" consisting of "one double rod hydraulic cylinder."

(c) Resolution

Prosecution history estoppel ensures that claims are interpreted by reference to those that were canceled or rejected during the application process.[35] Although the doctrine of equivalents protects the patent holder against "insubstantial alterations" in the patent claim, "[w]hen . . . the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent."[36] Thus,

> [p]rosecution history estoppel ensures that the doctrine of equivalents remains tied to its underlying purpose. Where the original application once embraced the purported equivalent but the patentee narrowed his claims to obtain the patent or to protect its validity, the patentee cannot assert that he lacked the words to describe the subject matter in question. The doctrine of equivalents is premised on language's inability to capture the essence of innovation, but a prior application describing the precise element at issue undercuts that premise. In that instance the prosecution history has established that the inventor turned his attention to the subject matter in question, knew the words for both the broader and narrower claim, and affirmatively chose the latter.[37]

Put succinctly, "[p]rosecution history estoppel serves to limit the doctrine of equivalents by denying equivalents to a claim limitation whose scope was narrowed during prosecution for reasons related to patentability."[38]

In this case, we focus on Schmidt's amended application for patent '365, which canceled his original claim 3 in response to the patent examiner's rejection of the original application for the

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[35] *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 122 S. Ct. 1831, 152 L. Ed. 2d 944 (2002).

[36] *Id.*, 535 U.S. at 733-34.

[37] *Id.*, 535 U.S. at 734-35.

[38] *Pioneer Magnetics, Inc. v. Micro Linear Corp.*, 330 F.3d 1352, 1356 (Fed. Cir. 2003).

’365 patent based in part upon prior art. The first question in a prosecution history estoppel inquiry is whether the literal scope of the claim has been narrowed by amendment.[39]

The district court found that Schmidt’s cancellation of his original claim 3 was a narrowing amendment. New Tek argues this was an error because the amended application included a new claim specifying “a hydraulic cylinder means” and a dependent claim specifying a second hydraulic cylinder means. However, as the district court correctly noted, even if the patent were so construed, it would still not include a claim for the single two-way hydraulic cylinder described in claim 3 of the original application. We view the amendments in this case as similar to those considered in *J & M Corp. v. Harley-Davidson, Inc.*,[40] a case involving a patent for a device used to mount accessories to a motorcycle helmet. The patentee originally argued that its claim was broad enough to include a mounting device using either one or two clamps, but in response to an examiner’s objection, it canceled the single clamp claims and substituted a claim for “‘gripping means’” drafted in a means-plus-function format.[41] The device alleged to have infringed upon the patent utilized a single clamp. The court concluded that the amendment of the claims prior to the issuance of the patent narrowed the claim to dual clamp accessories and estopped the patentee from asserting infringement by the accused single clamp accessories under the doctrine of equivalents.

In this case, the single two-way hydraulic cylinder claim originally asserted as claim 3 was canceled, but the two-cylinder lever-pivoting means originally asserted as claim 4 was retained in the amended application. The drawings incorporated in the ’365 patent and the ’080 patent reflect only the two-cylinder means. Element 4, claim 22, of the ’080 patent, as construed by the district court in its *Markman* order, describes only a device utilizing two hydraulic cylinders as lever-pivoting means. We conclude that the rejected claim 3 of the original application

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[39] *Festo v. Shoketsu Kinzoku Kogyo Kabushiki*, 344 F.3d 1359 (Fed. Cir. 2003), citing *Pioneer Magnetics, Inc. v. Micro Linear Corp., supra* note 38.

[40] *J & M Corp. v. Harley-Davidson, Inc.*, 269 F.3d 1360 (Fed. Cir. 2001).

[41] *Id.* at 1364.

was replaced by a narrowing claim which may trigger prosecution history estoppel as a legal limitation on the doctrine of equivalents.

The occurrence of a narrowing amendment triggers a second inquiry as to "whether the reason for that amendment was a substantial one relating to patentability."[42] Only the patent's prosecution history can be a basis for such reason.[43] The record in this case clearly discloses the reason for the amendment. The examiner rejected claim 3, pursuant to 35 U.S.C. § 102(e), as being anticipated by an existing patent. In his response, Schmidt requested the cancellation of claim 3. Such a narrowing amendment made to distinguish claims from those disclosed in prior art forms the "classic basis for the application of prosecution history estoppel."[44] Patentees are "not free to . . . renege on a deal struck with the [Patent Trademark Office] during patent prosecution. . . . When an applicant distinguishes prior art by surrendering some previously-claimed subject matter, the patentee may not later seek to recover that surrendered subject matter by the doctrine of equivalents."[45]

The final inquiry is to determine the scope of the estoppel resulting from the cancellation of claim 3 describing a lever-pivoting means employing a single hydraulic cylinder. The law applicable to this determination has developed over the past 25 years. In *Hughes Aircraft Co. v. United States*,[46] the Court of Appeals for the Federal Circuit held that prosecution history estoppel applied as a flexible bar, such that depending on the

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[42] *Festo v. Shoketsu Kinzoku Kogyo Kabushiki, supra* note 39, 344 F.3d at 1366.

[43] *Pioneer Magnetics, Inc. v. Micro Linear Corp., supra* note 38.

[44] *Id.* at 1357. See, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., supra* note 35; *Warner-Jenkinson Co. v. Hilton Davis Chemical Co., supra* note 20 (cases cited therein); *Exhibit Supply Co. v. Ace Corp.*, 315 U.S. 126, 62 S. Ct. 513, 86 L. Ed. 736 (1942); *Keystone Co. v. Northwest Eng. Co.*, 294 U.S. 42, 55 S. Ct. 262, 79 L. Ed. 747 (1935).

[45] *Sage Products, Inc. v. Devon Industries, Inc.*, 126 F.3d 1420, 1432-33 (Fed. Cir. 1997) (citations omitted).

[46] *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 1363 (Fed. Cir. 1983).

nature and purpose of an amendment, "it may have a limiting effect within a spectrum ranging from great to small to zero."

The same court revisited this issue in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki* (*Festo I*).[47] Concluding that the flexible bar principle announced in *Hughes Aircraft Co.* was "'unworkable'" and seemingly inconsistent with another line of its cases, the court rejected the principle and held that "prosecution history estoppel acts as a complete bar to the application of the doctrine of equivalents when an amendment has narrowed the scope of a claim for a reason related to patentability."[48]

The U.S. Supreme Court granted certiori and rejected the complete bar approach in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* (*Festo II*).[49] Noting its prior holdings that a patentee's decision to narrow claims through amendment may be presumed to be a general disclaimer of the territory between the original claim and the amended claim, the Court concluded that a patentee could nevertheless rebut this presumption by showing that a particular equivalent was "unforeseeable at the time of the application," that "the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question," or that "there may be some other reason suggesting that the patentee could not reasonably be expected to have described the insubstantial substitute in question."[50]

On remand from the U.S. Supreme Court, in *Festo v. Shoketsu Kinzoku Kogyo Kabushiki* (*Festo III*),[51] the Federal Circuit provided "general guidance" with regard to the three "rebuttal criteria" specified in *Festo II*. It held that the foreseeability of the first rebuttal criterion should be determined by an objective standard and noted that "if the alleged equivalent were known in the prior art in the field of the invention, it certainly should

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[47] *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki*, 234 F.3d 558 (Fed. Cir. 2000).

[48] *Id.* at 574, 575.

[49] *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., supra* note 35.

[50] *Id.*, 535 U.S. at 740-41.

[51] *Festo v. Shoketsu Kinzoku Kogyo Kabushiki, supra* note 39, 344 F.3d at 1368-69.

have been foreseeable at the time of the amendment."[52] Noting that it could not anticipate all instances in which a narrowing amendment could be merely "tangential" to the equivalent in question, under the second rebuttal criterion, the court stated with certainty that "an amendment made to avoid prior art that contains the equivalent in question is not tangential; it is central to allowance of the claim."[53] The court held that the third criterion "may be satisfied when there was some reason, such as the shortcomings of language, why the patentee was prevented from describing the alleged equivalent when it narrowed the claim."[54]

New Tek contends that the district court erred in applying the analytical approach announced in *Festo II* and refined in *Festo III* in reaching its conclusion that prosecution history estoppel barred any claim that the Orthman device infringed upon its patent under the doctrine of equivalents. It argues that this amounted to an impermissible retroactive application of decisional law because this suit was filed before those decisions. We are not persuaded by this argument. It is impossible to know precisely when any actual infringement action by New Tek would have been tried if the patent had not lapsed, and thus impossible to know what law would have been applied in such an action. Moreover, the Federal Circuit specifically recognized in *Festo I* that its "flexible bar" approach had been unworkable and inconsistent with another line of cases from the same court.[55] The opinions in *Festo II* and *Festo III* provided clarity in this unsettled area of the law, and we therefore apply those principles in our de novo review.

We conclude as a matter of law that none of the rebuttal criteria identified in *Festo II* and explained further in *Festo III* are met in this case. The first criterion is not met because it cannot be said that the claimed equivalent was unforeseeable at the time of the narrowing amendment. The claimed means consisting of

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[52] *Id.* at 1369.

[53] *Id.*

[54] *Id.*

[55] *Festo I, supra* note 47, 234 F.3d at 574.

a single two-way hydraulic cylinder was canceled in response to a prior art objection. As we noted in *New Tek I*, there is no evidence that the alleged equivalent is "after-arising technology."[56] The second criterion is not met because the amendment to claim 3 was made to avoid prior art that contained the equivalent in question, and thus it is not tangential, but is central to the allowance of the claim.[57] The third criterion is not met because the claim for the single two-way hydraulic cylinder was rejected on the basis of prior art; there can be no other reason that Schmidt could not have described the accused equivalent.[58]

For these reasons, we conclude that prosecution history estoppel would have barred any patent infringement claim by New Tek against Orthman Manufacturing if the patents had remained in effect at all relevant times. Because the hypothetical infringement claim lacked merit, there is no genuine issue of material fact regarding the injury and damages allegedly sustained by New Tek as a result of Beehner's negligence, and the Estate is entitled to judgment as a matter of law.

