THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JULY 3, 2008 and JANUARY 15, 2009

IN THE

Supreme Court of Nebraska

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VOLUME CCLXXVI

PEGGY POLACEK

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

For the benefit of the State of Nebraska

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	Jeffre Cheuvront	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	Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
		James J. Orr	Valentine
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 275

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Jill Ann Finken
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Erin Lynn Gerdes
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ANNELIESE MAE WRIGHT
JOSHUA JAMES YAMBOR
SEAN BAHRAM ZEHTAB
KATIE WEICHMAN ZULKOSKI

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No. S-07-1320: **State v. Anderson**. Appeal dismissed. Per Curiam.

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No. S-87-352: **State ex rel. NSBA v. Kinney**. By order of the court, John C. Kinney is reinstated as a member of the Nebraska State Bar Association, effective September 16, 2008.

No. S-04-1139: **State ex rel. Counsel for Dis. v. Horneber**. Motion for reinstatement sustained; respondent reinstated effective July 2, 2008.

No. S-06-215: **Scott v. Poepsel**. Appeal dismissed.

No. S-07-075: **State ex rel. Counsel for Dis. v. Smyrak**. Surrender of license accepted without opinion. Judgment of disbarment.

No. S-07-578: **State ex rel. Counsel for Dis. v. Kratina**. Motion for reinstatement sustained; respondent reinstated effective July 2, 2008.

No. S-07-831: **State ex rel. Counsel for Dis. v. Eker**. John F. Eker III reinstated as member of the Nebraska State Bar Association effective December 23, 2008.

No. S-07-1162: **State v. Korgel**. Reversed, and cause remanded to district court for vacation of appellant's sentence and reinstatement of appellant's original sentence.

No. S-07-1195: **State v. Harris**. Appeal dismissed. See § 2-107(A)(2).

No. S-08-047: **State v. Lam**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-08-073: **Moeller v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-08-100: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. Second motion for postconviction relief does not establish basis for relief that was not available at the time of first motion for postconviction relief. See *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

No. S-08-109: **Jacob v. Cruickshank**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-271: **State v. Vo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-08-463: **State v. Grandon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-530: **State v. Long**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-639: **Nesbitt v. Board of Parole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-724: **State v. Buckman**. Appeal dismissed. See § 2-107(A)(2).

No. S-08-755: **Lewis v. Auten**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. S-08-756: **Lewis v. Crosby**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. S-08-769: **Wilson v. Gunter**. Appeal dismissed. See § 2-107(A)(2).

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No. S-08-859: **In re Interest of Markice M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-08-908: **State v. Smith**. On the court's own motion, appeal is dismissed. See § 2-107(A)(2).

No. S-08-912: **Citizens Opposing Indus. Livestock v. Jefferson Cty**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-36-060001: **In re Petition of NSBA to Adopt Concept of Mandatory Cont. Legal Ed**. Rules regarding the "Petition for Adoption of Rules for the Implementation of a Program of Mandatory Continuing Legal Education" are adopted. See §§ 3-401.1 through 3-402.3.

No. S-36-080002: **In re Application to Amend Rules Creating NSBA, Increase Bar Dues**. Application to amend § 3-803(D)(1) to increase bar dues charged to its members granted as modified.

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No. A-05-1358: **McCroy v. Clarke**. Petition of appellee for further review denied on September 10, 2008.

No. S-05-1520: **King v. Burlington Northern Santa Fe Ry. Co.**, 16 Neb. App. 544 (2008). Petition of appellant for further review sustained on July 16, 2008.

No. A-06-499: **Forman v. Pacific Realty Group**. Petition of appellant for further review denied on September 10, 2008.

No. A-06-566: **State v. Cole**. Petition of appellant for further review overruled on July 2, 2008.

No. A-06-649: **Pittman v. Houston**. Petition of appellant for further review denied on August 27, 2008.

No. A-06-681: **Dowd Grain Co. v. County of Sarpy Bd. of Adj**. Petition of appellee for further review denied on September 17, 2008.

No. A-06-681: **Dowd Grain Co. v. County of Sarpy Bd. of Adj**. Petition of intervenor-appellee for further review denied on September 17, 2008.

No. A-06-682: **Dowd Grain Co. v. County of Sarpy**. Petition of appellee County of Sarpy for further review denied on September 17, 2008.

No. A-06-682: **Dowd Grain Co. v. County of Sarpy**. Petition of appellee OSI Properties Ltd. Partnership for further review denied on September 17, 2008.

No. A-06-826: **Hanus v. County Planning Comm**. Petition of appellant for further review overruled on July 2, 2008.

No. A-06-1067: **Marsh v. Filipi**. Petition of appellant for further review overruled on July 9, 2008.

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No. A-06-1250: **Ramirez-Flores v. State**. Petition of appellant pro se for further review denied on September 24, 2008.

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No. A-06-1396: **Marriott v. SID No. 230**. Petition of appellee for further review denied on July 23, 2008.

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Nos. A-07-283, A-07-284: **Bligh v. Douglas Cty. Sch. Dist. No. 0017**. Petitions of appellee for further review denied on August 27, 2008.

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No. A-07-358: **Baldwin v. Olsen**. Petition of appellant for further review denied on August 27, 2008.

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No. A-07-480: **Perkins v. Perkins**. Petition of appellant for further review overruled on July 9, 2008.

No. A-07-552: **Boxum v. Munce**, 16 Neb. App. 731 (2008). Petition of appellee for further review denied on July 23, 2008.

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No. S-07-556: **State v. Schmidt**, 16 Neb. App. 741 (2008). Petition of appellant for further review sustained on July 16, 2008.

No. A-07-568: **Sauer v. Sauer**. Petition of appellee for further review denied on September 17, 2008.

No. A-07-601: **Vencil v. Vencil**. Petition of appellant for further review denied on December 17, 2008.

No. A-07-659: **State v. Ashcraft**. Petition of appellant for further review overruled on July 9, 2008.

No. A-07-682: **State v. Rathjen**, 16 Neb. App. 799 (2008). Petition of appellant for further review denied on September 17, 2008.

No. A-07-730: **American Fam. Mut. Ins. Co. v. Allstate Ins**. Petition of appellant for further review denied on September 10, 2008.

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No. A-07-809: **State v. Patterson**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-820: **Whittamore v. Howell**. Petition of appellant for further review denied on September 17, 2008.

No. A-07-822: **State v. Carter**. Petition of appellant for further review overruled on July 9, 2008.

No. A-07-827: **State v. Munoz**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-830: **Duda v. American Fam. Ins. Group**. Petition of appellant for further review denied on September 2, 2008, as filed out of time.

No. A-07-853: **Noordam v. Noordam**. Petition of appellant for further review denied on October 29, 2008.

No. A-07-857: **Fraternal Order of Eagles v. Marvin**. Petition of appellant for further review overruled on July 16, 2008.

No. A-07-882: **Faltin v. Nelson**. Petition of appellees for further review denied on September 10, 2008.

No. A-07-887: **State ex rel. Linder v. Remmen**. Petition of appellant for further review denied on October 15, 2008.

No. S-07-903: **Regency Homes Assn. v. Schrier**. Petition of appellant for further review sustained on August 27, 2008.

No. A-07-909: **In re Estate of Wegelin**. Petition of appellant for further review denied on September 24, 2008.

No. A-07-926: **State v. Cantando**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-928: **State v. Pitzer**. Petition of appellant for further review denied on September 10, 2008.

No. A-07-930: **State v. Agee**. Petition of appellant for further review denied on July 23, 2008.

No. A-07-932: **Howard Sales Co. v. Bradley**. Petition of appellee for further review denied on October 16, 2008, as filed out of time.

No. A-07-957: **White v. Tyco Fire & Security**. Petition of appellant for further review denied on November 13, 2008.

Nos. A-07-985 through A-07-988: **State v. Schlotfeld**. Petitions of appellant for further review denied on September 17, 2008.

No. A-07-989: **Bihuniak v. Robert Corrigan Farm**, 17 Neb. App. 177 (2008). Petition of appellant for further review denied on December 23, 2008.

No. S-07-991: **Incontro v. Jacobs**. Petition of appellee for further review sustained on August 27, 2008.

No. A-07-1005: **Mann v. Rich**, 16 Neb. App. 848 (2008). Petition of appellee for further review denied on December 10, 2008.

No. A-07-1010: **State v. Mazza**. Petition of appellee for further review denied on October 15, 2008.

No. A-07-1013: **Villotta v. Tuzzio**. Petition of appellant for further review denied on September 23, 2008, as filed out of time.

No. A-07-1065: **State v. Cave**. Petition of appellant for further review denied on August 27, 2008.

No. S-07-1072: **Sears v. Sears**. Petition of appellant for further review sustained on November 13, 2008.

No. A-07-1100: **State v. Axtell**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1142: **Henderson v. Henderson**. Petition of appellant for further review denied on September 24, 2008.

No. A-07-1145: **State v. Capps**. Petition of appellant for further review overruled on July 2, 2008.

No. A-07-1155: **State v. Craven**, 17 Neb. App. 127 (2008). Petition of appellant for further review denied on November 26, 2008.

No. A-07-1174: **Zitterkopf v. Aulick Indus.**, 16 Neb. App. 829 (2008). Petitions of appellant for further review denied on August 27, 2008.

No. A-07-1178: **Paben v. Paben**. Petition of appellant for further review denied on November 19, 2008.

No. A-07-1216: **State v. Turner**. Petition of appellant for further review denied on December 10, 2008.

No. A-07-1223: **State v. Burdette**. Petition and amended petition of appellant for further review denied on December 10, 2008.

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No. A-07-1251: **State v. Wells**. Petition of appellant pro se for further review denied on December 10, 2008.

No. A-07-1295: **In re Interest of Courtney S. et al**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-1301: **Burnham v. Pacesetter Corp**. Petition of appellant for further review denied on November 13, 2008.

No. A-07-1307: **In re Interest of Diego G**. Petition of appellant for further review denied on October 29, 2008.

No. A-07-1334: **State v. Stevens**. Petition of appellant for further review overruled on July 2, 2008.

No. S-07-1346: **Metcalf v. Metcalf**, 17 Neb. App. 138 (2008). Petition of appellant for further review sustained on December 10, 2008.

No. A-07-1352: **Miles v. Director, Dept. of Motor Vehicles**. Petition of appellee for further review denied on October 21, 2008.

No. A-07-1364: **State v. Tolliver**. Petition of appellant for further review denied on December 17, 2008.

No. A-07-1376: **State v. Walls**, 17 Neb. App. 90 (2008). Petition of appellant for further review denied on December 10, 2008.

No. A-08-004: **Omni Behavioral Health v. Keenan Ins. Agency**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-020: **State v. Hiatt-King**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-024: **State v. Pacha**. Petition of appellant for further review overruled on July 16, 2008.

No. A-08-033: **State v. Refior**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-034: **State v. Schaefer**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-048: **State v. Burr**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-049: **In re Interest of Ashantay H**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-052: **Young v. Crampton**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-053: **Tyler v. "Glaze"**. Petition of appellant for further review denied on September 15, 2008, as untimely filed.

No. A-08-081: **State v. Lacz**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-090: **State v. Delgado**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-095: **Weiler v. Square D Co**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-099: **State v. Nicholson**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-104: **State v. Henning**. Petition of appellant for further review denied on September 29, 2008, as filed out of time.

No. A-08-107: **Countrywide Home Loans v. Allender**. Petition of appellant for further review denied on October 21, 2008.

No. A-08-120: **In re Interest of Deprece A. & Latysha A**. Petition of appellant for further review overruled on July 2, 2008.

No. A-08-131: **State v. Torres**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-172: **State v. Henderson**. Petition of appellant for further review denied on October 15, 2008.

No. A-08-173: **Lewis v. Lewis**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-198: **Camp Clarke Ranch v. Morrill Cty. Bd. of Comrs.**, 17 Neb. App. 76 (2008). Petition of appellant for further review denied on December 10, 2008.

No. A-08-226: **In re Interest of Kyara W. et al**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-239: **State v. Dinh**. Petition of appellant for further review dismissed on September 17, 2008, as moot.

No. A-08-241: **In re Interest of Danielle H**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-248: **State v. Jennings**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-249: **State v. Smoak**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-254: **Shelby v. Lacey**. Petition of appellant for further review overruled on July 2, 2008.

No. A-08-265: **State v. Owen**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-277: **Jacob v. Department of Corr. Servs**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-280: **In re Interest of McKenzi D**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-283: **Schiefelbein v. School Dist. No. 0013**, 17 Neb. App. 80 (2008). Petition of appellant for further review denied on October 29, 2008.

No. A-08-288: **Ebersbacher v. Bunge North America**. Petition of appellant for further review overruled on July 16, 2008.

No. A-08-294: **Carter v. Metropolitan Util. Dist**. Petition of appellant for further review denied on October 15, 2008.

Nos. A-08-308, A-08-318: **State v. Bryant**. Petitions of appellant for further review denied on November 13, 2008.

Nos. A-08-313, A-08-314: **State v. Breazeale**. Petitions of appellant for further review denied on August 27, 2008.

No. A-08-319: **State v. Sornberger**. Petition of appellant for further review denied on July 23, 2008.

No. A-08-322: **State v. Epp**. Petition of appellant for further review denied on October 21, 2008.

No. A-08-325: **State v. Gooden**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-334: **Cottrell v. State Patrol**. Petition of appellant for further review denied on November 10, 2008, as filed out of time.

No. A-08-337: **State v. Towns**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-374: **State v. Gallagher**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-384: **State v. Morganflash**. Petition of appellant for further review denied on September 24, 2008.

No. A-08-388: **State v. Guardado-Lazo**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-398: **In re Interest of Tyler C**. Petition of appellant for further review denied on December 10, 2008.

No. S-08-409: **In re Interest of Sylena M**. Petition of appellant for further review sustained on December 23, 2008.

No. A-08-411: **State v. Monje**. Petition of appellant for further review denied on November 17, 2008, as filed out of time.

Nos. A-08-413, A-08-414: **State v. Duester**. Petitions of appellant for further review denied on November 13, 2008.

No. A-08-426: **State v. Franklin**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-444: **In re Interest of Adonaven G. & Izarel G**. Petition of appellant for further review denied on November 19, 2008.

No. A-08-468: **State v. Alama**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-477: **Hardin v. Neth**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-488: **Goeden v. Goeden**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-490: **State v. Harper**. Petition of appellant for further review denied on October 21, 2008.

No. A-08-493: **In re Interest of M.H**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-495: **State v. Shiley**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-511: **State v. Myrick**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-572: **In re Interest of Dakota L. et al**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-589: **Johnson v. County of Loup**. Petition of appellant for further review denied on October 15, 2008.

No. A-08-595: **In re Interest of Elvis T**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-624: **In re Interest of Levi T**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-625: **In re Interest of Kayla T**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-640: **Brunner v. Department of Motor Vehicles**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-643: **Lawler v. Lawler**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-663: **State v. Miller**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-666: **Lewis v. Pecha**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-667: **Lewis v. Henningson**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-668: **Lewis v. Kavars**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-669: **Lewis v. Charlisle**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-670: **Lewis v. Starlin**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-671: **Lewis v. Circo**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-672: **Lewis v. Carmody**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-673: **Lewis v. Behren**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-674: **Lewis v. Lucero**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-675: **Lewis v. Smith**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-676: **Lewis v. Novotny**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-677: **Lewis v. Washington**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-678: **Lewis v. Grossoehang**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-679: **Lewis v. Bart**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-680: **Lewis v. Teply**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-681: **Lewis v. Yaghotfam**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-682: **Lewis v. Stranglen**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-683: **Lewis v. Shada**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-684: **Lewis v. Bart**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-685: **Lewis v. Butler**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-686: **Lewis v. Brunning**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-687: **Lewis v. Rummel**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-688: **Lewis v. Love**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-689: **Lewis v. Barnes**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-690: **Lewis v. Osier**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-691: **Lewis v. Gaskell**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-692: **Lewis v. Herout**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-693: **Lewis v. Friend**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-694: **Lewis v. Vaccaro**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-695: **Lewis v. Tonsoni**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-696: **Lewis v. Daley**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-729: **Shepard v. Roach**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-750: **State v. Bittner**. Petition of appellant for further review denied on December 17, 2008.

No. A-08-786: **Spence v. Bush**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-905: **State v. Montin**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-1005: **State v. Reising**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-1006: **State v. Reising**. Petition of appellant for further review denied on December 10, 2008.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
JONATHAN MOORE, APPELLANT.
751 N.W.2d 631

Filed July 3, 2008. No. S-06-1001.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
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. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Courts: Judgments: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, J RUSSELL DERR, Judge. Judgment of Court of Appeals affirmed.

Joseph L. Howard, of Gallup & Schaefer, for appellant.

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

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

McCormack, J.

NATURE OF CASE

In *State v. Moore*,[1] the Nebraska Court of Appeals reversed Jonathan Moore's conviction for first degree assault and use of a weapon to commit a felony, and remanded the cause for a new trial. The Court of Appeals held that the jury was misled by the trial court's failure to instruct the jury on the meaning of "recklessly." The court also found that the jury was misled by the giving of an instruction which stated that the jury "must find [Moore] guilty[,] even though the achieved wrong was unintended," if it found that he had "intended to do wrong, but as a result of his actions[,] an unintended wrong occurred as a natural and probable consequence." On further review, the State assigns as error the Court of Appeals' determination that the trial court should have defined "recklessly" for the jury. Although our reasoning differs from that of the Court of Appeals, we affirm its judgment.

BACKGROUND

Shooting

Kenesha Burton and her brother, Karnell Burton, have the same father as Moore, but not the same mother. The half siblings knew each other, saw each other frequently, and were generally on friendly terms. Sometime in late March 2005, however, Moore and Karnell had an argument over whom their father favored more. Karnell testified that he did not believe this argument was anything serious, and he never expected that any violence would result from the dispute.

The day of the shooting, April 3, 2005, a group of people, including Moore, his girlfriend, their infant child, and a friend, Deandre Primes, were outside "hanging out" near the "Spencer projects" in Omaha. Moore and Primes had been drinking. Karnell drove by the gathering in his black 1986 Chevrolet Monte Carlo, and an unfriendly exchange was had between Moore and Karnell. That exchange resulted in Moore's spitting in the direction of Karnell's car. Karnell kept driving, but when he reached the street corner, his passengers, who were

[1] *State v. Moore*, 16 Neb. App. 27, 740 N.W.2d 52 (2007).

apparently armed, fired several gunshots. There is some dispute about whether these shots were fired into the air or toward the crowd, but no one was injured.

Karnell drove away, and soon thereafter, Moore left with Primes to go to a store. On the way, Moore first drove past the house where Karnell and Kenesha lived with their mother. Primes testified that there was no discussion between himself and Moore as to why Moore went there.

At the time that Moore drove by the house, Kenesha, her mother, and some friends were sitting inside watching a movie. Karnell was not there, and his car was not nearby. The mother's car, a black 2004 Monte Carlo, was parked in the driveway, and two other cars were parked on the street in front of the house. Nobody was standing outside. The evidence was in dispute as to whether light from the television or any other source inside the house was visible from the street. There is no indication that anyone was standing near a window or otherwise visible from outside the house.

Primes testified that he did not, in fact, believe there was anyone home. He did not see any lights on, or any other evidence that anyone was inside. But Primes testified, at one point, that he and Moore had observed a black Monte Carlo and discussed that it looked like Karnell's car.

Primes testified that he did not expect a shooting to occur. But, when they circled past the house for a second time, Moore suddenly pulled out his .44 Magnum revolver. According to Primes, Moore took no real "aim." With the gun pointing across Primes' face, Moore fired a single shot out the passenger window in the general direction of the house and drove away. That shot pierced the house and hit Kenesha as she sat inside on a stool, leaning against the wall. Kenesha was paralyzed as a result.

Jury Instructions

Moore was charged with assault in the first degree and use of a deadly weapon to commit a felony, and the case proceeded to a jury trial. At the instruction conference, the court denied Moore's request that the jury be instructed on assault in the third degree as a lesser-included offense. The court reasoned that

there was no dispute that Kenesha had suffered a "serious bodily injury," as opposed to only the "bodily injury" referred to in the third degree assault statute. Failing to get an instruction on third degree assault, Moore asked that the court at least instruct the jury on the definition of "recklessly." Moore did not request any instruction that would describe recklessness as a defense to the crime for which he was charged. Neither did Moore object to instruction No. 7, which distinguished "'[i]ntentionally'" from "accidentally or involuntarily," but not from "recklessly." The court denied Moore's motion. The jury was not given the definition of "recklessly," and that term was not found in any of the instructions given.

Jury instruction No. 4 provided that in order to convict Moore of assault in the first degree, the State had to prove beyond a reasonable doubt that Moore did cause "serious bodily injury to Kenesha" and that Moore "caused said serious bodily injury . . . intentionally or knowingly." But, over Moore's objection, the court gave instruction No. 10 on natural and probable consequences: "If you find that [Moore] intended to do wrong, but as a result of his actions an unintended wrong occurred as a natural and probable consequence, you must find that [Moore] is guilty even though the achieved wrong was unintended."

The jury returned a general verdict finding Moore guilty of both first degree assault and use of a weapon to commit a felony. Moore was sentenced to two consecutive terms of 20 to 20 years' imprisonment, and he appealed.

On appeal, Moore argued that the court erred in giving instruction No. 10 to the jury and in failing to instruct the jury on the definition of "recklessly." He did not dispute the failure to instruct the jury on third degree assault. The Court of Appeals agreed that the lack of a "recklessly" instruction and the giving of instruction No. 10 were erroneous decisions by the trial court. The Court of Appeals explained that the instructions, as given, suggested to the jury that it had to find Moore guilty if it found that he intentionally shot at the house, as opposed to accidentally doing so, without regard to whether Moore intended to assault anyone. In addition, the jury was not presented with "recklessly" as a possible mens rea and would not have understood that if it found that Moore had shot into the

house with a reckless disregard for the risk of an assault occurring, then Moore would lack the intent necessary for assault in the first degree.

We granted the State's petition for further review of the Court of Appeals' decision.

ASSIGNMENT OF ERROR

The State assigns on further review that the Court of Appeals erroneously concluded that the trial court had committed prejudicial error by not instructing the jury on Moore's requested definition of "recklessly."

STANDARD OF REVIEW

[1,2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[2] Regarding a question of law, the Nebraska Supreme Court reaches a conclusion independent of the determination reached by the Court of Appeals.[3]

ANALYSIS

The State's assignment of error narrowly focuses on the issue of whether the Court of Appeals erred in concluding that the trial court committed error in failing to define "recklessly" for the jury. The State did not assign as error the Court of Appeals' holding that instruction No. 10 was likewise confusing and misleading to the jury. Although the State argued during oral argument that the trial court did not err in giving instruction No. 10, absent plain error, our review on a petition for further review is restricted to matters assigned and argued in the briefs.[4]

[3] We find no plain error in the Court of Appeals' conclusion regarding instruction No. 10.[5] We therefore limit our review in the present case to whether the Court of Appeals erred

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[2] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[3] *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006).

[4] *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[5] See, generally, *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(f) (2d ed. 2003).

in concluding that the lack of a "recklessly" instruction was erroneous and prejudicial. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[6] While the definition was a correct one, we agree with the State that a definition of "recklessly" was unwarranted and that the failure to define "recklessly" for the jury was not prejudicial to Moore.

Moore was charged with first degree assault under Neb. Rev. Stat. § 28-308(1) (Reissue 1995), which states, "A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." Nowhere in that statute, or in the instruction given to the jury on the crime charged, is the term "recklessly" used.

Nor was the concept of "recklessly" implicated by any of the remaining instructions. We recognize that the theory of Moore's defense was that he acted with reckless disregard as to whether an assault would occur. But without an instruction explaining this theory of defense, the bald definition of "recklessly" has no context. On appeal, Moore does not argue that any other instruction should have been given. In fact, had Moore's requested instruction on "recklessly" been given as requested by Moore, there would have been a danger that the jury would have inferred that "recklessly" was a sufficient mens rea for the crime with which Moore was actually charged.

In short, Moore's proposed instruction on "recklessly" was unrelated to the legal issues presented in the case, and would have been confusing to the jury. Moore was not prejudiced by its rejection, and the trial court did not err in refusing to give it. The Court of Appeals erred in concluding that it should have been given.