## V. CONCLUSION

We conclude that the district court did not err in determining as a matter of law that prosecution history estoppel would have barred New Tek's hypothetical patent infringement claim which is the basis for its alleged injury and damages in this professional negligence action. Because this issue is dispositive, we need not address New Tek's argument that the district court erred in concluding that the claim would also have been barred by the all-elements rule. We affirm the judgment of the district court.

AFFIRMED.

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[56] *New Tek I, supra* note 1, 270 Neb. at 281, 702 N.W.2d at 352.

[57] See *Festo III, supra* note 39. See, also, *Pioneer Magnetics, Inc. v. Micro Linear Corp., supra* note 38.

[58] See *Pioneer Magnetics, Inc. v. Micro Linear Corp., supra* note 38.

# John Wooden and Connie Wooden, husband and wife, appellants, v. County of Douglas, a political subdivision of the State of Nebraska, appellee.

751 N.W.2d 151

Filed June 27, 2008. No. S-06-1163.

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. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Eminent Domain: Jurisdiction: Notice: Appeal and Error.** In a condemnation action, only the filing of the notice of appeal and, by extension, service of this notice is jurisdictional. The failure to timely file an affidavit of proof of service is not jurisdictional; rather, such is merely directory.
4. **Eminent Domain: Notice: Appeal and Error.** Though service of process is unnecessary upon the filing of a petition on appeal under Neb. Rev. Stat. § 76-717 (Reissue 2003), it is necessary for the party filing such petition to give notice of the filing to the opposing party.

Petition for further review from the Court of Appeals, Irwin, Sievers, and Moore, Judges, on appeal thereto from the District Court for Douglas County, John D. Hartigan, Jr., Judge. Judgment of Court of Appeals reversed, and cause remanded.

William E. Pfeiffer, of Raynor, Rensch & Pfeiffer, for appellants.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellee.

Heavican, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Heavican, C.J.

## INTRODUCTION

The Court of Appeals affirmed the district court's dismissal of John Wooden and Connie Wooden's appeal in this condemnation action.[1] The Woodens petitioned for further review of that decision. We reverse the decision of the Court of Appeals.

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[1] *Wooden v. County of Douglas*, 16 Neb. App. 336, 744 N.W.2d 262 (2008).

## FACTUAL BACKGROUND

This case stems from a condemnation action commenced against the Woodens by Douglas County (the County). The report and award of the appraisers was filed with the Douglas County Court on August 17, 2005. On September 9, the Woodens filed with the county court a notice of intent to appeal the report and award to the district court. The record indicates that this notice was served upon counsel for the County by first class mail. Twelve days later, on September 21, the Woodens filed their "Affidavit of Mailing of Notice" with the district court. On October 31, the Woodens filed their "Petition on Appeal to District Court," as required by Neb. Rev. Stat. § 76-717 (Reissue 2003). The record indicates that this petition was also served upon counsel for the County by first class mail. On March 21, 2006, the petition was dismissed for lack of service of a summons pursuant to Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006).

A praecipe for service was then filed on June 2, 2006. Service was perfected on June 6, and the summons was returned on June 9. On July 20, Douglas County filed a motion to dismiss the Woodens' appeal, alleging that the district court lacked subject matter jurisdiction. On September 19, the district court granted the motion, concluding that it lacked jurisdiction. In dismissing the appeal, the district court cited, without further discussion, Neb. Rev. Stat. §§ 76-715 and 76-715.01 (Reissue 2003) and *Neumeyer v. Omaha Public Power Dist.*[2]

The Court of Appeals affirmed the district court's dismissal. The court noted that under § 76-715.01, a party appealing from the award for assessment of damages must file a notice of appeal within 30 days and also must serve that notice upon all other parties, with "'proof of such service . . . made by an affidavit of the appellant filed with the court within five days after the filing of the notice.'"[3] The Court of Appeals held that "compliance with the requirement of timely filing the affidavit of mailing

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[2] *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972).

[3] *Wooden v. County of Douglas, supra* note 1, 16 Neb. App. at 338, 744 N.W.2d at 265.

notice pursuant to § 76-715.01 has not been the subject of prior appellate litigation in Nebraska," but found that "such timely compliance is required."[4] Since the Woodens did not file their affidavit of proof of service within 5 days, the Court of Appeals concluded that the district court lacked jurisdiction to hear the Woodens' appeal.

## ASSIGNMENT OF ERROR

In their petition for further review, the Woodens argue that the Court of Appeals erred in affirming the district court's dismissal of their condemnation 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.[5]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

## ARGUMENT

The Woodens argue that the Court of Appeals erred in finding that the lack of timely filing of the affidavit of proof of service divested the district court of jurisdiction to hear their appeal. We agree.

*Filing of Affidavit of Proof of Service.*

Because they are helpful to an understanding of the issues presented in this case, we first set forth the relevant statutory provisions dealing with the filing of an appeal in a condemnation action.

The right to appeal from an award for assessment of damages in an eminent domain action is set forth in § 76-715, which provides:

> Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings

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[4] *Id.*

[5] *Poppert v. Dicke, ante* p. 562, 747 N.W.2d 629 (2008).

[6] *McClellan v. Board of Equal. of Douglas Cty., ante* p. 581, 748 N.W.2d 66 (2008).

> was filed. Such appeal shall be taken by filing a notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers as provided in section 76-710.

These requirements are expanded upon in § 76-715.01:

> The party appealing from the award for assessment of damages by the appraisers in any eminent domain action shall, within thirty days of the filing of the award, file a notice of appeal with the court, specifying the parties taking the appeal and the award thereof appealed from, and shall serve a copy of the same upon all parties bound by the award or upon their attorneys of record. Service may be made by mail, and proof of such service shall be made by an affidavit of the appellant filed with the court within five days after the filing of the notice stating that such notice of appeal was duly mailed or that after diligent search the addresses of such persons or their attorneys of record are unknown.

Finally, § 76-717 provides:

> Within thirty days after the filing of such notice of appeal, the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings had concerning the parcel or parcels of land as to which the particular condemnee takes the appeal upon payment of the fees provided by law for preparation thereof. When notice of appeal is filed by both the condemner and the condemnee, such transcript shall be prepared only in response to the first notice of appeal. The transcript prepared in response to the second notice of appeal shall contain only a copy of such notice and the proceedings shall be docketed in the district court as a single cause of action.
>
> *The filing of the notice of appeal shall confer jurisdiction on the district court.* The first party to perfect an appeal shall file a petition on appeal in the district court within fifty days after the filing of the notice of appeal. If no petition is filed, the court shall direct the first party to perfect an appeal to file a petition and impose such sanctions as are reasonable. The appeal shall be tried de novo in

> the district court. Such appeal shall not delay the acquisition of the property and placing of same to a public use if the condemner shall first deposit with the county judge the amount assessed by the appraisers.

(Emphasis supplied.)

In concluding that the district court lacked jurisdiction, the Court of Appeals relied upon *Radil v. State*,[7] while the district court cited to *Neumeyer v. Omaha Public Power Dist*.[8] In both *Neumeyer* and *Radil*, this court held that the provisions of § 76-715.01 were mandatory. A closer examination of these cases, however, shows that they are both distinguishable from this case.

In *Radil*, the issue presented to the court was whether it was necessary for a notice of appeal to be filed and served upon the other party in a condemnation action. The precise question of whether the filing of the affidavit of proof of service was also mandatory was not presented to or decided by the court. And in *Neumeyer*, while we did note that the requirements of § 76-715.01 were mandatory, we did so in the context of holding that the requirements of § 76-716 (requiring the filing of an appeal bond) were directory.[9] Again, the issue of whether the filing of the affidavit of proof of service was jurisdictional was not presented or decided.

[3] What both the district court and the Court of Appeals overlook is language from § 76-717, which provides in relevant part that the filing of the notice of appeal confers jurisdiction on the district court. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.[10] 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

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[7] *Radil v. State*, 182 Neb. 291, 154 N.W.2d 466 (1967).

[8] *Neumeyer v. Omaha Public Power Dist., supra* note 2.

[9] *Id.*

[10] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

provisions of the act are consistent, harmonious, and sensible.[11] And when §§ 76-715, 76-715.01, and 76-717 are considered in light of each other, it is clear that the act which confers jurisdiction on the district court, and which is therefore mandatory, is the filing of the notice of appeal and, by extension, service of this notice.

Moreover, we note that two distinct acts occurring days apart cannot both be jurisdictional. And because the act which is mandatory and jurisdictional is the filing of the notice of appeal, we conclude that the Woodens' failure to timely file an affidavit of proof of service could not and did not divest the district court of jurisdiction. Instead, the timely filing of such an affidavit is directory. We find persuasive the reasoning of the *Neumeyer* court, which held that the filing of an appeal bond was directory rather than mandatory and that "to hold [that such was mandatory] would convert clear, brief language into a jurisdictional maze."[12]

The Court of Appeals erred in concluding that the district court lacked jurisdiction due to the Woodens' failure to file a timely affidavit of proof of service.

*Service of Process.*

As noted, we conclude the district court did not lack jurisdiction as a result of the Woodens' failure to timely file an affidavit of proof of service. However, in addition to this reasoning, the district court also concluded it lacked jurisdiction due to lack of service of process, i.e., the service of a *summons*. The Court of Appeals did not reach this issue given its conclusion with respect to the affidavit of proof of service. We consider the issue now, and reject the contention that the County was entitled to service of process in this case.