CONCLUSION

[4] The State's assignment of error in its petition for further review has merit. Nevertheless, upon further review from a

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

judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.[7] The Court of Appeals also reversed Moore's conviction because of its conclusion that the trial court had erred in giving the jury instruction No. 10—a decision that is not challenged by the current petition. The judgment of the Court of Appeals, reversing Moore's conviction and remanding the cause for a new trial, is therefore affirmed.

AFFIRMED.

[7] *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER E. BAZER, APPELLANT.
751 N.W.2d 619

Filed July 3, 2008. No. S-07-316.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.
4. **Pleas: Effectiveness of Counsel.** When a defendant pleads guilty, he is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
5. **Postconviction: Appeal and Error.** A defendant cannot secure postconviction review of issues which were or could have been litigated on direct appeal.
6. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer

with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

7. **Effectiveness of Counsel: Presumptions.** The entire ineffectiveness analysis is viewed with the strong presumption that counsel's actions were reasonable.
8. **Effectiveness of Counsel: Proof.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
9. **Pleas.** A voluntary plea of guilty intelligently made in the light of the then-applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.
10. **Trial: Effectiveness of Counsel.** The fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.
11. **Pleas: Attorneys at Law.** A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.
12. **Postconviction.** Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
13. ____. Even if appropriate allegations are made in the motion for postconviction relief, an evidentiary hearing should be denied if the trial records and files affirmatively show that the defendant is entitled to no relief.

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

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Christopher E. Bazer appeals the dismissal of his motion for postconviction relief from his conviction, pursuant to a plea agreement, of first degree felony murder. Bazer argues that his guilty plea was compelled by his counsel's unreasonable trial strategy. He further argues that his plea was involuntary because the trial court failed to advise him of his right against self-incrimination. We affirm.

BACKGROUND

Trial Record: Pretrial Discovery

On March 1, 1988, Bazer was charged with one count of first degree felony murder and one count of use of a firearm to commit a felony, in connection with the death of Mary G. Jirsak. There was no dispute from the evidence procured during pretrial discovery that Bazer had, either intentionally or accidentally, shot and killed Jirsak after robbing her candy store. There was some dispute as to the extent of Bazer's intoxication at the time of the robbery and shooting. Bazer was 19 years old at the time of the shooting.

Dale Lee Demont testified in his deposition that he had driven the getaway car the day of the robbery. Demont stated that on the morning of February 18, 1988, he picked up Bazer and their friend, Phillip Bowen, and that Bowen told him to "'Head down toward 13th Street.'" The candy store was located on 13th Street in Omaha, Nebraska. When they got there, Bowen and Bazer told Demont to wait in the car while they went to rob someone. Bowen and Bazer explained to Demont that they needed money to get out of town. Demont testified that when Bowen and Bazer returned to the vehicle, Bazer told him that they had robbed a woman and that when she ran for the door, Bazer grabbed her by the hair and shot her. Demont stated that while driving, he saw Bazer pull a gun out of his waistband and place it briefly on the seat next to Demont. Bazer eventually directed him to take them to Vicky Strunk's house.

Vicky testified in her deposition that Bazer and Bowen had stayed at her house the night before the robbery. At approximately 11 a.m., on February 18, 1988, Bazer woke her up and told her something about a woman running out the door and that he had pulled her by the hair and shot her. According to police reports, Vicky's husband, Gary Strunk, was also present at the house that morning. Gary gave a taped statement to the police in which he described how Bazer had told him that Bazer had robbed Jirsak and, when she started screaming and tried to run out the door, grabbed her and shot her. Gary was listed as a witness for the State in the information filed against Bazer.

Omaha police officers arrived at Vicky's home at approximately 12:10 p.m. on February 18, 1988. A police report indicates that the officers were directed to Vicky's home after Mack Riggs, an acquaintance of Bazer and Bowen, went to the scene of the crime. Riggs reported that during the previous 2 weeks, Bazer and Bowen had asked him if he wanted to help them rob Jirsak's candy store. Riggs was also listed as a witness in the information.

Vicky gave the officers permission to search her home. The officers testified that they located Bazer inside the home and that after Bazer was informed of his *Miranda* rights, he voluntarily admitted to the robbery and shooting of Jirsak. Bazer told the officers that certain individuals had threatened him because he owed them money. According to the officers' depositions and police reports, Bazer told them that he had pulled Jirsak by the hair and had pointed the gun at her head when she tried to escape. Bazer claimed that he had thought the safety was on and that the gun had discharged accidentally, killing Jirsak. At the time he was making these statements, Bazer denied being intoxicated, and the officers did not believe Bazer to be intoxicated at that time. Bazer did not make a taped confession.

Before leaving Vicky's house, Bazer led the officers to the location of the gun he had used. This gun was later found by the crime laboratory to be in good operating condition. But an expert hired by Bazer's trial counsel opined that the gun was in a condition such that the user could think the safety was in a safe position, when, in reality, it was not. Tests also found that the gun matched a cartridge casing found at the scene of the shooting. The actual bullet found in the victim was broken into several pieces and was unidentifiable.

On-the-Record Colloquy of Strategy

Bazer's counsel made a motion to suppress Bazer's confessions to the police, but the motion was denied by the trial court. Nevertheless, a plea agreement offered by the State was rejected by Bazer, and the defense's intent was to proceed to trial. Before voir dire, the court reporter recorded a conversation between Bazer and his trial cocounsel. In this conversation, Bazer affirmed that they had spent considerable time discussing

trial strategy and that he agreed with trial counsel's strategy to tell the jury "right from Day One" that Bazer did, in fact, "fire that weapon that killed Miss Jirsak." During this colloquy, trial counsel explained that all the other evidence already supported this conclusion and that it was not something the jury was "going to have trouble with anyway." Instead, trial counsel explained that by Bazer's admitting that he held the gun that had discharged and killed Jirsak, it was cocounsel's strategy to focus the jury's inquiry on whether Bazer had the requisite intent to commit the underlying crime of robbery. Trial counsel further stated that because cocounsel believed that Bazer lacked such intent, they would be asking the court to instruct the jury on a lesser offense such as manslaughter or second degree murder.

Statements to Jury During Voir Dire

During voir dire, Bazer's trial counsel accordingly explained to the jury that he was not denying that the case involved a "senseless waste of life." Furthermore, he was "not going to hide" from the jury the fact that Bazer "held the gun that—that fired a shot that struck the back of her head and killed Mary Jirsak." Counsel stated that whether Bazer caused Jirsak's death was not an issue. Instead, the issue in the case was whether Bazer had intended to commit the robbery that formed the basis of the felony murder charge. Trial counsel made reference to possible evidence that the gun had misfired, and he explained to the jury that in order for the State to prove felony murder, it would have to prove, beyond a reasonable doubt, that Bazer intended to commit the underlying robbery.

In this regard, counsel stated that he expected the jury to be presented with evidence that Bazer had consumed large amounts of alcohol and other controlled substances prior to the incident. Without objection, trial counsel told the jury that it would be presented with expert testimony that a person's ability to think, and to form the goal-directed thought process of intent, could be affected by the consumption of alcohol and other substances. Trial counsel also mentioned fears in Bazer's mind "because of what other people were trying to do to him at that time." Counsel told the jury that he was not denying that Bazer committed some type of crime and deserved some form of punishment. However,

counsel explained that the question with which the jury was presented was whether Bazer had the intent to commit the crime of felony murder.

Discussion With Trial Court About Lesser-Offense Instruction

When trial counsel went further and suggested to the jury that it could find Bazer guilty of a lesser offense, the State initiated an off-the-record sidebar discussion with the court, and Bazer's trial counsel did not continue this line of discussion. The next day, during the State's voir dire, when the State explained to the jury that it made no difference whether the killing was accidental, Bazer's trial counsel requested a sidebar discussion. The record shows that the jury was then briefly dismissed so that the parties could discuss the unresolved issue of whether the court would allow instruction on a lesser offense.

Bazer's trial counsel argued that the State's voir dire was prejudicing the jury against a possible instruction on a lesser offense. The court responded that it had cautioned Bazer's counsel the day before that there was no guarantee such an instruction would be given, but it would hear "whatever arguments you have right now as to why I should deviate from what the Supreme Court has said over and over and over again on the felony murder charge. There is no lesser-included offense." Trial counsel argued that if Bazer did not formulate the requisite intent to commit the underlying crime of felony murder, then a manslaughter instruction would still be appropriate.

Trial counsel explained to the court that he was "very familiar" with Nebraska case law that holds that "[o]rdinarily it is not error for the court not to instruct for lesser-included when it's felony murder." Still, trial counsel quoted *State v. Montgomery*,[1] in which we said: "This is not to say . . . there might not occur a set of facts under which an instruction on the lesser offenses of second degree murder or manslaughter might not be appropriate." Counsel argued that the facts of this case justified such an exception. Counsel argued that there was a delay between the assault and the robbery such that the death was not "'"in

[1] *State v. Montgomery*, 191 Neb. 470, 473, 215 N.W.2d 881, 884 (1974).

the perpetration"'" of the robbery, as that language is used in the felony murder statute. Trial counsel further cited *Beck v. Alabama*[2] and *Enmund v. Florida*[3] for the argument that due process and equal protection demanded that lesser offenses should be presented to the jury.

After hearing the State's argument on this point, the court concluded:

> I don't have to decide on lesser-included until such time as we have an instruction conference. I think that I can almost predict, though, that unless the evidence is something that is completely different than I anticipate it to be, there will be no lesser-included. I will make that decision at the proper time when we have our instruction conference.
>
> I find nothing objectionable in [the State's] statement that [t]he State has no obligation and no duty to prove an intentional killing in this case.

The court went on to again caution Bazer's counsel that it was "highly improbable" that the jury would get any instructions other than felony murder and the use of a firearm in the commission of a felony. The court explained that if Bazer could not form the intent to commit the robbery, then the court could not see how Bazer could form the intent of any other criminal act—and there was no evidence of a sudden quarrel that would support an instruction on manslaughter.

PLEA

Trial counsel then asked for a moment to consult with Bazer because "[t]his is a critical situation that we talked about before . . . ." Less than an hour later, Bazer entered a plea of guilty to the charge of first degree murder.

In exchange for Bazer's plea of guilty to the felony murder charge, the State agreed to dismiss the use of a firearm charge. Before accepting the plea, the court reviewed with Bazer various constitutional rights that he would be waiving by making

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[2] *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

[3] *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

the plea and Bazer affirmed that he understood. With regard to Bazer's Fifth Amendment right against self-incrimination, the Court stated:

> At the trial you'd have a right to take the witness stand and testify in your own defense if you wanted to. No one could force you to testify; and, if you chose to remain silent, the jury could in no way construe your silence as evidence of guilt. By pleading guilty you do waive the opportunity to testify at a trial if you so desired . . . .

Before accepting Bazer's plea, the court heard Bazer describe to the court how he had gone to the candy store to rob Jirsak and how, when Jirsak started running, Bazer had grabbed her and then "the gun went off."

The court did not make any promises as to the sentence that would be imposed on the felony murder charge. Trial counsel did explain to the court that although Bazer was aware that the death penalty was a possibility, they were confident, given the review of the aggravating and mitigating circumstances, that Bazer would not be given the death penalty. Indeed, at the sentencing hearing, the State argued to the court that the evidence did not suggest aggravating circumstances that would justify the death penalty. The court found no aggravating or mitigating circumstances and sentenced Bazer to life imprisonment. No appeal was filed from the conviction.

Motion for Postconviction Relief

On January 14, 2004, Bazer filed a pro se motion for postconviction relief. Thereafter, he was appointed counsel. In his operative motion, Bazer stated that before trial counsel's statements to the jury during voir dire, Bazer had rejected the State's offer to enter into a plea agreement wherein the weapons charge would be dropped. However, when trial counsel admitted to the jury that Bazer was the person who held the gun that shot and killed Jirsak, this admission of guilt left Bazer no other choice but to accept trial counsel's recommendation that Bazer accept the State's renewal of its plea bargain. Bazer alleged that but for counsel's admission of his guilt, he would not have pleaded guilty and that, therefore, his plea was not knowingly, intelligently, and voluntarily entered.

Bazer explained in his motion that he had agreed to the strategy of admitting he had shot Jirsak based on his trial cocounsel's incorrect and objectively unreasonable advisement that they would be able to get a lesser-included offense instruction before the jury. Bazer's motion does not explicitly call into question his trial cocounsel's strategy to show that Bazer did not form the requisite intent to commit robbery because of his levels of intoxication at the time of the incident.

As an alternative ground for postconviction relief, Bazer's motion asserted that the trial court failed to properly explain Bazer's waiver of his privilege against self-incrimination, as required by *Boykin v. Alabama.*[4]

A hearing on Bazer's motion for an evidentiary hearing was set for October 11, 2006. At the hearing on October 11, Bazer's postconviction counsel clarified that the hearing was not an evidentiary hearing, but was a hearing on whether an evidentiary hearing would be granted. Nevertheless, postconviction counsel entered into evidence the deposition testimony of both Bazer and one of his trial counsel in relation to their trial strategy and trial counsel's decision to plead guilty. The State then made an oral motion to dismiss the motion for postconviction relief. The proceedings ended with the court noting that prior to completing the hearing, the parties discussed and agreed that the appropriate procedure would be for Bazer's postconviction counsel to offer the bill of exceptions from the trial at that time. The trial record was offered and accepted without objection. No further hearing was held, and the trial court eventually granted the State's motion to dismiss on February 26, 2007.

Order of Postconviction Court

On February 26, 2007, the trial court granted the State's motion to dismiss Bazer's motion for postconviction relief. As a result, the court explained, Bazer's request for an evidentiary hearing would not be considered further.

The court found, after a complete review of the trial record, that the record did not support Bazer's allegations that trial

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[4] *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). See, also, e.g., *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

counsel was unaware of the law of felony murder, that he had inappropriately advised Bazer on the ability to obtain an instruction on lesser offenses, or that trial counsel's action in admitting Bazer's actions to the jury in voir dire amounted to ineffective assistance of counsel. Instead, the court found that "the record supports [that trial] counsel chose a trial strategy which [Bazer] agreed to . . . , that the defense would attempt to establish a new precedent in the law in Nebraska since [Bazer] wanted to go to trial and he had virtually no other options in terms of a defense." Moreover, the court also found that the statement made to the jury that Bazer had fired the gun which caused the death of Jirsak, "[i]f for no other purpose . . . [,] was merely the strategy that the jury would ultimately hear of these acts . . . and . . . the jury would best hear it from defense counsel, as there was no basis to deny [Bazer's] actions."

The court found that Bazer's allegations concerning improper plea advisements were procedurally barred. The court reasoned that the advisement given to Bazer was necessarily known to him when a direct appeal could have been filed, but he did not file a direct appeal.

Bazer appeals the order granting the State's motion to dismiss his motion for postconviction relief.

ASSIGNMENTS OF ERROR

In this appeal, Bazer asserts that because of the alleged ineffective assistance of counsel and failure of the trial court to inform him of his privilege against self-incrimination, the postconviction court erred in not granting an evidentiary hearing on his motion for postconviction relief.

STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[5]

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing

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[5] *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007).

a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

ANALYSIS

[3,4] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[8] And, for any purpose, a plea of guilty generally embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional.[9] When a defendant pleads guilty, he is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[10]

[5] Bazer alleges both that his plea was involuntary and that it was a result of ineffective assistance of counsel. While the plea itself did not waive issues relating to whether he entered into the plea voluntarily, on postconviction relief, a defendant cannot secure review of issues which were or could have been litigated on direct appeal.[11] Whether the trial court gave Bazer the proper admonitions before accepting his guilty plea was a matter concerning the on-the-record pretrial proceedings. Accordingly, this issue could have been raised in a direct appeal. Bazer's counsel did not file such an appeal, and Bazer does not argue that counsel was ineffective for failing to do so. Therefore, we do not address Bazer's claim relating to the court's alleged failure to

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[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[8] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

[9] *State v. Mason*, 187 Neb. 675, 193 N.W.2d 576 (1972).

[10] See, *id.*; *State v. Barnes, supra* note 8.

[11] See, *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

ascertain whether he understood and waived his privilege against self-incrimination.[12]

We will, however, address Bazer's claim that his plea of guilty was the result of the ineffective assistance of trial counsel. When a defendant was represented both at trial and on direct appeal by the same lawyers, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[13] The same is true where trial counsel elects not to file a direct appeal at all.[14] The current postconviction action, in which Bazer was appointed counsel different from his trial counsel, is Bazer's first opportunity to challenge trial counsel's effectiveness.

[6-8] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[15] The entire ineffectiveness analysis is viewed with the strong presumption that counsel's actions were reasonable.[16] And, when reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[17]

We conclude that the trial records and files affirmatively show that Bazer's plea was not the result of ineffective assistance of counsel.[18] Bazer's claim is that his guilty plea derived from trial counsel's unreasonable and erroneous strategy of trying to get

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[12] See, *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993); *People v. Stewart*, 123 Ill. 2d 368, 528 N.E.2d 631, 123 Ill. Dec. 927 (1988).

[13] See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[14] See *State v. Barnes, supra* note 8.

[15] *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[16] *State v. Lyman, supra* note 11. See, also, e.g., *State v. Benzel, supra* note 7.

[17] *State v. Benzel, supra* note 7.

[18] See, *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Jones, supra* note 4.

a lesser-related offense instruction before the jury. According to Bazer, because he believed that such an instruction would be given, he agreed that counsel could "admit Bazer's guilt" to the jury during voir dire.[19] But once it became clear that the lesser-related offense instruction would not be given, Bazer had no choice, given this admission, but to plead guilty.

We begin by noting that the record clearly demonstrates that Bazer's trial counsel did not, as Bazer suggests, "admit Bazer's guilt." Trial counsel told the venire that he was "not going to hide" the fact that Bazer held the gun that misfired and killed Jirsak, but counsel explained that the charge of felony murder required that the State prove Bazer intended the underlying robbery. Counsel suggested that Bazer was too intoxicated to formulate such an intent, and that therefore, he was not guilty of the crime charged.

As the recorded trial strategy discussion between Bazer and his counsel reflects, the decision to admit, from the beginning, that Bazer fired the gun that killed Jirsak was based on the overwhelming evidence against Bazer. Several people witnessed Bazer's admissions that he had shot Jirsak. In addition, Bazer confessed to the police that he had shot Jirsak, although he claimed that the gun fired accidentally. Bazer's motion to suppress these statements to the police had been overruled. Casings from the scene of the crime matched the gun that Bazer led the police to on the day of his arrest. In the recorded strategy conference, counsel explained to Bazer that the jury was not going to have any trouble reaching the conclusion that Bazer shot Jirsak.

The strategy of admitting Bazer shot Jirsak stemmed from counsel's determination that Bazer would be better off dealing frankly with the evidence and focusing the jury instead on a theory that might have had a better chance for acquittal. In light of the evidence that was going to be presented against Bazer, such a strategy was reasonable. As the U.S. Supreme Court has explained, "[c]ounsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations . . . . Often

[19] Brief for appellant at 42.

the interests of the accused are not advanced . . . by contesting all guilt . . . ."[20]

Bazer's ineffective assistance claim focuses exclusively on what he considers trial counsel's unreasonable belief that the jury should have been instructed as to a lesser-related offense. He claims that the decision to admit that he had fired the gun was related to this false belief and not to any other strategy. Contrary to Bazer's allegation, the record demonstrates that the strategy of obtaining a lesser-related offense instruction was merely another way that counsel sought in order to increase Bazer's chance of being acquitted on the felony murder charge.

But even if Bazer's plea was a direct result of counsel's pursuit of a lesser-related offense instruction, Bazer is simply wrong in concluding that seeking such an instruction was, at that time, an unreasonable and ineffective trial strategy. In a recorded sidebar discussion with the trial court, Bazer's counsel explained that he was well aware that, traditionally, Nebraska cases had held that there was no lesser-included offense to felony murder, but counsel noted that in *State v. Montgomery*,[21] this court seemingly left the door open to lesser-related instructions under certain circumstances, and counsel cited *Beck v. Alabama*[22] for the proposition that due process and equal protection demanded such instructions when the death penalty was in issue. In *Beck*, the U.S. Supreme Court held that it was error not to instruct the jury on the lesser-included offenses to the capital crime of "'[r]obbery or attempts thereof when the victim is intentionally killed by the defendant.'"[23] The Court reasoned, in part, that the "unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished."[24]

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[20] *Tollett v. Henderson*, 411 U.S. 258, 268, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

[21] *State v. Montgomery, supra* note 1.

[22] *Beck v. Alabama, supra* note 2.

[23] *Id.*, 447 U.S. at 627.

[24] *Id.*, 447 U.S. at 642.

Bazer correctly points out that our law has always been clear that there is no lesser-*included* offense to felony murder.[25] But this is beside the point. The question was whether Bazer had a right to have the jury instructed on lesser-*related* offenses of second degree murder or manslaughter. A lesser-included offense is one in which its elements are fully embraced by the greater crime.[26] In contrast, a lesser-related offense is one that shares a common factual ground with the greater offense, but not a commonality in statutory elements.[27] Trial counsel's argument was that regardless of whether second degree murder or manslaughter were technically lesser-included offenses, under the reasoning of *Beck*, the jury should be instructed on these offenses because it should not be forced to choose between putting Bazer to death or setting him free.

Indeed, at the time of Bazer's trial, the law was unclear about the extent to which the principles articulated in *Beck* were applicable to cases involving felony murder—a crime to which, under Nebraska law, there is no lesser-included offense. Many courts have held that lesser-related instructions were mandated by the principles articulated in *Beck*.[28] In 1996, in *Reeves v. Hopkins*,[29] the Eighth Circuit affirmed habeas corpus relief to the defendant convicted under Nebraska's felony murder statute because the trial court had refused to instruct the jury on the lesser-related offenses of second degree murder and manslaughter.

At the time of Bazer's trial, we had not specifically addressed the applicability of *Beck* to lesser-related offenses and felony murder. We had said only that it was "ordinarily" error to instruct the jury in a felony murder case that it could find the

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[25] See, e.g., *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976); *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897).

[26] See *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

[27] See, e.g., *State v. Thomas*, 187 N.J. 119, 900 A.2d 797 (2006).

[28] See, generally, Annot., 50 A.L.R.4th 1081 (1986).

[29] *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996).

defendant guilty of second degree murder or manslaughter.[30] In *Montgomery*, we elaborated that there might occur a set of facts under which an instruction on the lesser offenses of second degree murder or manslaughter might be appropriate.

It was not until 1994 that, in *State v. Masters*,[31] we first addressed and rejected the applicability of *Beck* to felony murder and its lesser-related offenses. And it was not until 1998 that the U.S. Supreme Court finally resolved this issue when it reversed the Eighth Circuit's decision in *Reeves v. Hopkins*.[32] In *Hopkins v. Reeves*,[33] the U.S. Supreme Court explained that mandating a lesser-related offense instruction was "unworkable" and that because in Nebraska, capital sentencing was in the hands of the judge, the jury was not presented with the stark choice described in *Beck*.[34]

[9-11] "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."[35] Furthermore, the fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.[36] A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.[37] We conclude that based on the law as it existed at the time Bazer made his plea and given the strength

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[30] See, e.g., *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990); *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984); *State v. Hubbard, supra* note 25.

[31] *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). See, also, *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

[32] *Reeves v. Hopkins, supra* note 29.

[33] *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

[34] *Id.*, 524 U.S. at 97. See, also, *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

[35] *Brady v. United States*, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

[36] *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981).

[37] *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

of the State's case against Bazer, it is apparent from the files and records that Bazer's trial counsel demonstrated no incompetence in attempting to procure instructions of second degree murder and manslaughter.

[12,13] Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.[38] Even if appropriate allegations are made, an evidentiary hearing should be denied if the trial records and files affirmatively show that the defendant is entitled to no relief.[39] In this case, the trial records and files affirmatively show that based upon the allegations made in Bazer's motion, Bazer is entitled to no relief. The trial court was correct in dismissing the motion.

AFFIRMED.

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[38] *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[39] See, *State v. Jones, supra* note 4; *State v. Soukharith, supra* note 18.