Pursuant to § 76-717, the first party perfecting an appeal must file a petition on appeal with the district court within 50 days after the filing of the notice of appeal. The record establishes that the Woodens filed such a petition on October 31, 2005, and

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[11] *Id.*

[12] *Neumeyer v. Omaha Public Power Dist., supra* note 2, 188 Neb. at 521, 198 N.W.2d at 83.

that such was done in a timely manner. The record also indicates that counsel for the County was served by first class mail with this petition. However, this petition was dismissed on March 21, 2006, due to a lack of service of process. Service was eventually perfected by summons on June 6.

The County contends that it was entitled to service of process of the Woodens' petition. It further argues that the Woodens' October 31, 2005, petition was dismissed for lack of such service pursuant to § 25-217 and that by the time service of process was requested and perfected on June 6, 2006, it was too late.

The comment to Neb. Ct. R. of Pldg. in Civ. Actions 3 (rev. 2003) states that a civil action is commenced by the filing of a complaint in "the office of the clerk of a proper court," while the comment to Neb. Ct. R. of Pldg. in Civ. Actions 4 (rev. 2003) provides that service of process of such complaints should be made in accordance with the provisions of chapter 25, article 5, of the Nebraska Revised Statutes. And § 25-217 provides that an "action shall stand dismissed . . . as to any defendant not served within six months from the date the complaint was filed." However, we conclude that such provisions relating to the commencement of an action and service of process of that action are inapplicable in this case.

Instead, the petition on appeal filed by the Woodens was not the commencement of a new action, but simply a continuation of the condemnation action filed by the County. The continuation of this action, and of the petition on appeal itself required by § 76-717, is therefore governed by the statutory scheme relating to condemnation actions.[13]

[4] Because the petition is merely a continuation of the County's condemnation action, it is not equivalent to a complaint under this court's rules of pleading. As such, the County was not entitled to service of process. We note, though, that the County was entitled to notice of the filing of such petition,[14] which the record indicates was given.

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[13] Neb. Rev. Stat. §§ 76-701 to 76-726 (Reissue 2003 & Cum. Supp. 2004).

[14] See, Neb. Rev. Stat. § 25-534 (Reissue 1995); Neb. Ct. R. of Pldg. in Civ. Actions 5 (rev. 2003).

The district court's dismissal of the Woodens' appeal for lack of service of process was erroneous.

## CONCLUSION

The Court of Appeals erred in concluding that the district court lacked jurisdiction over the Woodens' appeal. We therefore reverse the decision of the Court of Appeals and remand the cause to that court with instructions to remand the cause to the district court for reinstatement of the Woodens' appeal.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

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# GILBERT M. AND MARTHA H. HITCHCOCK FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, V. DENMAN KOUNTZE, JR., APPELLEE, EDWARD H. KOUNTZE, APPELLANT AND CROSS-APPELLEE, AND CHARLES DENMAN KOUNTZE, APPELLEE.

751 N.W.2d 129

Filed June 27, 2008. No. S-07-286.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
2. **Actions: Corporations: Notice.** Notice to the Attorney General as an interested party is an essential prerequisite to proceeding in an action under the Nebraska Nonprofit Corporation Act, Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 1997 & Cum. Supp. 2006).

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., and David J. Lanphier, of Broom, Johnson, Clarkson & Lanphier, for appellant.

Edward D. Hotz and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees Gilbert M. and Martha H. Hitchcock Foundation et al.

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

McCormack, J.

## NATURE OF CASE

This is an appeal after remand in which all the issues presented are procedural and jurisdictional. The underlying findings of fact and conclusions of law are not disputed.

A derivative action was brought by several trustees of a public benefit corporation against three fellow trustees: Denman Kountze, Jr., Edward H. Kountze, and Charles Denman Kountze. In *Gilbert & Martha Hitchcock Found. v. Kountze*[1] (*Hitchcock I*), we reversed the district court's judgment on the plaintiffs' claims and the defendants' counterclaims and remanded the cause, holding that the court had erred in proceeding to trial without sufficient evidence that the Attorney General was notified of the action and had an adequate opportunity to intervene on behalf of the public, as mandated by the Nebraska Nonprofit Corporation Act.[2]

Upon remand, the district court ordered that the plaintiffs serve notice upon the Attorney General of the prior proceedings and provide proof of service of such notice. The Attorney General, upon receiving notice, informed the court that its office did not wish to intervene. The court eventually granted the plaintiffs' motion to reenter the court's original findings of fact and conclusions of law, except those rendered moot by the intervening death of Denman. Edward appeals.

## BACKGROUND

The plaintiffs are members of the board of trustees of the Gilbert M. and Martha H. Hitchcock Foundation (the Foundation). Under the bylaws of the Foundation, the presence of at least one of several specified linear descendants of the founders was required to constitute a quorum. Of the specified descendants, Denman was the only one still living during the events underlying this litigation. The plaintiffs' complaint alleged that Denman, Edward, and Charles had consistently failed or refused

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[1] *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006).

[2] Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 1997 & Cum. Supp. 2006).

to participate in board meetings since September 2002. The plaintiffs sought declaratory judgment as to various actions in the preceding year, a court-ordered meeting of the Foundation to dispense with the quorum requirement, an injunction preventing the defendants from attempting to conduct further business with the Foundation, removal of the defendants from the board, and damages resulting from an alleged civil conspiracy by the defendants. The defendants filed a counterclaim, similarly challenging various actions of the plaintiffs, seeking removal of several of the plaintiffs as trustees for alleged fraudulent and dishonest conduct, and injunctive relief from future action in contravention of the bylaws.

After a bench trial, the district court found that the record was devoid of any proof of notice to the Attorney General, but it concluded that such lack of notice was not a jurisdictional defect and it could proceed with judgment. The court entered an order ruling on the validity of the various acts disputed by the parties, some favorably to the plaintiffs and others favorably to the defendants. It then removed Edward as trustee after finding his actions constituted a gross abuse of authority, but denied the plaintiffs' request to remove Charles. The court acceded to the plaintiffs' decision that it would not be in the Foundation's best interests to remove Denman. It ordered the bylaws amended so that the presence of no particular individual was necessary to constitute a quorum. The district court found no actionable civil conspiracies by any of the parties.

The defendants appealed. Of the 19 assignments of error made by the defendants, the only one reached by this court in *Hitchcock I* dealt with the failure to notify the Attorney General of the claim. We held that the statutory notice was "an essential prerequisite to proceeding in any action involving a public benefit corporation for which such notice is required"[3] and that it was the plaintiffs' burden to present evidence, as outlined by § 21-1915, that the notice had been effectively given. Despite the plaintiffs' contentions on appeal that evidence was presented as to the required notice, we noted that the district

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[3] *Gilbert & Martha Hitchcock Found. v. Kountze*, *supra* note 1, 272 Neb. at 260, 720 N.W.2d at 38.

court had specifically found the evidence of notice lacking. The plaintiffs had failed to cross-appeal this finding, and thus, we explained that the plaintiffs had failed to preserve any complaint with respect to the district court's reasoning. We reversed and remanded the cause for further proceedings consistent with our opinion.

After remand, Edward argued to the district court that our opinion in *Hitchcock I* mandated only a limited inquiry into whether the Attorney General had been properly notified within 10 days of the plaintiffs' original complaint. Edward argued that this was the plaintiffs' only opportunity to perfect "springing" subject matter jurisdiction. According to Edward, if the plaintiffs had failed to give proper notice to the Attorney General at that time, then there was no way to remedy the court's lack of jurisdiction and the court was required to vacate its prior judgment.

The district court disagreed. The court read *Hitchcock I* as foreclosing further inquiry into whether the original notice had actually been sent, and it refused to admit further evidence presented by the plaintiffs on this point. Instead, over Edward's objection, the court ordered the plaintiffs to send a new notice to the Attorney General. The court contemplated at that time that a new trial would then proceed after proof of service on the issues previously joined by the parties.

The plaintiffs sent notice to the Attorney General and provided the court with proof of service. The notice included copies of the operative pleadings and relevant court orders. The Attorney General responded by letter, advising the court that its office did not wish to intervene. The Attorney General explained that after reviewing a voluminous record of pleadings, orders, hearing transcripts, and exhibits, and after meeting with "both sides," its office had concluded that "able counsel for the parties and the Court can provide sufficient protection to the public interest." The Attorney General explained that this was not the type of case contemplated by the notice requirements of the Nebraska Nonprofit Corporation Act, where the participants were without a sufficient economic interest to ensure oversight.

A hearing was held before the district court in which the Attorney General's office again stated its intention not to intervene. At the hearing, Charles made an oral motion to dismiss

his counterclaims. No objection to this motion is found in the record. The court granted the motion to dismiss Charles' counterclaims; however, it explained that it was not dismissing Charles as a defendant to the action.

Edward did not move at that time for dismissal of his counterclaims, but later filed a "Dismissal of Counterclaims," stating: "Edward . . . dismisses his counterclaims without prejudice. No leave of court to do so is required as the court never acquired subject matter jurisdiction of this action as was determined by the Nebraska Supreme Court." Edward also filed a motion to dismiss all of the plaintiffs' claims, with prejudice, for lack of subject matter jurisdiction. The plaintiffs objected to Edward's "Dismissal of Counterclaims" on the grounds that Edward had recently filed the same claims against them in federal court and that a dismissal of counterclaims would subject the plaintiffs to inconsistent judgments involving the same subject matter in different courts. The plaintiffs asserted that their claims against Edward should not be dismissed, because the new notice to the Attorney General was sufficient for the court to proceed with judgment.

Once it was clear that the Attorney General would not intervene, the plaintiffs argued that a new trial was not necessary and asked the court to simply reenter its pre-*Hitchcock I* findings of fact and conclusions of law, except those rendered moot by the death of Denman. Edward orally objected to this motion. Edward argued that it was essentially a "Rule 12" motion, "tantamount to a motion for summary judgment," and that he should be entitled to "put on evidence about it." The discussion on Edward's objection quickly devolved again, however, into the issue of whether the district court could have subject matter jurisdiction.