LIBERTY DEVELOPMENT CORPORATION, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

751 N.W.2d 608

Filed July 3, 2008. No. S-07-582.

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. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question.
3. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.

4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
5. **Eminent Domain: Easements: Damages.** The measure of damages for the taking of an easement is the difference between the reasonable market value of the property before and after the taking of the easement.
6. **Eminent Domain: Easements: Damages: Time.** Damages for the taking of a permanent easement and a temporary construction easement are measured as of the date of taking.
7. **Eminent Domain: Valuation: Damages: Time.** The date for determining valuation and damages in eminent domain proceedings is the date the condemnor files its petition in condemnation in the county court.
8. **Damages: Proof.** A plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.
9. **Eminent Domain: Real Estate: Valuation.** There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.
10. **Trial: Eminent Domain: Witnesses.** For the testimony of an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar with the property in question and the state of the market.
11. **Eminent Domain: Valuation.** When real property is temporarily taken by eminent domain, the value of compensation is determined by one of several methods: (1) ascertaining the value of the property for the period it is held by the condemnor, (2) ascertaining the difference in the value of the property before and after the taking, or (3) looking at the fair market rental value of the property during the time it was taken.
12. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
13. ____: ____. Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court.

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 Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Daniel G. Crouchley and Susan E. Prazan for appellant.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

The county court for Douglas County appointed three appraisers who awarded Liberty Development Corporation (Liberty) $55,000 as damages for the taking of easements by the Metropolitan Utilities District of Omaha (MUD). Liberty filed a petition for review in the district court for Douglas County, and a jury awarded Liberty $750,000. MUD appealed, and the Nebraska Court of Appeals summarily dismissed the appeal for lack of jurisdiction. We granted further review.

II. SCOPE OF REVIEW

[1] 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. *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

[2,3] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*

[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or

refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998).

III. FACTS

1. Jurisdictional Background

MUD is a municipal corporation and political subdivision of the State of Nebraska operating as a natural gas and water facility in the Omaha metropolitan area. Liberty is a corporation whose shareholders are David and Robin Broekemeier. Liberty purchased and developed land referred to as the "Ranch View Estates 2" subdivision, which included the property subject to MUD's easements.

After MUD was unable to purchase the easements from Liberty, it filed a petition in the county court for Douglas County to acquire permanent and temporary construction easement rights for the public purpose of constructing, maintaining, and operating water mains as a part of its water distribution system. The particular easement parcels were selected due to their proximity to MUD's "Skyline Reservoir" and future "Platte West Treatment Plant." MUD would allow the easements to be covered with things such as concrete or asphalt, fencing, and landscaping, except trees, so long as such coverings did not unreasonably interfere with MUD's use and enjoyment of its easement rights. MUD requested that the court appoint three disinterested appraisers from Douglas County to assess the damages which Liberty would sustain by MUD's acquisition of temporary and permanent easement rights in Liberty's properties.

The easements crossed the length of the Ranch View Estates 2 subdivision, a new residential subdivision in Elkhorn, Nebraska, developed and owned by Liberty. At the time MUD filed its petition, the land had been graded and planted to grass. Streets and sewers had been built, but the subdivision was vacant of homes. The permanent easements were located on Lots 1, 13, 14, 27, 28, 40, 41, 52, and 77 through 86, as well as Outlot A, totaling

1.486 acres. The temporary construction easements were located on the same lots and totaled 1.654 acres.

Neither the necessity of the taking nor the authority to take the property was disputed. The amount of compensation was the sole issue. The county court appointed three disinterested appraisers to assess the damages Liberty would sustain by reason of the acquisition of the permanent and temporary easements. After reviewing and inspecting the lots in question, the appraisers filed an award in the county court for Douglas County in the amount of $55,000 for temporary and permanent easement rights acquired by MUD through condemnation. The appraisers found that the permanent easements resulted in damages of $37,500 and that the temporary construction easements resulted in damages of $17,500.

Liberty timely filed with the county court its notice of intent to appeal the award of the appraisers to the district court. Liberty also filed with the county court a certificate of service stating that it had served MUD's assistant general counsel with a copy of the notice of appeal and a praecipe for transcript. The signature of Liberty's attorney was on the certificate of service.

The case was tried to a jury, and on November 6, 2006, the district court for Douglas County entered judgment on the verdict. On the same day, the case was mistakenly dismissed via an "Order of Dismissal on Progression." On November 13, Liberty moved for prejudgment interest, attorney fees, and witness fees. MUD moved for a new trial. Presumably, neither party knew that the case had been dismissed. When Liberty realized this fact, it moved to set aside the dismissal. On January 3, 2007, the district court vacated the order of dismissal and reinstated the case. The court noted that the dismissal had been made by a different judge and that the dismissal was based on "an incorrect computer calendar in the Clerk's Office."

On April 3 and 24, 2007, the district court awarded attorney fees, witness fees, and prejudgment interest to Liberty. MUD's motion for new trial was overruled, and it appealed on May 18. On October 17, the Court of Appeals summarily dismissed the cause for lack of a final order.

2. Jurisdictional Analysis

Before proceeding to the merits, we address the jurisdictional issue decided by the Court of Appeals and a jurisdictional issue raised by MUD on appeal.

(a) Court of Appeals Jurisdictional Issue

The parties agree that the Court of Appeals erroneously dismissed the appeal for lack of a final order. However, because the parties cannot confer jurisdiction upon this court by either acquiescence or consent, we review the issue of jurisdiction below. See *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

In its petition for further review, MUD asserted that the Court of Appeals erred in concluding the district court did not have jurisdiction when it entered judgment on the jury verdict. The progression order which dismissed the case was dated November 1, 2006. The verdict of the jury was delivered November 2. Both of these orders were file stamped November 6. Because neither order was effective until it was file stamped by the clerk of the district court, both orders were effective on November 6. In the absence of a showing to the contrary, we conclude that the district court had jurisdiction at the time it entered the jury verdict. To conclude that the court dismissed the case and then entered the jury verdict would create an anomaly. It would be an odd and unjust result if a jury verdict was not entered because another judge had erroneously dismissed the case before the verdict could be entered. In the case at bar, the order of dismissal was an error by a judge who was unfamiliar with the fact that the case had recently been tried and a verdict entered.

The district court did not enter any other judgments or orders before it formally reinstated the case on January 3, 2007. Therefore, all orders from which MUD's appeal was taken were properly entered by the district court. Accordingly, the decision of the Court of Appeals which dismissed MUD's appeal pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001) is reversed. We conclude that MUD's notice of appeal was timely and that we have jurisdiction of the matter.

(b) District Court Jurisdictional Issue

MUD claims that Liberty did not properly perfect its appeal from the award in the Douglas County Court. MUD raised the issue in its reply brief before this court.

On December 12, 2002, Liberty filed a notice of appeal in the Douglas County Court from the appraisers' $55,000 award. Attached to this notice was a certificate of service. MUD claims that Liberty did not correctly file a proof of such service as required by Neb. Rev. Stat. § 76-715.01 (Reissue 2003) and that, therefore, the district court did not acquire jurisdiction of the appeal.

The manner of perfecting an appeal to the district court from an award by appraisers in a condemnation proceeding is governed by § 76-715.01, which provides:

> 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.

(Emphasis supplied.)

Liberty timely filed a notice of appeal in the Douglas County Court. However, instead of an affidavit as proof of service of the notice of appeal, Liberty filed a "Certificate of Service." MUD claims the failure to file an affidavit as proof of service of the notice was jurisdictional and that Liberty therefore did not perfect its appeal to the district court.

MUD argues that *Wooden v. County of Douglas*, 16 Neb. App. 336, 744 N.W.2d 262 (2008), controls this jurisdictional question. We disagree. In *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 151 (2008), the issue was whether the timely

filing of the affidavit of proof of service was necessary to vest the district court with jurisdiction of the condemnation appeal. The Court of Appeals had concluded that the timely filing of such affidavit was jurisdictional. We reversed because we concluded that the timely filing of such an affidavit was directory and, therefore, not jurisdictional. In the case at bar, the notice of appeal was timely filed and the proper parties were served with the notice of appeal.

Having determined that all lower courts and appellate courts were properly vested with jurisdiction, we proceed to the merits of the appeal before us.

IV. ASSIGNMENTS OF ERROR

MUD claims the district court erred (1) in failing to limit evidence of damages to the difference in the fair market value before and after the taking, (2) in allowing Liberty's expert to testify without proper foundation, and (3) in denying MUD's motion for new trial.

V. FACTS REGARDING MERITS OF APPEAL

Installation of water mains on the subject property commenced March 31, 2003. Construction of both the 42- and the 54-inch water mains was completed no later than September 30. MUD's engineer testified that except on Lot 1, the 54-inch water main that ran along Ranch View Drive was located entirely in the public right-of-way and that the 42-inch water main was located both on the private easement and the public right-of-way.

David Broekemeier (hereinafter Broekemeier), a co-owner of the development, testified that out of 110 lots in the subdivision, he had 68 lots contracted for sale at the time of the taking and that subsequently, only 18 closed. He attributed the failure to sell the 50 lots to the easements. He stated that the average price for those lots was $60,000 and that he had sold only 31 lots since the taking. Broekemeier also testified the development had been held up by MUD's failure to service the area with 8-inch water mains. Broekemeier claimed he could not sell the lots without water, because the power company would not service the area before the water mains were in place.

Ason Okoruwa, a certified appraiser, testified on behalf of Liberty. On direct examination, Okoruwa stated that he had determined the market value for the lots in the subdivision before the easements were taken. He testified that in this particular case, the installation of the water mains vastly affected the market value of the lots on which the water mains were located, as well as adjoining lots. He ascertained the effect on the lots from "research" and from talking to Broekemeier, who indicated that he lost 50 presales as soon as the purchasers became aware of the water mains.

Okoruwa testified that given Liberty could not sell those lots, he had to estimate what were the damages caused by the taking. If there was a low market value for residential lots, the highest and best use changed. He concluded that before the taking of the easements, the highest and best use of the property was residential, and that afterward, it became recreational, park, or open space. He then subtracted the recreational value of the lots from their residential value, and the difference was his estimate of damages.

The record indicates Okoruwa testified that the damages to the property actually taken by the permanent easements were $206,000. He opined that the damages to the balance of the lots upon which the easements were located were $892,000. Thus, according to Okoruwa, the total damages to the lots upon which the easements were located were $1,098,000.

Okoruwa then testified to the damages to the lots directly adjacent to the permanent easements. The before value of the lots directly adjacent to the lots with permanent easements was $657,000. He opined their value after the easements was $89,000. This amount reflected a difference of $568,000, which Okoruwa stated was the damages caused to the lots that were adjacent to the permanent easements.

Okoruwa then gave his opinion as to the damages caused by the temporary easements. He stated that because of the temporary construction easements, Liberty could not sell any of the lots for at least 1 year. He proceeded to determine what he considered was the appropriate rental rate for the lots in the subdivision because they could not be sold. He concluded that the reasonable rental rate, or rate of return, for 1 year on the

land was 15 percent. This rate applied to the value of all the lots that were off the market for at least 1 year, which, according to Okoruwa, was the entire subdivision. Okoruwa testified that the value before the construction of the temporary easements was $2,159,000 and that the value after was $1,877,000. The difference of $282,000 was the amount he attributed as damages to the subdivision for being taken out of the market for at least 1 year.

MUD objected to Okoruwa's testimony on the basis of foundation, arguing that Okoruwa was relying on statements made to him about effects and events that took place after the taking. MUD's objections were overruled.

Okoruwa was then asked to total all the damages about which he testified. He was directed to exclude from his total the amount of any damage that might have been calculated for lots to the south of those described in his testimony. He stated that the damages were $2,418,000. He opined this was the sum that should be awarded to Liberty to compensate it for the takings. MUD's objection based on lack of proper and sufficient foundation was overruled.

Thomas Stevens, an appraiser for MUD, testified that the highest and best use of Liberty's property was single-family residential. He stated that in his 40 years of experience in the appraisal business, he had not seen an impact on valuation of a property due to the presence of a water main. He valued the permanent easements at $32,500 and the temporary easements at $17,500.

VI. ANALYSIS

[5-7] The measure of damages for the taking of an easement is the difference between the reasonable market value of the property before and after the taking of the easement. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). Damages for the taking of a permanent easement and a temporary construction easement are measured as of the date of taking. See *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978). The date for determining valuation and damages in eminent domain proceedings is the date the condemnor files its petition in condemnation in the county court. See

Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N.W.2d 200 (1955).

The basis for Liberty's evidence concerning its measure of damages was Broekemeier's testimony that prior to the condemnation, Liberty had 68 lots sold and that after the condemnation, it lost 50 sales. MUD claims that the district court erred in allowing such evidence because it was irrelevant to the proper measure of damages. It claims that the record contains numerous instances where the court allowed evidence regarding the market value of the property which was not computable as of October 2, 2002, the date MUD filed its petition for condemnation.

MUD argues that Okoruwa's testimony lacked sufficient foundation because it relied upon Broekemeier's assertion that he lost 50 presales after the condemnation. It argues that the loss of sales was irrelevant and that the district court abused its discretion in allowing this testimony.

MUD also asserts that the district court erred by admitting evidence of damages to the lots not affected by the easements. Liberty claimed that the sale of lots in the entire subdivision was adversely affected due to the installation of the water mains. Okoruwa testified regarding damages to lots adjacent to the lots with easements.

Okoruwa stated that the before value of the lots directly adjacent to the lots with the permanent easements was $657,000 and that their value after the taking was $89,000. He calculated the damages related to the difference in market value before and after the taking of lots adjacent to the easements at $568,000. This was despite the fact that five of these lots (Lots 2, 12, 15, 16, and 29) had been sold for full value at the time of the proceedings and none of the easements touched these lots.

[8,9] It is fundamental that the plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural. *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

> There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or

> capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.

Walkenhorst v. State, 253 Neb. 986, 991, 573 N.W.2d 474, 480 (1998).

[10] For the testimony of an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar with the property in question and the state of the market. *Id.* Okoruwa purported to testify to the before and after values of lots subject to the easements using the market data and comparable sales methods. However, the record reflects that his testimony did not meet the necessary foundational requirements concerning the effect that the easements had on the value of the lots.

Okoruwa testified that the installation of the water mains "vastly affected the market values" of the lots. He stated he obtained that information from Broekemeier and "[f]rom research." Broekemeier told Okoruwa that 50 sales were lost as soon as purchasers became aware of the water mains and that Liberty had sold only 31 lots in the 4 years since the taking. Okoruwa attributed the failure of the sales to the easements.

Okoruwa did not set forth the method or "research" he used to determine the value of the lots subject to the taking. His basis for determining that the highest and best use of the lots had changed from residential to recreational was because Broekemeier had lost presales. Because Broekemeier could not sell these lots, Okoruwa concluded that the lost sales were caused by the easements.

When asked how he estimated the damage, Okoruwa said that if there was a low market for residential lots, the highest and best use changed. Because there was a low market for these lots, he stated the use of the lots changed from residential to recreational or open space. His foundation for this opinion was Broekemeier's claim that he had lost some 50 contracts. There

was no evidence that Okoruwa had researched any comparable properties subject to similar easements or conducted any market data analysis of the highest and best use of similar properties.

Moreover, Okoruwa did not testify that he had confirmed with any of the alleged prepurchasers that the contracts were actually lost due to the easements. On cross-examination, Okoruwa admitted that he "did not find comparable sales with aqueducts on them" and that he did not rely on any studies or publications relating to water mains to determine Liberty's damages. He concluded that the lots adjacent to the lots with easements changed in value from residential to recreational. Therefore, he valued all of these lots as recreational. He had no comparable sales for this change in valuation.

Okoruwa also concluded that because of the temporary construction easements, Broekemeier could not sell all the lots for at least 1 year. Okoruwa relied on this fact to determine the damage from the temporary easements. Since the lots could not be sold for at least 1 year, he computed a reasonable rate of return on the property at 15 percent. He applied this computation to the entire subdivision. Over MUD's objection, the district court permitted Okoruwa to testify that the rental value of the property before the temporary easements was $2,159,000 and the value after was $1,877,000—a difference of $282,000.

[11] When real property is temporarily taken by eminent domain, the value of compensation is determined by one of several methods: (1) ascertaining the value of the property for the period it is held by the condemnor, (2) ascertaining the difference in the value of the property before and after the taking, or (3) looking at the fair market rental value of the property during the time it was taken. 4 Julius L. Sackman, Nichols on Eminent Domain § 12E.01[1] (rev. 3d ed. 2007), citing David Schultz, *The Price is Right! Property Valuation for Temporary Takings*, 22 Hamline L. Rev. 281 (1998).

Okoruwa concluded that because of the temporary construction easement, Liberty could not sell those lots and that those lots could not be marketed for at least 1 year. He proceeded to determine what he opined as the appropriate rental rate for those lots because they could not be sold. He concluded that a reasonable rate of return of 15 percent applied to the value of

all the lots that could not be sold, which was basically the whole subdivision. Over MUD's objection, Okoruwa stated: "The value before was $2,159,000, and the value after, $1,877,000, and the difference [$]282,000." This was "[t]he damage to the subdivision for taking out the whole subdivision from the market for at least one year."

The evidence was undisputed that the temporary construction easements were located on only the 19 lots that were subject to the permanent easements. However, applying a rate of return for the whole subdivision was the equivalent of claiming the whole subdivision was part of the temporary easement, which, in fact, involved only 1.654 acres.

The valuation of permanent easements is a difficult task, and the valuation of temporary easements is even more difficult. See 9 Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain § G32.08[1][a] (rev. 3d ed. 2007). In the case at bar, Okoruwa attempted to value the temporary easements in terms of a rate of return for the entire property based upon rental value of the property before and after the temporary easements. In effect, he opined that the damages for the temporary taking of 19 lots for the temporary construction easements was $282,000. We conclude that it was error for the district court to allow such testimony.

On direct examination, Okoruwa was asked to calculate the total of all damages about which he had testified. He opined that the total damages were $2,418,000. This was despite the fact that the damages he testified to on direct examination totaled only $1,948,000. Over MUD's objection as to proper and sufficient foundation, Okoruwa stated that this amount should be awarded to Liberty to compensate it for the takings.

[12,13] Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983), citing *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979). The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Id.*

Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. *Wear v. State of Nebraska, supra*, citing *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

Okoruwa's opinions lacked sufficient foundation, and the district court abused its discretion in admitting Okoruwa's testimony. Except for Lot 1, which had an additional 50-foot easement, the permanent easements were 20 to 25 feet in width on each lot and totaled 1.486 acres. The temporary construction easements were 20 to 30 feet in width and totaled an additional 1.654 acres. Okoruwa's conclusion that the easements changed the highest and best use of the property from residential to recreational was without sufficient foundation. His testimony as to Liberty's damages was therefore speculative and conjectural.

VII. CONCLUSION

The order of the Court of Appeals that dismissed the appeal is reversed. The trial court erred in admitting Okoruwa's testimony. We therefore reverse the judgment and remand the cause for a new trial. Liberty's motion for attorney fees is denied, and its cross-appeal is dismissed.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V.
JOHN C. EPTING, SR., APPELLANT AND CROSS-APPELLEE.
751 N.W.2d 166

Filed July 3, 2008. No. S-07-886.

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.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Patrick B. Hays, Lincoln County Public Defender, 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

This case is before the court styled as a new direct appeal arising from a motion for postconviction relief. Without conducting an evidentiary hearing, the district court for Lincoln County entered an order granting John C. Epting, Sr., a new direct appeal. We conclude that the district court erred in ordering postconviction relief.

SCOPE OF REVIEW

[1] The dispositive procedural issues presented by the State's cross-appeal arise under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995). Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

FACTS

On December 19, 2005, an information was filed in the district court for Lincoln County, charging Epting with second degree murder and use of a deadly weapon to commit a felony. Epting subsequently entered a plea of no contest to an amended information charging him with manslaughter and first degree assault. The court sentenced Epting to a term of imprisonment of 15 to 20 years for his manslaughter conviction and a term of 10 to 20 years for his first degree assault conviction.

Epting, acting pro se, filed a verified motion for postconviction relief, alleging that his "trial counsel did not file a notice of appeal nor advise his client that an appeal could be taken form [sic] the pleading proceeding and conviction." On July 17, 2007, the district court, without conducting an evidentiary

hearing, entered an order finding that "based on the allegations contained in the motion[,] there may have been a denial of the right to counsel on a direct appeal." It granted Epting relief in the form of a new direct appeal. Epting subsequently filed this appeal on August 15.

The State filed a praecipe for a bill of exceptions and a transcript for any proceedings or filings on or after July 9, 2007, the date Epting filed his motion for postconviction relief. The court reporter certified that no record of any proceedings or filings was made on the dates specified, other than Epting's July 9 motion and the district court's July 17 order.

ASSIGNMENTS OF ERROR

Epting proceeds as if he were before this court on a direct appeal. On cross-appeal, the State claims the district court erred in granting postconviction relief without first conducting an evidentiary hearing and making findings of fact and conclusions of law.

ANALYSIS

The issue is whether a district court may grant postconviction relief without first conducting a hearing. We have previously determined this issue in *State v. Jim, supra*, where we set forth the procedural requirements that the parties and the court must follow under the Nebraska Postconviction Act. "Unless the motion and the files and records of the case show . . . that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues[,] and make findings of fact and conclusions of law with respect thereto." § 29-3001. See *State v. Jim, supra*.

The record includes the bill of exceptions from Epting's trial but none from an evidentiary hearing before the district court regarding postconviction. We have only Epting's verified motion for postconviction relief and the district court's order in the postconviction record granting a new direct appeal. Because there was no evidentiary hearing as required, we cannot conduct a meaningful review of the postconviction proceedings before the district court.

If the district 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. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

CONCLUSION

The district court erred in granting Epting a new direct appeal without holding an evidentiary hearing. This is not permitted by the Nebraska Postconviction Act and constitutes reversible error. Thus, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DANIEL J. NIEMOLLER, APPELLANT, V. CITY OF PAPILLION, APPELLEE.

752 N.W.2d 132

Filed July 3, 2008. No. S-07-893.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
3. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

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

Leanne A. Gifford, of Scheldrup, Blades, Schrock, Sand & Aranza, P.C., for appellant.

Michaelle L. Baumert and Monica K. Hoppe, of Husch, Blackwell & Sanders, L.L.P., for appellee.

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

STEPHAN, J.

The issue presented in this appeal is whether compliance with the claim requirement of Neb. Rev. Stat. § 16-726 (Reissue 1997) is a condition precedent to an action against a city of the first class under the Nebraska Wage Payment and Collection Act (NWPCA), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004). We conclude that it is.

BACKGROUND

Daniel J. Niemoller commenced this action against the City of Papillion, Nebraska, in the district court for Sarpy County on February 23, 2007. He alleged that he was an employee of the city until August 11, 2006, and that the city had failed to compensate him for certain wages earned prior to the termination of his employment. In his complaint, Niemoller alleged that he served notice of his claim on the city on or about December 4, 2006.

The city denied this allegation and affirmatively alleged that Niemoller failed to comply with the procedural prerequisites of § 16-726. That statute applies to cities of the first class, and provides in part that "[a]s a condition precedent to maintaining an action for a claim, other than a tort claim as defined in section 13-903, the claimant shall file such claim within ninety days of the accrual of the claim in the office of the city clerk."

After filing its answer, the city moved for summary judgment. At a hearing on its motion, the city offered and the court received an affidavit of the city clerk stating that Niemoller had never filed a claim for unpaid wages with her office. The court also received the affidavit of Dan Hoins, the city administrator. Hoins averred that Papillion was a city of the first class and that on December 4, 2006, he received a letter from Niemoller's attorney, asserting a claim for unpaid sick leave alleged to constitute "wages" under the NWPCA. Hoins further averred that he did not provide a copy of the letter to the city clerk and that the "offices of the Papillion City Administrator and the Papillion City Clerk are separate offices with different responsibilities." In opposition to the motion, Niemoller offered and the court received Hoins' deposition; a copy of Niemoller's attorney's letter to Hoins dated December 1, 2006, asserting his unpaid

wage claim; and a letter from the city's insurance administrator denying coverage for Niemoller's claim. In his deposition, Hoins testified that the city clerk is one of his subordinates but does not report directly to him.