The court ultimately denied Edward's motion to dismiss the plaintiffs' claims, and no ruling appears on the record regarding Edward's "Dismissal of Counterclaims." The court granted the plaintiffs' motion to reenter its previous findings of fact and conclusions of law, and Edward appeals.

## ASSIGNMENTS OF ERROR

Edward's assignments of error, consisting of subparts and paragraphs of argument, do not comply with the mandate of

Neb. Ct. R. of Prac. 9D(1)e (rev. 2006) that they each be "[a] separate, concise statement of each error." Summarized, they are (1) that the district court lacked subject matter jurisdiction to render judgment; (2) that it was improper for the court to reenter its prior findings of fact and conclusions of law without giving the parties the opportunity for a new trial; and (3) that the court abused its discretion in failing to allow Edward to dismiss his counterclaims, when the court had granted Charles' motion to dismiss his similar counterclaims.

The plaintiffs cross-appeal, assigning as error the court's refusal to consider evidence that they had indeed sent proper notice to the Attorney General within 10 days of their original complaint.

## STANDARD OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.[4]

## ANALYSIS

Edward first contends that because the plaintiffs did not file within 10 days from the time of the original complaint, the proceedings were marred by a jurisdictional defect that could not be remedied by a late notice after remand. According to Edward, we only remanded the cause for further proceedings in order to determine the narrow question of whether the plaintiffs had given the Attorney General notice within 10 days.

Edward misconstrues our mandate in *Hitchcock I*. In that opinion, we specifically held that the issue of whether the plaintiffs had given the Attorney General notice within 10 days from the time of commencing the proceedings was foreclosed from further consideration. That fact had been conclusively determined after the plaintiffs failed to appeal the district court's specific determination that no notice had been given.

[2] The district court correctly reasoned that we would not have, therefore, remanded the cause for further proceedings if we thought that it contained a jurisdictional defect that could

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[4] See *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

not be remedied. We explained in *Hitchcock I* that the notice to the Attorney General as an interested party was an "essential prerequisite to *proceeding*" in an action involving a public benefit corporation.[5] Otherwise, the requirements of §§ 21-1949 and 21-1977 "would be meaningless" because "[t]here would be no consequence for a party's failure to meet the statutory requirement."[6] We accordingly concluded that "the district court erred in proceeding to trial without sufficient evidence that the Attorney General was notified of this action and had an adequate opportunity to intervene on behalf of the public."[7]

In doing so, we plainly rejected Edward's jurisdictional argument. The clear implication of our opinion was that, upon remand, the plaintiffs could provide the prerequisite notice to the Attorney General and the district court could proceed with the action once such notice was given. The plaintiffs did, in fact, notify the Attorney General of the action after we remanded the cause back to the district court, and we find no jurisdictional defect in the judgment currently before us.

Edward next asserts that the district court lacked authority to simply reenter its pre-*Hitchcock I* findings of fact and conclusions of law. In large part, this argument is dependent upon Edward's belief that the district court lacked subject matter jurisdiction and could not reenter a "vacated" judgment. As already discussed, the district court did not lack subject matter jurisdiction, and we did not "vacate" its previous judgment.

But Edward also argues that even if the district court had subject matter jurisdiction, it was impermissible for the court to issue judgment on the old record without giving the parties an opportunity to amend their pleadings and put on new evidence. Edward asserts that the adoption of its former judgment was simply a "concocted" procedure by the court.[8] Edward alleges that the rules of evidence were not complied with, no notice of trial was given, and summary judgment procedures were not

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[5] *Gilbert & Martha Hitchcock Found. v. Kountze*, *supra* note 1, 272 Neb. at 260, 720 N.W.2d at 38 (emphasis supplied).

[6] *Id.*

[7] *Id.* at 262, 720 N.W.2d at 39.

[8] Brief for appellant at 27.

followed. Edward asserts that he was prejudiced by the court's procedure because he was thus unable to present evidence and issues relating to the 3 years intervening between the district court's first order and its readoption of that order. In particular, he alleges that the court's procedure prohibited him from raising allegations that the plaintiffs had abused and dissipated the Foundation's funds while *Hitchcock I* was pending.

On remand, Edward's only objection to the procedure, as such, of adopting the former judgment was that it was akin to a motion for summary judgment and that Edward should be allowed to "put on evidence about it." Edward did not ask for permission to amend the pleadings. Nor did he make reference to further events in the interim period that he thought necessary to add to the record.

We conclude that the district court's procedure was not, as Edward contends, essentially a motion for summary judgment. It is, in fact, not uncommon for a court to "readopt" its prior judgment on the previous record, where the only defect in the judgment was that proper notice to an interested party had not been given, but such party was later notified and waived participation in the proceedings.[9]

We question whether much of Edward's current argument against the district court's procedure was properly raised before that court. But, in any event, we find no merit to it. The defective notice did not operate to open the door for new claims by Edward discovered in the interim of the appeal, and he has not been prejudiced by his inability to do so.

Finally, we consider Edward's argument that the district court abused its discretion in failing to allow Edward to dismiss his counterclaims. We can find no abuse of discretion in the court's failure to grant a motion that was never made. While Edward titled his motion a "Dismissal of Counterclaims," the motion clearly did not ask the court for any ruling. Instead, Edward stated that he was dismissing his own counterclaim and that "[n]o leave of court to do so is required . . . ." Moreover, the motion was specifically tied to Edward's belief that the "court

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[9] See, e.g., *Welfare of M.S.S.*, 86 Wash. App. 127, 936 P.2d 36 (1997); *Y. W. C. A. of Camden v. Murrelle*, 141 N.J. Eq. 229, 56 A.2d 738 (1948).

never acquired subject matter jurisdiction," and we have already found this contention to be without merit.

## CONCLUSION

We find no merit to Edward's assignments of error in the current appeal, and we affirm the judgment. Having done so, we need not consider the plaintiffs' cross-appeal.

AFFIRMED.

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# ANDERSON EXCAVATING CO., APPELLANT, V. BEVERLY NETH, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

751 N.W.2d 595

Filed June 27, 2008. No. S-07-539.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing a district court's order 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: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

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

Timothy L. Moll and Sara S. Pillen, of Rembolt Ludtke, L.L.P., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee.

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

CONNOLLY, J.

## I. SUMMARY

Anderson Excavating Co. (Anderson) is licensed under the International Fuel Tax Agreement (IFTA) and registered under the International Registration Plan (IRP). Nebraska is Anderson's base jurisdiction for IFTA and IRP. After an audit of Anderson's records, the Department of Motor Vehicles (DMV) concluded that the records failed to comply with the recordkeeping requirements of IFTA and IRP. Consequently, the DMV disallowed tax credits under IFTA and assessed additional registration fees under IRP. Anderson sought review by the district court. The district court affirmed the DMV's assessments.

To obtain credits for taxes paid in fuel purchases, an IFTA provision purports to require that licensees retain receipts showing the unit number of the vehicle being fueled to verify that the fuel was placed in an IFTA-qualified vehicle. Many receipts Anderson supplied for the audit did not include the unit number, so the DMV disallowed tax-paid credit for those purchases. Anderson contends that it was not required to document unit numbers and that the only requirement was that it could distinguish between qualified and nonqualified fuel purchases. Anderson claims it can connect fuel purchases to qualified vehicles because the receipts identified the drivers and Anderson can link drivers to qualified units. Anderson therefore contends that the DMV should not have disallowed the tax-paid credits under IFTA.

IRP requires that a registrant maintain mileage records supporting the registrant's claimed total distance traveled in each jurisdiction. If the registrant's mileage records are inadequate and an estimate of the registrant's true liability cannot be determined, the auditing jurisdiction may assess 100-percent registration fees for that jurisdiction. Anderson did not maintain the required mileage records, so the DMV assessed 100-percent fees for Nebraska. Anderson claims that even though it did not maintain mileage records, the DMV can estimate the percentage of miles Anderson traveled in each jurisdiction. Anderson argues that the DMV can estimate the percentage by looking at payroll records showing the percentage of hours worked in each jurisdiction. Anderson argues that the DMV can determine an

estimate of Anderson's true liability and that therefore, the 100-percent assessment was improper.

We affirm the district court's IFTA decision because we conclude that Anderson's records were insufficient for the DMV to verify Anderson's claims for tax-paid credit. We also affirm the court's IRP decision because we conclude that Anderson's payroll records did not enable the DMV to estimate Anderson's IRP liability.

## II. BACKGROUND

### 1. IFTA AND IRP

IFTA is a cooperative fuel tax agreement between Nebraska and other states. Under IFTA, licensees report and pay motor fuel use taxes to a base jurisdiction for distribution to other member jurisdictions in which the licensee traveled and incurred motor fuel use tax liability. The licensee's base jurisdiction has the primary responsibility for administering the agreement and executing its provisions with respect to the licensee. For instance, the base jurisdiction audits its licensees for all member jurisdictions.

IRP is a registration reciprocity agreement among states of the United States and provinces of Canada providing for payment of license fees based on the distance traveled in all jurisdictions. Under IRP, the operator of a fleet of apportionable vehicles registers the fleet in the base jurisdiction. The base jurisdiction then apportions and distributes registration fees to the cooperating jurisdictions. The registration fees are based in part on the percentage of miles traveled in each member jurisdiction. As with IFTA, the base jurisdiction is responsible for auditing its registrants for the other jurisdictions.

### 2. ANDERSON'S AUDIT

Anderson is an excavation contractor. Anderson demolishes buildings, bridges, and other structures and hauls the debris to landfills or recycling centers. Anderson primarily operates in Omaha, Nebraska, and Council Bluffs, Iowa, but does some work in other states.