The district court granted the city's motion for summary judgment. The court determined that Niemoller was required by § 16-726 to file his claim with the city clerk within 90 days of its accrual and that his attorney's letter to the city administrator did not satisfy this requirement. Accordingly, the court dismissed Niemoller's complaint. He perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Niemoller assigns, restated and consolidated, that the district court erred in (1) granting the city's motion for summary judgment, (2) finding he had to comply with § 16-726 in order to bring his NWPCA lawsuit, (3) failing to find that he substantially complied with § 16-726, and (4) failing to find that § 16-726 is unconstitutional under the Nebraska and U.S. Constitutions because it violates his equal protection rights, it is special legislation, it impairs his access to the courts, and it violates his substantive and procedural due process rights.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[2]

ANALYSIS

What Does § 16-726 Require?

[2-4] Statutory language is to be given its plain and ordinary meaning.[3] An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct,

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008); *In re Ervin W. Blauhorn Revocable Trust*, 275 Neb. 256, 746 N.W.2d 136 (2008).

[3] *In re Ervin W. Blauhorn Revocable Trust, supra* note 2; *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

and unambiguous.[4] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[5] Section 16-726 provides:

> All liquidated and unliquidated claims and accounts payable against a city of the first class shall: (1) Be presented in writing; (2) state the name and address of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for which payment is claimed or the time, place, nature, and circumstances giving rise to the claim.
>
> As a condition precedent to maintaining an action for a claim, other than a tort claim as defined in section 13-903, the claimant shall file such claim within ninety days of the accrual of the claim in the office of the city clerk.
>
> The city clerk shall notify the claimant or his or her agent or attorney by letter mailed to the claimant's address within five days if the claim is disallowed by the city council.
>
> No costs shall be recovered against such city in any action brought against it for any claim or for any claim allowed in part which has not been presented to the city council to be audited, unless the recovery is for a greater sum than the amount allowed with the interest due.

In this case, we are concerned with the second and fourth paragraphs of the statute. The plain language of the second paragraph states that filing a claim with the city clerk within 90 days of its accrual is a condition precedent to maintaining an action on the claim. We held in *Crown Products Co. v. City of Ralston*[6] that this language establishes a "procedural precedent to commencement of a claim" and that noncompliance is a defense which may be asserted by the city in a subsequent action. But Niemoller argues that the fourth paragraph of the

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[4] *Id.*

[5] *Zach v. Nebraska State Patrol, supra* note 3; *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006).

[6] *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 6, 567 N.W.2d 294, 297 (1997).

statute contemplates an alternative procedure whereby "a claimant may file suit without having presented a claim to the city," with the only consequence being "forfeiture of recovering court costs on a successful claim."[7] The city counters that although "the cost provision contained in the fourth paragraph of the statute is not entirely clear as to when costs may be awarded in actions against cities, the ambiguity in the fourth sentence does not erase the certainty of the previous sentences."[8] We agree that the fourth paragraph of the statute creates an ambiguity, and we therefore consult legislative history to ascertain the intent of the Legislature.[9]

All four paragraphs of the current statute were included in 1990 Neb. Laws, L.B. 1044. The previous version of the statute required that certain claims against a city of the first class must be filed with the city clerk, but did not specify a time limit for such filing.[10] The principal introducer of L.B. 1044 stated that the purpose of the bill was to "improve the procedure" by providing a "specified time" for filing of claims with cities of the first class.[11] After the bill was advanced by the Committee on Urban Affairs, its chairman stated on the floor that the "principle substantial change" in L.B. 1044 was "the requirement that a claimant file a claim within 90 days of accrual of the claim with the city clerk as a condition precedent to maintain [an] action for the claim."[12] The legislative history is silent as to the fourth paragraph of the current § 16-726. Given the clarity in which the 90-day filing requirement is expressed in the second paragraph of the statute and its significance as reflected in the legislative history, we are unwilling to read the fourth paragraph of the statute as negating or providing an alternative to the requirement that a timely claim must be filed with the city clerk as a

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[7] Brief for appellant at 12, 14.

[8] Brief for appellee at 14.

[9] See, *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007); *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

[10] § 16-726 (Reissue 1987).

[11] Committee on Urban Affairs Hearing, 91st Leg., 2d Sess. 59 (Jan. 23, 1990).

[12] Floor Debate, 91st Leg., 2d Sess. 9294 (Feb. 7, 1990).

"condition precedent" to maintaining an action on the claim. We therefore adhere to our holding in *Crown Products Co.* that noncompliance with the filing requirement of § 16-726 may be asserted as a defense in an action to recover on a claim against a city of the first class. The city did so in this case, and we therefore examine the merit of its position.

Did Niemoller Substantially Comply With § 16-726?

Niemoller offered no evidence to contradict the statement in the city clerk's affidavit that "Niemoller has never filed a claim with the Papillion City Clerk's office asserting a wage claim against the City for unused sick leave related to his past employment." Instead, he argues that his claim letter submitted to the city administrator constituted substantial compliance with § 16-726.

The filing requirement imposed by § 16-726 is analogous to that of the Political Subdivisions Tort Claims Act,[13] in that both constitute a "procedural precedent" to commencement of a judicial action.[14] In those cases, we have applied a substantial compliance analysis when there is a question about whether the content of the required claim meets the requirements of the statute.[15] However, we have expressly and repeatedly held that if the notice is not filed with the person designated by statute as the authorized recipient, a substantial compliance analysis is not applicable.[16] We reach the same conclusion here. Because Niemoller did not file a claim with the city clerk, he did not comply with § 16-726.

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[13] Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2006).

[14] § 13-905; *Crown Products Co. v. City of Ralston, supra* note 6.

[15] *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988).

[16] *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003); *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994); *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989).

CONSTITUTIONAL ISSUES

[5] A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[17] In this case, the district court did not address the constitutionality of § 16-726, and the record does not reflect that it was presented with any constitutional issue. Niemoller did not challenge the constitutionality of § 16-726 in his complaint, and there is no indication that he sought leave to amend his complaint in order to raise the issue after the city asserted its noncompliance defense.

Prior to the hearing on the city's motion for summary judgment, Niemoller's counsel filed a "Notice of Service" stating "[p]ursuant to Neb. Rev. Stat. § 25-21,159, [Niemoller] has served Notice on the Attorney General of Nebraska of his intent to argue that Neb. Rev. Stat. § 16-726 is unconstitutional." The statute cited in this notice is a part of the Uniform Declaratory Judgments Act as enacted in Nebraska, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995 & Cum. Supp. 2006), but the record does not reflect that Niemoller ever sought declaratory relief in this action. More importantly, the record does not reflect which, if any, of the constitutional arguments asserted in this appeal were actually presented to the district court. There was no mention of constitutional issues in the evidentiary portion of the summary judgment hearing, and the ensuing arguments were made off the record.

Because the record does not reflect that the constitutional issues asserted in this appeal were presented to or passed upon by the district court, we do not address them.

CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting the city's motion for summary judgment and dismissing the action. We therefore affirm the judgment of the district court.

AFFIRMED.

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[17] *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

STATE OF NEBRASKA, APPELLANT, V.
HEATH K. ARTERBURN, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V.
DANIEL J. SOUCIE, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V.
ERIC W. NEJEZCHLEB, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V.
PAUL R. SHAFER, APPELLEE.

751 N.W.2d 157

Filed July 3, 2008. Nos. S-07-1037 through S-07-1040.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Statutes: Legislature: Intent.** Whether the Legislature intended a civil or criminal sanction is a matter of statutory construction.
5. **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.
6. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
7. **Statutes: Intent.** When construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
8. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.

Appeals from the District Court for Adams County, STEPHEN R. ILLINGWORTH, Judge, on appeal thereto from the County Court for Adams County, JACK R. OTT, Judge. Judgments of District Court reversed, and causes remanded with directions.

Alyson Keiser, Deputy Adams County Attorney, for appellant.

Arthur R. Langvardt, of Langvardt & Valle, P.C., for appellees.

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

WRIGHT, J.

I. NATURE OF CASE

Based upon administrative license revocations for driving under the influence of alcohol, the director of the Department of Motor Vehicles (DMV) disqualified Heath K. Arterburn, Daniel J. Soucie, Eric W. Nejezchleb, and Paul R. Shafer (collectively Appellees) from holding commercial driver's licenses for 1 year pursuant to Neb. Rev. Stat. § 60-4,168 (Cum. Supp. 2006). Appellees entered pleas in bar to criminal charges pending for driving under the influence. The county court overruled the pleas, but the district court reversed. It held that the disqualification of Appellees from holding commercial driver's licenses was a criminal proceeding and that further prosecution of Appellees for driving under the influence constituted double jeopardy. The issue is whether the Legislature's intent in enacting § 60-4,168 was to create a criminal or civil sanction.

II. SCOPE OF REVIEW

[1,2] Statutory interpretation presents a question of law. *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

III. FACTS

Appellees were arrested for driving under the influence of alcohol. Complaints were filed in the county court for Adams County, charging Appellees with driving under the influence. Appellees were subjected to administrative license revocation (ALR) proceedings that resulted in 90-day license revocations.

They appealed the revocations to the district court, which subsequently affirmed the revocations.

Each Appellee held a commercial driver's license. Following the district court's decision to affirm the revocations, they received additional orders from the director disqualifying them from holding commercial driver's licenses for 1 year. In issuing such orders, the director relied upon § 60-4,168.

After these disqualifications, Appellees filed pleas in bar to the driving under the influence charges pending in the Adams County Court. They alleged that the State's criminal prosecution for driving under the influence placed them twice in jeopardy for the same offense. The county court overruled the pleas in bar. Appellees appealed to the Adams County District Court, which reversed. The district court concluded that the language of § 60-4,168, when imposing the 1-year commercial driver's license disqualification, "constitute[d] a criminal conviction" and, therefore, further prosecution of Appellees for driving under the influence constituted double jeopardy.

IV. ASSIGNMENTS OF ERROR

The State argues that the district court erred (1) in holding that the Legislature intended the ALR procedure for commercial license holders to be criminal, (2) in finding that § 60-4,168(7) makes an ALR a criminal conviction, and (3) in finding that the pleas in bar should have been sustained.

V. ANALYSIS

Appellees argue that the disqualification of their commercial driver's licenses constituted criminal punishment and that their subsequent prosecution for driving under the influence, which emanates out of the same factual circumstances, is barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The State disagrees and argues that the sanctions imposed are civil in nature and that, therefore, double jeopardy is not implicated.

[3] The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after

conviction, and (3) multiple punishments for the same offense. *State v. Howell, supra.*

Section 60-4,168 provides:

> (1) . . . [A] person shall be disqualified from driving a commercial motor vehicle for one year upon his or her first conviction . . . for:
>
> (a) Driving a commercial motor vehicle in violation of section 60-6,196 or 60-6,197 . . . or, beginning September 30, 2005, driving any motor vehicle in violation of section 60-6,196 or 60-6,197 . . . .
>
> . . . .
>
> (7) For purposes of this section, conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law, in a court of original jurisdiction or by an authorized administrative tribunal . . . .

We examine the above statute to determine whether the Legislature intended the sanctions contained therein to be civil or criminal.

In *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998), we addressed the question of whether the administrative revocation of a driver's license for refusal to submit to a chemical test constituted punishment such that any subsequent prosecution put the offender twice in jeopardy. Steven Howell was arrested and charged with refusal to submit to a chemical test and driving under the influence. His driver's license was administratively revoked by the DMV. After the revocation, he filed a plea in bar alleging that criminal prosecution for refusal to submit to a chemical test and for driving under the influence placed him twice in jeopardy for the same offense. The county court denied his plea in bar, and he appealed to the district court. The district court affirmed the county court's decision, and Howell appealed to this court.

We affirmed the district court's decision, holding that the administrative revocation of a person's driver's license for refusing to submit to a chemical test was not "punishment" that could raise a double jeopardy bar to a criminal prosecution. We applied the analysis of multiple punishments under the Double Jeopardy Clause as set out in *United States v. Ward*, 448 U.S.

242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), supplemented by *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), and reaffirmed in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). In *State v. Howell*, 254 Neb. at 251, 575 N.W.2d at 865, we referred to the analysis as "the two-part *Kennedy-Ward* analysis, as applied in *Hudson*."