In 2005, the DMV audited Anderson's records for compliance with IFTA and IRP. The IFTA audit period was from July

1, 2003, through June 30, 2004. The IRP audit period included the registration years 2003 through 2005, but only registration years 2003 and 2004 are at issue here. The DMV found that Anderson's records were incomplete. Because Anderson failed to maintain proper records, the DMV disallowed more than $17,000 of tax-paid fuel credits Anderson had included on its IFTA return and assessed a 100-percent IRP registration fee for Nebraska.

Anderson protested the alleged deficiencies. After IFTA and IRP hearings, the hearing officer affirmed the deficiency determinations. Anderson appealed to the district court, which affirmed the hearing officer's orders.

## III. ASSIGNMENTS OF ERROR

Anderson assigns, restated, that the district court erred in concluding that Anderson (1) was not entitled to credit for tax-paid fuel under IFTA and (2) owed additional registration fees to the DMV under IRP.

## IV. STANDARD OF REVIEW

[1,2] The Administrative Procedure Act (APA) governs Anderson's appeal.[1] A judgment or final order rendered by a district court in a judicial review under the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[2] When reviewing a district court's order under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[3] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

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[1] See Neb. Rev. Stat. §§ 60-3,198(4) (Cum. Supp. 2006) and 66-1411(1) (Reissue 2003).

[2] See *Holmes v. State, ante* p. 211, 745 N.W.2d 578 (2008).

[3] See *id.*

[4] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

## V. ANALYSIS

### 1. IFTA Assessment

Anderson claimed a tax-paid credit on its IFTA return for diesel purchases on which Anderson had already paid fuel tax. The DMV disallowed many credits, claiming Anderson's records were insufficient to prove the gallons Anderson reported on its return. Anderson argues the DMV improperly disallowed the credit.

To resolve this issue, we review Nebraska statutes[5] and regulations[6] and the IFTA governing documents, which include the articles of agreement, procedures manual, and audit manual. The record contains copies of the IFTA governing documents. The copies show that some provisions, including provisions on which we rely, were revised after the relevant audit periods. The copies contain the provisions *as revised* and do not include the prerevision language. Because these copies were included in the record, we assume the parties intended for us to rely on the text therein, including the revisions.

Section R700 of the articles of agreement requires that licensees maintain records to substantiate information reported on their IFTA tax returns. The audit manual's § A550.200 further provides, "When tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed." So, to decide whether the DMV properly disallowed the tax paid fuel credits, we must determine whether the "tax paid fuel documentation [was] unavailable." And to determine whether the documentation was unavailable, we must first decide what documents were required.

Sections R700 and R1010.200 of the articles direct us to the procedures manual for the specific recordkeeping requirements. The procedures manual's § P560 establishes the recordkeeping requirements for tax-paid retail purchases:

> **.100** Retail purchases must be supported by a receipt or invoice . . . .

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[5] See Neb. Rev. Stat. §§ 66-1401 to 66-1419 (Reissue 2003, Cum. Supp. 2006 & Supp. 2007).

[6] See 251 Neb. Admin. Code, ch. 1 (1998).

> **.200** Receipts for retail fuel purchases must identify the vehicle by the plate or unit number or other licensee identifier, as distance traveled and fuel consumption may be reported only for vehicles identified as part of the licensee's operation.
>
> **.300** An acceptable receipt or invoice must include, but shall not be limited to, the following:
>
> .005 Date of purchase;
> .010 Seller's name and address;
> .015 Number of gallons or liters purchased;
> .020 Fuel type;
> .025 Price per gallon or liter or total amount of sale;
> .030 *Unit numbers*; and
> .035 Purchaser's name . . . .

(Emphasis supplied.) For our analysis, we will focus on the item in subsection .300.030—unit numbers.

After auditing Anderson's records, the DMV allowed tax-paid credit for purchases documented by receipts listing a unit number for the truck being fueled. But many receipts Anderson supplied for the audit did not include the unit number. The DMV claimed that without a unit number, it could not verify that Anderson put the fuel in an IFTA-qualified vehicle. So, the DMV disallowed tax-paid credit when the receipts did not include a unit number.

Anderson does not dispute that many receipts were missing unit numbers. Instead, Anderson contends that unit numbers were unnecessary. Anderson argues that the IFTA procedures manual does not require unit numbers. Anderson also argues that the Nebraska IFTA regulations do not require unit numbers. As discussed below, we conclude that the district court did not err in its findings.

### (a) Contrary to Anderson's Argument, Its Records Were Insufficient Even Under the Procedures Manual's § P560.200

Anderson contends that it met the recordkeeping requirements in the procedures manual's § P560. Section P560 contains three subsections: .100, .200, and .300. Subsection .300 lists several items that must be included on each receipt, including unit numbers. But Anderson argues that subsection .200 clarifies subsection .300. Subsection .200 states, "Receipts for retail fuel

purchases must identify the vehicle by the plate or unit number *or other licensee identifier*, as distance traveled and fuel consumption may be reported only for vehicles identified as part of the licensee's operation." (Emphasis supplied.) Relying on subsection .200, Anderson argues that a specific unit number is not required if another "licensee identifier" exists. Anderson claims the receipts included a licensee identifier because although not all the receipts included unit numbers, they did identify the driver by name or credit card number.

Admittedly, the language in subsection .200 appears inconsistent with the language in subsection .300: subsection .200 requires "plate or unit number or other licensee identifier," while subsection .300 specifically requires unit numbers.

The parties have not favored us with an explanation of IFTA's tax-paid credits. Without such an explanation, we are unable to reconcile the apparent inconsistency between subsections .200 and .300. It may simply be an issue of fuzzy drafting. But even if subsection .200 applied and allowed a licensee to provide a vehicle identifier other than a unit number, we conclude that the identifier must be sufficient for the DMV to properly conduct its audit.

The articles of the IFTA agreement explain that to qualify for the tax-paid credit, the fuel must be placed in an IFTA-qualified vehicle. Not all vehicles in a licensee's fleet will necessarily be qualified vehicles. For instance, the record shows Anderson had smaller diesel trucks that were not IFTA-qualified. Therefore, even if subsection .200 applies to allow an identifier other than a unit number, the identifier must enable the DMV to verify that the fuel was placed in an IFTA-qualified vehicle. We agree with the DMV that Anderson provided insufficient identification information.

Anderson counters it can link fuel purchases to qualified vehicles. Relying on a company policy that requires drivers to use the same truck each day, Anderson argues that the driver's name on the receipt adequately identifies the truck being fueled. We disagree with Anderson's assertion that "the identification of the driver is the functional equivalent to a unit number."[7]

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[7] Brief for appellant at 12.

During the audit period, Buck's, Inc., was the primary vendor Anderson used for fueling its fleet of trucks. At Buck's, each driver would sign his or her name to a log and list the date, the number of gallons purchased, and the total amount of the sale. Though most drivers did not list a unit number when signing the log, "R.D." often included his unit number. He most often listed unit No. 317, but occasionally, he listed other units, including Nos. 154, 324, and 306. The log shows that although R.D. usually drove unit No. 317, not every purchase R.D. made was for unit No. 317. A driver's name is simply not equivalent to a unit number.

Also, as mentioned, Anderson had smaller diesel trucks that were not IFTA-qualified. Therefore, knowing a particular driver made a diesel purchase is insufficient to determine that the fuel went into a qualified vehicle because without a vehicle identifier, the DMV cannot verify that the driver was not driving one of these nonqualified trucks.

We conclude that even if subsection .200 applies to allow an identifier other than a unit number, Anderson's records were insufficient. With only the driver's name, the DMV could not verify that Anderson met the threshold condition of placing the fuel in an IFTA-qualified vehicle. Anderson's reliance on subsection .200 fails.

(b) Anderson's Reading of the DMV's Regulation Does Not Help Anderson

Anderson also relies on a DMV regulation implementing IFTA to argue that its receipts were adequate even without unit numbers. That regulation provides: "No tax-paid credit fuel shall be allowed pursuant to IFTA unless licensee is able to distinguish fuel used by qualified versus non-qualified motor vehicles as specified in the agreement."[8] Anderson contends that the regulation does not require licensees to provide receipts listing unit numbers. According to Anderson, the regulation requires only that the licensee can distinguish between qualified and nonqualified fuel purchases. Anderson again argues that unit numbers are simply one means of connecting fuel purchases to qualified

[8] 251 Neb. Admin. Code, ch. 1, § 016.02.

vehicles, but not the sole means. Anderson claims it can link fuel purchases to qualified vehicles by using the driver's name on the receipt.

Even if Anderson's reading of the regulation is correct, the regulation does not help Anderson under these facts. As discussed, we conclude that Anderson's receipts were insufficient to link fuel purchases to qualified vehicles. With no vehicle identifier other than a driver's name, the DMV could not verify that the fuel was placed in a qualified vehicle.

(c) The District Court Did Not Err in Affirming the DMV's IFTA Deficiency Determination

Nebraska, as Anderson's base jurisdiction, is responsible for conducting an accurate audit for the other member jurisdictions. The audit manual's § A100 stresses the base jurisdiction's responsibility:

> The IFTA requires licensees to pay fuel taxes to each participating jurisdiction commensurate with the distance traveled in each jurisdiction. To fulfill this requirement, an effective and uniform audit program is necessary to verify the integrity of IFTA tax returns. It is essential that the basic audit program adopted by each jurisdiction be uniform and thorough to insure accuracy. It is each jurisdiction's responsibility to . . . conduct an accurate audit in a professional manner . . . .

Nebraska cannot fulfill its responsibility of conducting an accurate audit when the licensee's records are insufficient to verify information on the licensee's IFTA tax return.

We conclude that to support Anderson's claims for tax-paid credit, the IFTA governing documents required Anderson to maintain receipts showing the fuel was placed in an IFTA-qualified vehicle. But for many of Anderson's purchases, the receipts were insufficient for the DMV to verify that the fuel was placed in an IFTA-qualified vehicle. The "tax paid fuel documentation [was] unavailable" for those purchases represented by receipts with only the driver's name. Therefore, under the audit manual's § A550.200, the DMV properly disallowed those claims for tax-paid fuel credits. The district court did not err in affirming the IFTA deficiency determination.

### 2. IRP Assessment

Anderson filed renewal applications in Nebraska in 2003 and 2004 for apportioned registration under IRP. The DMV conducted an audit of Anderson's records to verify the mileage reported in the applications. Anderson did not keep mileage records during the audit period because Anderson believed it was not feasible to do so. After concluding that Anderson failed to maintain proper mileage records, the DMV assessed additional registration fees for Nebraska. Anderson claims the DMV improperly assessed these additional fees.

To resolve this issue, we review Nebraska statutes[9] and regulations,[10] the IRP itself, and the IRP audit procedures manual. The record contains copies of the IRP documents. The copies show that some of the provisions on which we rely were amended during the 2004 audit period. As with the IFTA documents, the copies in the record contain only the revised language. Again, because the parties made these copies part of the record, we will rely on the language contained therein.

An IRP registrant pays all registration fees to the base jurisdiction. The base jurisdiction then apportions the fees and distributes them to all member jurisdictions through which the registrant traveled. The registration fees are based in part on the percentage of miles traveled in each member jurisdiction. As such, the distance the registrant's vehicles traveled in the respective jurisdictions is critical information for IRP's operation. The IRP and its audit procedures manual set forth recordkeeping requirements so that the base jurisdiction can verify the registrant's reported miles.

The IRP's § 1501 provides that a registrant must maintain records to prove its application filing. Section 1501 states that the source documents "must contain necessary details to trace vehicle movement." Section 1501 directs us to the audit procedures manual's § 400 for specific recordkeeping requirements.

Subsection 401 of the audit procedures manual mandates that the registrant "maintain operational records that support the total

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[9] See Neb. Rev. Stat. §§ 60-3,192 to 60-3,206 (Cum. Supp. 2006 & Supp. 2007).

[10] See 251 Neb. Admin. Code, ch. 2 (1999).

distance traveled in each jurisdiction and total distance traveled everywhere." Section 400 lists information that these mileage records must contain. The mileage records must include the trip origin and destination, total trip distance traveled, distance traveled by jurisdiction, and route of travel or beginning and ending odometer readings. A DMV regulation implementing the IRP similarly requires Nebraska registrants to maintain these mileage records.[11]

If a registrant fails to maintain the required records, the jurisdiction may impose an assessment of liability. Under the IRP's § 1502, the member jurisdiction must estimate the registrant's "true liability" from (1) information the registrant furnished, (2) information the member jurisdiction gathered, (3) information relative to other similar registrants based in the jurisdiction, or (4) any other information available to the member jurisdiction. But "[*i*]*f an estimate of the registrant's true liability cannot be determined*," subsection 603 of the audit procedures manual provides that "the registrant may be assessed 100% registration fees for the [auditing] jurisdiction." (Emphasis supplied.) Similarly, a DMV regulation states, "If adequate records are not maintained or are not made available for audit, the registrant may lose the right to apportioned registration and may be subject to a possible full fee assessment."[12]

Anderson did not maintain mileage records during the audit period. According to Anderson, such logs were not feasible because of Anderson's day-to-day business operations, where the drivers drive all day, making multiple short trips between the jobsite and dumpsite. And, when the project is in downtown Omaha, the drivers often cross into Iowa for a dumpsite in Council Bluffs. Anderson claims that it was not feasible to log odometer readings for each "trip."[13]

After deciding it could not determine an estimate of Anderson's true liability without the required mileage records, the DMV assessed 100-percent registration fees for Nebraska.

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[11] See 251 Neb. Admin. Code, ch. 2, § 014.

[12] 251 Neb. Admin. Code, ch. 2, § 013.07.

[13] Brief for appellant at 14.

The deficiency determination (an additional $18,000 in registration fees) represented the difference between the percentage of Nebraska miles Anderson stated on its renewal application and the 100-percent assessment. The auditor testified that this assessment increased the reported Nebraska percentage to 100 percent. The assessment, however, left the other jurisdictions' percentages as Anderson initially reported, meaning the 100-percent assessment for Nebraska did not deny the other jurisdictions the amounts to which they were entitled.

The issue is whether the DMV correctly concluded it could not determine an estimate of Anderson's true liability.

Anderson claims that an estimate of its true liability *can* be determined and that therefore, the 100-percent assessment for Nebraska fees was not justified. Although Anderson did not keep the required mileage records, it offered payroll records to show the percentage of *hours* drivers worked in various jurisdictions. The records show that during the audit period, Anderson performed jobs in states other than Nebraska, including Iowa, Alabama, Kansas, Louisiana, Maryland, Missouri, and Tennessee. The records also purportedly show that, on average, 67 percent of the hours worked by Anderson drivers were in Nebraska, 15 percent were in Iowa, and another 19 percent were in other states. Anderson contends that these percentages provide a reasonable estimate of the percentage of miles driven in the respective jurisdictions because the employees spent their working hours driving.

The DMV argues that Anderson's reliance on general labor records that bear no relation to mileage cannot be accepted because the IRP requires documents showing actual mileage. We agree with the DMV that the payroll records are insufficient to estimate mileage traveled. At one point in her testimony, Anderson's bookkeeper stated, "I couldn't prove in any way, shape, or form, that they left that job site for any reason. They could have been sitting there all day long waiting for their truck to be filled up." This testimony shows no direct correlation exists between hours worked and miles driven because there is no guarantee that the drivers spend every working hour driving.

The payroll records, without any mileage information, did not enable the DMV to estimate the percentage of distance traveled

in each jurisdiction. Because "an estimate of [Anderson's] true liability cannot be determined," the audit procedures manual allows for an assessment of 100-percent registration fees for Nebraska.[14]

As with IFTA, Nebraska has a responsibility to protect the integrity of IRP by performing a complete and accurate audit. Section 100 of the audit manual recognizes the importance of this responsibility:

> 100.2 The purpose of auditing registrants under the [IRP] is to protect the integrity of the vehicle registration laws of all jurisdictions party to the IRP and to ensure equitable treatment of all registrants subject to the IRP. . . . [I]t is incumbent upon each jurisdiction to meet its obligations under the provisions of the IRP, i.e., proportional registration of commercial vehicles, by insuring proper documentation of carrier total distance operated, and official examination and verification of the appropriate records . . . .

Nebraska cannot carry out its responsibility of conducting an accurate audit when a registrant fails to provide the required mileage records or other records from which the DMV can estimate the registrant's true liability.

We conclude that without the mileage records, the DMV could not estimate Anderson's true liability. The DMV was therefore justified in imposing the 100-percent assessment against Anderson for its failure to maintain the proper records. The district court did not err in affirming the IRP deficiency determination.

## VI. CONCLUSION

We conclude that Anderson was not entitled to IFTA tax-paid credit for fuel purchases when the receipts only identified the driver. Therefore, the DMV properly disallowed Anderson's claims for credit on those purchases. The district court did not err in affirming the DMV's IFTA deficiency determination.

We further conclude that because Anderson failed to maintain mileage records documenting distance traveled in IRP member

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[14] See, also, 251 Neb. Admin. Code, ch. 2, § 013.07.

jurisdictions, the DMV was unable to estimate Anderson's IRP liability. Therefore, IRP allowed an assessment against Anderson of 100-percent registration fees for Nebraska. The district court did not err in affirming the DMV's 100-percent assessment against Anderson.

AFFIRMED.

McCORMACK, J., participating on briefs.
HEAVICAN, C.J., not participating.

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ST. MONICA'S, APPELLANT, V.
LANCASTER COUNTY BOARD
OF EQUALIZATION, APPELLEE.

751 N.W.2d 604

Filed June 27, 2008. No. S-07-1031.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by an appellate court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Charities.** Neb. Rev. Stat. § 77-202(1)(d) (Reissue 2003) requires (1) the property be owned by an educational, religious, charitable, or cemetery organization and (2) the property be used exclusively for educational, religious, charitable, or cemetery purposes.
5. **Taxation: Time.** Neb. Rev. Stat. § 77-202.03(3)(a) (Cum. Supp. 2006) provides that the exempt use be determined as of the date of application for exemption.
6. **Taxation: Property: Intent.** The intention to use property in the future for an exempt purpose is not a use of the property for exempt purposes.
7. **Taxation: Property.** The ownership of property is not evidence of use under Neb. Rev. Stat. § 77-202(1)(d) (Reissue 2003).

Appeal from the Tax Equalization and Review Commission. Affirmed.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellant.

Gary Lacey, Lancaster County Attorney, Michael E. Thew, and Ryan M. Mick, Senior Certified Law Student, for appellee.

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

HEAVICAN, C.J.

## INTRODUCTION

The Tax Equalization and Review Commission (TERC) upheld the decision of the Lancaster County Board of Equalization (the Board) denying application for property tax exemption filed by St. Monica's. We affirm.

## FACTS

St. Monica's provides substance abuse and mental health treatment for women on a charitable basis. St. Monica's is a Nebraska nonprofit corporation that holds a 501(c)(3) exemption designation from the Internal Revenue Service as a religious charitable organization.

On March 15, 2005, St. Monica's purchased real property located in Lincoln, Nebraska, to convert into a short-term residential therapeutic community, an outpatient facility, and administrative offices. On March 28, an application for a property tax exemption was filed. On or about May 5, St. Monica's was notified that the Lancaster County assessor's office had recommended denial of the application. A hearing before the Board regarding the application was scheduled for May 24.

After St. Monica's received the notification, but before the Board's hearing, a representative of the organization contacted the county assessor's office. During that conversation, the representative was informed that the basis for the recommendation was that St. Monica's was not yet using the subject property for exempt purposes; however, once building permits were issued, the county assessor would consider the property to be devoted to an exempt use. The representative from St. Monica's was notified that the organization could reapply for the exemption by August 1, 2005, for the 2005 tax year.

Following the hearing on May 24, 2005, and based upon the county assessor's recommendation, the Board voted to deny St. Monica's the exemption. St. Monica's applied for the proper

building permits on July 21. The property was remodeled, and St. Monica's began occupying it in October. There is nothing in the record that suggests that St. Monica's reapplied at any time for a property tax exemption for the 2005 tax year.

On December 22, 2005, St. Monica's petitioned TERC to reverse the decision of the Board and grant its exemption. Initially, the petition of St. Monica's was dismissed for lack of jurisdiction on December 14, 2006. That dismissal was appealed and docketed with the Court of Appeals on January 12, 2007, as case No. A-07-050.

The parties filed a joint stipulation for summary reversal on May 4, 2007, which was granted by the Court of Appeals on June 7. The petition was then submitted to TERC without a hearing. On September 12, TERC upheld the Board's decision, and St. Monica's appeals.

## ASSIGNMENT OF ERROR

On appeal, St. Monica's assigns that TERC erred in denying its application for a property tax exemption.

## STANDARD OF REVIEW

[1,2] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission.[1] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[3] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[3]

## ANALYSIS

The sole issue presented by this case is whether TERC erred in upholding the denial of application for property tax exemption filed by St. Monica's.

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[1] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2006); *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003).

[2] *City of York v. York Cty. Bd. of Equal., supra* note 1.

[3] *Id.*

[4,5] Neb. Rev. Stat. § 77-202(1) (Reissue 2003) provides that

> [t]he following property shall be exempt from property taxes:
>
> . . . .
>
> (d) Property owned by [an] educational, religious, charitable, or cemetery organization[], or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for educational, religious, charitable, or cemetery purposes . . . .

The statute thus requires (1) the property be owned by an educational, religious, charitable, or cemetery organization and (2) the property be used exclusively for educational, religious, charitable, or cemetery purposes.[4] And Neb. Rev. Stat. § 77-202.03(3)(a) (Cum. Supp. 2006) provides that "the exempt use shall be determined as of the date of application" for exemption.

We turn first to the issue of whether the subject property was being "used exclusively" for an exempt purpose as of the date of application, March 28, 2005.

In its brief, St. Monica's argues that its "intent . . . when purchasing the property was to use the property in its charitable work by converting [the property] into a short-term residential therapeutic community, an outpatient facility and administrative offices to provide substance abuse and mental health treatment for women on a charitable basis."[5] St. Monica's does not dispute that the property was not actually being occupied for such a purpose at the time it filed its application.

[6,7] This court has consistently held that the "intention to use property in the future for an exempt purpose is not a use of the

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[4] See *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991).

[5] Brief for appellant at 8.

property for [exempt] purposes."[6] These historic principles are equally applicable under the current statutory scheme regarding exemptions. Because at most St. Monica's expressed an intent to use the property in an exempt manner in the future, we determine that the conclusion reached below that St. Monica's was not entitled to its requested property tax exemption for the 2005 tax year was not error. We also reject the assertion made by St. Monica's at oral argument that its purchase of the property showed that it had more than intent to use the property for an exempt purpose. The ownership of property is not evidence of use under the statute.[7]

St. Monica's also contends that because it was qualified for the exemption, it was unnecessary for it to reapply by August 1, 2005, in order to obtain such exemption. The basis for this argument is that as of July 21, St. Monica's had obtained the necessary building permits, and in accordance with the county assessor's policy, the subject property was considered to be devoted to an exempt purpose.

We also reject this contention. As is noted above, § 77-202.03(3)(a) requires a property owner seeking an exemption to file for that exemption and further states that "the exempt use shall be determined as of the date of application." The record demonstrates that St. Monica's applied for an exemption on March 28, 2005, at a time when, as demonstrated above, it was not using the property for an exempt purpose. Even assuming that St. Monica's thereafter began to use the property for an exempt purpose, it was required under § 77-202.03 to reapply for the exemption and allow the county assessor and the Board to consider any possible exemption of the property anew.

Because St. Monica's was not using the property for an exempt purpose as of the date of its application, it was not

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[6] *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 6-7, 337 N.W.2d 103, 107 (1983). See, *Y. M. C. A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900); *Academy of the Sacred Heart v. Irey*, 51 Neb. 755, 71 N.W. 752 (1897); *First Christian Church of Beatrice v. City of Beatrice*, 39 Neb. 432, 58 N.W. 166 (1894).

[7] See *Y. M. C. A. of Omaha v. Douglas County, supra* note 6.

entitled to an exemption. The sole assignment of error by St. Monica's is without merit.

## CONCLUSION

We affirm the denial of application for property tax exemption filed by St. Monica's.

AFFIRMED.

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# IN RE APPLICATION OF DAVID W. DOERING FOR ADMISSION TO THE NEBRASKA STATE BAR.

751 N.W.2d 123

Filed June 27, 2008. No. S-34-070004.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver.** The Nebraska Supreme Court has the power, under appropriate circumstances, to waive the application of its own rules regarding the admission of attorneys to the Nebraska bar.
4. **Rules of the Supreme Court: Attorneys at Law: Intent.** The Nebraska Supreme Court Rules for Admission of Attorneys are intended to weed out unqualified applicants, not to prevent qualified applicants from taking the bar.
5. **Rules of the Supreme Court: Attorneys at Law: Waiver.** Exceptions to the Nebraska Supreme Court Rules for Admission of Attorneys should be recognized and waivers granted whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule.
6. **Rules of the Supreme Court: Attorneys at Law.** While a strict application of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) may not always be appropriate for those who attended law school outside the United States, a strict application of rule 5C is appropriate for graduates of nonaccredited United States law schools.

Original action. Denial of application affirmed.

Robert F. Bartle, of Bartle & Geier Law Firm, for applicant.

Jon Bruning, Attorney General, and Tom Stine for Nebraska State Bar Commission.

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

GERRARD, J.

David W. Doering graduated from Western State University College of Law (Western State) in Fullerton, California, in 1982. At the time of his graduation, Western State's law school was not approved by the American Bar Association (ABA). In 2007, Doering filed an application with the Nebraska State Bar Commission (Commission), seeking admission without examination as a Class I-A applicant.[1] The Commission denied Doering's application on the basis that he did not possess a first professional degree from a law school approved by the ABA, as required by rule 5C of the Nebraska Supreme Court Rules for Admission of Attorneys. Thereafter, at Doering's request, a hearing was held before the Commission, and Doering presented evidence regarding his educational qualifications and Western State's credentials. The Commission again denied Doering's request, and he appeals.

## FACTS

Doering received a bachelor of science degree in criminal justice from the University of Nebraska-Lincoln in 1977. In 1979, Doering enrolled at Western State. After successfully completing 3 years of coursework, Doering earned a juris doctor degree from Western State in 1982.

Doering's transcript shows that his first-year law school curriculum consisted of two terms of civil procedure, two terms of contracts, two terms of property, two terms of torts, and one term of criminal law. During his second and third years, Doering took courses in family law, constitutional law, media law, law office management, space law, wills and trusts, community property, education law, legal research and writing, evidence, investigative technique, remedies, the Uniform Commercial Code, agency and partnerships, corporations, criminal procedure, clinical education, and professional responsibility. The record indicates that at some point while attending Western State, Doering took the

[1] See Neb. Ct. R. for Adm. of Attys. 5A(1) (rev. 2005).

Multistate Professional Responsibility Examination (MPRE) and received a score that satisfies Nebraska's MPRE requirement.[2]

At all times relevant to this case, Western State was accredited by the Committee of Bar Examiners of the State of California and accredited by the Western Association of Schools and Colleges. However, during the time that Doering attended and eventually graduated from Western State, the law school was not accredited by the ABA.

After graduation, Doering took, but failed, bar examinations in Montana and California. In 1992, Doering sat for and passed the Georgia bar examination, and was admitted to the Georgia bar in 1992. Beginning in March 1995 and continuing until February 1996, Doering worked as a volunteer for the Georgia Indigent Defense Council. In February 1996, the felony trial division of the Georgia Indigent Defense Council made the decision to start its own office and separated from the Georgia Indigent Defense Council. The director of the felony trial division offered Doering a position with the felony trial division as a staff attorney, which Doering accepted. Doering worked as a staff attorney and was eventually promoted to senior attorney, where he remained until he moved to Nebraska in 2006.

The record reflects that Doering is currently a lawyer in good standing with the Georgia bar. Doering testified that he moved to Nebraska in 2006 in order to be closer to his parents, who were in poor health.

On April 12, 2007, Doering submitted a Class I-A application to the Commission seeking admission to the Nebraska bar without examination.[3] In a letter dated June 18, 2007, the Commission denied Doering's application because he had not received his law degree from an ABA-approved law school. Doering appealed the Commission's denial, and a hearing was held.

Doering testified and presented evidence at the hearing. Included in the evidence offered by Doering were two affidavits by Richard E. Jenkins, an associate dean and professor of law at Western State. In his affidavits, Jenkins testified to, among

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[2] See, rule 5A(1)(c); Neb. Ct. R. for Adm. of Attys. 16 (rev. 2004).

[3] See rule 5A(1)(b).

other things, Western State's curriculum and its accreditations. Jenkins, who graduated from Western State in 1974 and later joined the teaching faculty at Western State in 1976, testified that he is familiar with the accreditation standards of the bar examiners of the State of California and the ABA and that both accreditation standards "are equal or substantially equivalent."

Attached to one of Jenkins' affidavits was an exhibit which set forth various ABA accreditation requirements as they existed in 1982. These requirements included standards relating to the law school library, the number of full-time faculty members, and faculty workload and compensation. Given these ABA standards, Jenkins opined that "[r]elative to the number of fulltime faculty . . . and other requirements relative to faculty teaching loads, study and law library requirements, . . . Western State . . . offered a program substantially similar to ABA-approved law schools."

Jenkins further averred that it was his understanding that "the single and most important reason" why Western State had not applied for accreditation with the ABA by the time Doering graduated in 1982 was because the ABA then required "through Rule 202, that a law school should be organized as a non-profit educational institution," prohibiting for-profit law schools, such as Western State, from receiving ABA accreditation. Jenkins testified that Western State did not seek ABA accreditation "until some time in approximately 1987" and that Western State "was first accredited by the ABA in the mid-1990s."

Doering presented evidence that in 1995, the Department of Justice brought an antitrust lawsuit against the ABA and obtained a consent decree under which the ABA was enjoined from "adopting or enforcing any Standard, Interpretation or Rule, or taking any action that has the purpose or effect of prohibiting a law school from . . . being an institution organized as a for-profit entity."[4] Doering's evidence indicates that as a result of this ruling, the ABA removed its requirement that a law school be organized as a nonprofit educational institution in order to receive ABA accreditation.

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[4] *U.S. v. American Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996).

Following this rule change, Western State applied for and received ABA accreditation. For some reason, not apparent from the record, Western State temporarily allowed its ABA accreditation to lapse. In 2005, Western State reacquired, and has maintained until the present time, provisional accreditation from the ABA. The record indicates that a school that is provisionally approved by the ABA is entitled to all the rights of a fully approved law school. After reviewing Doering's law school transcript, Jenkins testified that Doering's academic experience and course of study from 1979 to 1982 was essentially the same as the academic experience and course of study for law students who graduated from Western State in 2007.

On October 23, 2007, the Commission again denied Doering's application on the basis that he lacked a first professional degree from an ABA-approved law school. Doering now appeals to this court.

## ASSIGNMENT OF ERROR

Doering assigns, restated, that the Commission erred in denying his application seeking admission to the Nebraska bar.

## STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission.[5]

## ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.[6] Rule 5A(1)(b) requires a Class I-A applicant, such as Doering, to have attained "educational qualifications at least equal to those required" of Class II applicants (i.e., those required to take the written examination). And Class II applicants, pursuant to rule 5C, must possess their first professional degree from an ABA-approved

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[5] *In re Application of Brown*, 270 Neb. 891, 708 N.W.2d 251 (2006); Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000).

[6] *In re Application of Budman*, 272 Neb. 829, 724 N.W.2d 819 (2006). See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25.

law school.[7] Thus, Doering must meet the ABA-approved law school requirement or, in the absence of such degree, seek a waiver of rule 5C.

[3-5] Doering concedes that Western State was not accredited by the ABA at the time he graduated in 1982. Nevertheless, Doering requests that we waive the application of the educational qualifications in rule 5C as they apply to him. This court has the power, under appropriate circumstances, to waive the application of its own rules regarding the admission of attorneys to the Nebraska bar.[8] In determining whether a waiver of the educational qualifications requirement is appropriate, we are guided by certain principles. We have explained that our "admission rules [are] intended to 'weed' out unqualified applicants, not to prevent qualified applicants from taking the bar."[9] We have also noted that "exceptions should be recognized and waivers granted '"whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule."'"[10]

Doering notes that under certain circumstances, we have waived rule 5C where a foreign-educated applicant proves that the education he or she received was equivalent to that for a juris doctor degree available at an ABA-approved law school.[11] Doering argues that given his circumstances—in particular, his allegation that Western State would have been ABA-accredited at the time of his graduation but for its proprietary status—we should extend to him, a graduate of an unaccredited United States law school, the same waiver opportunity afforded to foreign-educated applicants. This we decline to do.

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[7] See *In re Application of Brown, supra* note 5.

[8] See *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998).

[9] *In re Application of Gluckselig*, 269 Neb. 995, 1001, 697 N.W.2d 686, 691 (2005).

[10] *In re Application of Collins-Bazant, supra* note 8, 254 Neb. at 621, 578 N.W.2d at 43.

[11] See, *In re Application of Budman, supra* note 6; *In re Application of Brown, supra* note 5; *In re Application of Gluckselig, supra* note 9; *In re Application of Collins-Bazant, supra* note 8.

[6] While we have, on occasion, granted waivers to graduates of foreign law schools, there is a critical distinction between graduates of foreign law schools and graduates of nonaccredited U.S. law schools. The ABA does not evaluate foreign law schools for accreditation; thus, there is no way for citizens of foreign countries to attend an ABA-accredited school in their own country.[12] Accordingly, we reaffirm what we said in *In re Application of Collins-Bazant*[13]: While a strict application of rule 5C may not always be appropriate for those who attended law school outside the United States, a strict application of rule 5C is appropriate for graduates of nonaccredited U.S. law schools.

For applicants who graduate from U.S. law schools, we have chosen, as reflected in rule 5C, to rely upon the ABA accreditation process as an objective determination of the educational environment for prospective attorneys. The ABA's process for evaluating law schools is extensive and involves many detailed standards for law school organization and administration, the educational programs offered, the faculty, admissions, the library, and the law schools' actual physical facilities.[14] The ABA's standards are an appropriate, effective, and objective means of measuring the quality of a law school and "provide assurance that applicants to the bar 'have experienced a generally uniform level of appropriate legal education.'"[15]

In the present case, Doering would have us evaluate nonaccredited U.S. law schools on a case-by-case basis to determine whether a particular school, at a certain point in time, provided a legal education that was substantially equivalent to that from an ABA-accredited law school. But such a case-by-case approach into the individual qualifications and standards of every nonaccredited U.S. law school, whenever a graduate from that school applies to the bar, would impose upon this court an unreasonable

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[12] See *In re Application of Collins-Bazant, supra* note 8. See, also, *In the Matter of Tocci*, 413 Mass. 542, 600 N.E.2d 577 (1992); *Application of Macartney*, 163 Ariz. 116, 786 P.2d 967 (1990).

[13] *In re Application of Collins-Bazant, supra* note 8.

[14] See *Fla. Bd. of Bar Ex'mrs re Mass. School*, 705 So. 2d 898 (Fla. 1998).

[15] *In the Matter of Tocci, supra* note 12, 413 Mass. at 548, 600 N.E.2d at 581.

and unnecessary burden. The resources of this court are neither sufficient nor suited to the task of conducting such individualized waiver determinations. Furthermore, we believe that for us to evaluate U.S. law schools on a case-by-case approach would yield results far less reliable than those of the ABA, and would invite challenges as to the quality of such determinations.[16] Simply stated, the ABA is best equipped to perform the function of accrediting law schools, and we will continue to rely on its determinations.

The circumstances in the present case illustrate the difficultly we would face if we were to grant waivers for rule 5C on a case-by-case basis, rather than relying on the ABA's accreditation. Here, Doering claims that the education he received at Western State from 1979 until 1982 was functionally equivalent to that of an ABA-approved law school. Yet Doering offered little by way of comprehensive evidence to support this claim. The evidence Doering did offer suggested that the only reason Western State was not ABA-accredited at the time he graduated in 1982 was because of its proprietary status. However, other courts have considered Western State's accreditation history, and their opinions suggest that, from June 1977 until approximately July 1981, a proprietary law school could have applied for and received provisional ABA accreditation if the school substantially complied with all other standards.[17] But despite being invited to do so, Western State did not apply, and when Western State did eventually apply in 1987, it was denied accreditation for reasons other than its proprietary status.[18]

Doering's request for a waiver does not explain or address these inconsistent findings and relies solely on the limited evaluation permitted by the evidence he adduced at the hearing. This evaluation is, necessarily, less detailed and reliable than the searching inquiry of the ABA accreditation process. The ABA

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[16] See *Appeal of Kartorie*, 486 Pa. 500, 406 A.2d 746 (1979).

[17] See, *Application of Urie*, 617 P.2d 505 (Alaska 1980); *In re Nort*, 96 Nev. 85, 605 P.2d 627 (1980); *Application of Hansen*, 275 N.W.2d 790 (Minn. 1978).

[18] See, *In re Lewis*, 86 S.W.3d 419 (Ky. 2002); *Application of Urie, supra* note 17; *In re Nort, supra* note 17; *Application of Hansen, supra* note 17.

has the resources to conduct an examination that is far more credible than any that could be performed by this court or an applicant for admission to our bar. And to evaluate law schools case by case, based on the limited evidence adduced by a particular applicant, would risk inconsistency and unfairness to students who were otherwise identically situated. As we stated in *In re Appeal of Dundee*,[19] "[i]f we do not apply rule 5 uniformly rather than on a case-by-case basis, it will cease to operate as a rule at all."

It is for precisely these reasons that we have chosen, in rule 5C, to rely on the ABA's well-founded, consistent, and definitive conclusions. Therefore, we continue to hold that waiver of rule 5C is not available to graduates of nonaccredited U.S. law schools. Because Western State was not ABA-accredited at the time Doering graduated, we affirm the decision of the Commission to deny his application for admission.

## CONCLUSION

To evaluate an applicant's legal education effectively, consistently, and expeditiously, we have elected to utilize the accreditation resources of the ABA. While waiver of rule 5C may, in certain circumstances, be appropriate for graduates of foreign law schools, rule 5C will not be waived for graduates of nonaccredited U.S. law schools. At the time Doering graduated, Western State was not ABA-accredited; therefore, his application for admission to the Nebraska bar should be denied. The decision of the Commission is affirmed.

DENIAL OF APPLICATION AFFIRMED.

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[19] *In re Appeal of Dundee*, 249 Neb. 807, 812, 545 N.W.2d 756, 760 (1996).

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