[4] In analyzing whether an ALR for driving under the influence constitutes punishment for purposes of double jeopardy, the court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See *State v. Howell, supra*. The Double Jeopardy Clause protects against the imposition of multiple criminal punishments for the same offense. See *Hudson v. United States, supra*. It does not prohibit the imposition of a civil sanction and a criminal punishment for the same act. See *id*. Whether the Legislature intended a civil or criminal sanction is a matter of statutory construction. See *id.*

1. Legislative Intent

We first determine whether the Legislature intended the sanction of license revocation to be civil in nature. "'If so, we ordinarily defer to the legislature's stated intent.'" *State v. Howell*, 254 Neb. at 252, 575 N.W.2d at 866, quoting *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

The Legislature specifically set forth its intent in enacting § 60-4,168, indicating that the purpose of Neb. Rev. Stat. §§ 60-4,137 to 60-4,172 (Reissue 2004 & Supp. 2005) is to implement federally mandated requirements and to reduce motor vehicle accidents, fatalities, and injuries:

> The purposes of sections 60-462.01 and 60-4,137 to 60-4,172 are to implement the requirements mandated by the federal Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 31100 et seq., the federal Motor Carrier Safety Improvement Act of 1999, Public Law 106-159, section 1012 of the federal Uniting and Strengthening America

> by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, USA PATRIOT Act, 49 U.S.C. 5103a, and federal regulations and to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by: (1) Permitting drivers to hold only one operator's license; (2) disqualifying drivers for specified offenses and serious traffic violations; and (3) strengthening licensing and testing standards.

Neb. Rev. Stat. § 60-4,132 (Cum. Supp. 2006). Implicit in this language is the goal of protecting the public from accidents, fatalities, and injuries involving commercial drivers who are under the influence of alcohol or drugs.

The Legislature set forth a very similar goal when it enacted the ALR statutes. See Neb. Rev. Stat. § 60-6,205 (Cum. Supp. 2002), transferred to Neb. Rev. Stat. § 60-498.01 (Reissue 2004). We have previously interpreted the ALR statutes, concluding that the Legislature intended to create a civil sanction. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Accordingly, because the goal in § 60-4,168 is very similar to that of the ALR statutes, there is strong evidence that the Legislature intended to create a civil sanction.

Nevertheless, Appellees argue, and the district court found, that the word "conviction" as defined in § 60-4,168(7) expressly demonstrates that the Legislature intended disqualification for commercial licensees to be a criminal sanction. Appellees claim that "conviction" means guilty of a *criminal* offense and that because § 60-4,168(7) describes a decision of an "authorized administrative tribunal" as a "conviction," a subsequent prosecution of Appellees for driving under the influence constitutes double jeopardy.

Appellees' argument fails to consider the intent of the commercial driver's license legislation. The Legislature's explicit intent is to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries. See § 60-4,132. The stated purpose by the Legislature indicates that it intended a civil sanction.

However, the language used by the Legislature in a statute is not always dispositive. See *State v. Howell, supra*. See, also, *Kansas v. Hendricks*, 521 U.S. at 361 (stating that "a 'civil label is not always dispositive'"). A court must also look at the

structure and design of the statute to determine the Legislature's intent. The primary consideration in this regard is the procedural mechanisms established by the Legislature to enforce the statute. *State v. Howell, supra*, citing *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996).

[5-7] In our review of § 60-4,168, we are guided by the following principles: 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. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006), citing *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). When construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

A review of the structure, design, and procedural mechanisms to enforce § 60-4,168 reaffirms that the Legislature intended to create a civil sanction. In commercial license disqualifications, the director of the DMV, not a judge, revokes the license based upon a "conviction" as defined in § 60-4,168(7). If the offender is aggrieved by the final decision of the director, the party may appeal to the district court. See Neb. Rev. Stat. § 60-4,105 (Reissue 2004) and § 60-4,170.

A disqualification under § 60-4,168 is distinct from a criminal procedure. The burden of proof is a preponderance of the evidence—not proof beyond a reasonable doubt. The district court hears the appeal in equity. See § 60-4,105(3). The disqualification may occur following a criminal conviction or an ALR. In this instance, the disqualification was the result of an ALR by the DMV. Such ALR hearing has limited issues presented for determination by the director.

In § 60-4,168(7), the phrase "authorized administrative tribunal" implicitly references ALR proceedings. If the offender

requests a hearing, the burden of proof is on the State to make a prima facie case for revocation. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998), citing *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). Once a prima facie case is made, the burden shifts to the offender, who must disprove the prima facie case by a preponderance of the evidence to avoid revocation. *State v. Howell, supra.* This type of summary proceeding, which shifts the burden of proof to the offender, is a distinctly civil procedure. *Id.*, citing *United States v. Ursery, supra*; *U.S. v. Imngren*, 98 F.3d 811 (4th Cir. 1996); *Ex parte Avilez*, 929 S.W.2d 677 (Tex. App. 1996).

[8] A criminal trial and ALR proceedings serve different purposes. The ALR statutes anticipate that the criminal proceeding will be pursued, and the validity of the ALR may depend upon the resolution of the criminal proceeding. See Neb. Rev. Stat. § 60-498.02(4)(a) (Reissue 2004). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

In sum, the structure, design, and procedural mechanisms, along with the Legislature's specified purpose, lead us to conclude that the Legislature's intent in enacting § 60-4,168 was to create a civil sanction.

2. Punitive in Purpose or Effect

Having determined that the Legislature intended a commercial license revocation to be a civil sanction, we examine whether § 60-4,168 is so punitive in purpose or effect as to negate the Legislature's intent. See *State v. Howell, supra*, citing *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Although the district court did not make a specific finding of such and Appellees do not argue such, we nevertheless address this issue because it is relevant to our interpretation of § 60-4,168.

We presume the sanction is civil unless Appellees provide the clearest proof that the statute is so punitive in its purpose

or effect as to negate the Legislature's intent. See *State v. Howell, supra*.

In analyzing whether the purpose or effect of the statute is so punitive as to negate the Legislature's intent, we look to the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

See, also, *Hudson v. United States, supra*.

Keeping in mind that these factors are "helpful" but "certainly neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), and that these factors "'must be considered in relation to the statute on its face,'" *Hudson v. United States*, 522 U.S. at 100, quoting *Kennedy v. Mendoza-Martinez, supra*, we review each of the seven factors below for the "'clearest proof'" to override the Legislature's intent, see *id.*

(a) Affirmative Disability or Restraint

Although we recognize that the loss of a commercial driver's license imposes a sanction that the driver may not operate a commercial vehicle for a 1-year period, this sanction is not an affirmative disability or restraint, as the term is normally understood. In *Hudson v. United States*, 522 U.S. at 104, the Court found that prohibiting a person from participating in the banking industry was not an affirmative disability or restraint, stating that the prohibition was "'certainly nothing approaching the "infamous punishment" of imprisonment.'" (Quoting *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).) Accordingly, the 1-year revocation of a commercial license compares more closely to prohibiting a person from participating in the banking industry than to the "infamous punishment"

of imprisonment. We conclude that an affirmative disability or restraint is not present.

(b) Historically Regarded as Punishment

As shown by our previous decisions on this topic, *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), and *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998), an ALR has not traditionally been understood to constitute punishment. A commercial driver's license is a privilege and not a right, and because the revocation of a privilege is usually not considered punishment, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), we conclude that the revocation of a commercial driver's license is not considered punishment, as it is merely the revocation of a privilege.

(c) Scienter

The 1-year revocation does not come into play "only" on a finding of scienter. The revocation applies regardless of the offender's state of mind.

(d) Promotion of Punishment—Retribution and Deterrence

We recognize that the imposition of the 1-year revocation will deter others from emulating Appellees' conduct, a traditional goal of criminal punishment; however, the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals. See *Hudson v. United States, supra*, citing *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). Thus, although the 1-year revocation deters others because it serves the statute's nonpunitive purpose of protecting the public from accidents, fatalities, and injuries, and because any deterrent purpose it has is merely secondary to its stated purpose, we conclude that its deterrent purposes do not render the 1-year revocation a criminal sanction.

(e) Behavior Already Crime

The behavior to which the commercial license revocation applies is already a crime.

(f) Alternative Purpose

As stated above, the statute in question has the alternative, nonpunitive purpose of protecting the public from accidents, fatalities, and injuries. Any deterrent purpose is merely secondary to the statute's stated, nonpunitive purpose.

(g) Excessive

The statute's nonpunitive purpose of protecting the public from accidents, fatalities, and injuries is justified based on the offender's willingness to engage in conduct that, if continued, poses a danger to the public. In sum, there simply is very little showing, to say nothing of the "clearest proof" required, that a 1-year revocation is so punitive in purpose or effect as to make the sanction criminal.

VI. CONCLUSION

For the above-stated reasons, we reverse the district court's judgment and remand the cause to the district court with directions to affirm the judgment of the county court which overruled Appellees' pleas in bar.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., concurs in the result.

STEVEN MAHNKE, M.D., APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE, APPELLANT.

751 N.W.2d 635

Filed July 11, 2008. No. S-06-918.

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 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: 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.
4. **Statutes.** All statutes relating to the same subject are considered as parts of a homogeneous system, and later statutes are considered as supplementary to preceding enactments.
5. ____. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
6. ____. To ascertain the proper meaning of a statute, a court may refer to later as well as earlier legislation upon the same subject.
7. **Administrative Law.** To be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
8. **Administrative Law: Legislature.** It is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority.
9. **Administrative Law: Statutes.** An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes the agency is to administer; the agency may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.

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

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

William M. Lamson, Jr., and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

CONNOLLY, J.

I. SUMMARY

The State brought disciplinary charges against Steven Mahnke, M.D., alleging Mahnke engaged in unprofessional conduct. Following a hearing before the hearing officer, the director of the Department of Health and Human Services Regulation and Licensure (the Department) suspended Mahnke's license to practice medicine and surgery in Nebraska for 90 days. Mahnke moved for judicial review. An issue before the district court was whether the locality rule applied in disciplinary actions for unprofessional conduct. The locality rule is the statutory

standard of care for medical malpractice actions under Neb. Rev. Stat. § 44-2810 (Reissue 2004). The district court concluded that the locality rule does apply and determined that the State failed to prove unprofessional conduct under that standard.

The State appealed the district court's decision regarding the locality rule, but we believe the threshold issue is whether the State may discipline a physician for a single act of "ordinary negligence." We use the term "ordinary negligence" here to mean medical negligence that does not show a physician's gross incompetence or gross negligence in treating a patient or a pattern of negligent conduct. We conclude that the State may not discipline a physician for a single act of ordinary negligence. We affirm the district court's reversal of Mahnke's discipline.

II. BACKGROUND

Mahnke has practiced medicine as a board-certified family practice physician in Central City, Nebraska, since 1984. R.C. had been Mahnke's patient since 1985. In 2003, she became pregnant. On December 10, R.C. reported that she had been nauseated and feverish for 2 to 3 days and was experiencing brown vaginal discharge. Mahnke ordered an ultrasound. The radiologist informed Mahnke of fetal demise and stated that the fetus looked like it was probably 13 to 14 weeks into gestation.

Mahnke gave R.C. the option to have an obstetrician-gynecologist in Hastings do a dilation and curettage (D&C) or to have Mahnke do it in Central City. R.C. decided that Mahnke should do the D&C in Central City, and the surgery was scheduled for the following morning at the Litzenberg Memorial County Hospital.

Mahnke did the D&C on December 11, 2003. He initially used a dull curette. R.C. started bleeding "pretty rapidly" soon after the surgery began. Mahnke had difficulty separating the placenta from the uterine wall. He decided he needed to switch to a sharp curette to remove the placenta. After changing to the sharp curette, Mahnke was eventually able to free the placenta. In the process, he perforated the uterus. R.C.'s bleeding slowed after Mahnke removed the placenta. Following the surgery, Mahnke did what he could to stabilize R.C., but she went into cardiac arrest. R.C. was taken by helicopter to St. Elizabeth

Regional Medical Center in Lincoln, where she later died. Pathology reports later showed that R.C. suffered from placenta increta. This is a rare condition in which the placenta invades the muscle layer of the uterus, making it difficult to separate the placenta from the wall of the uterus.

In March 2005, the State filed its operative petition for disciplinary action against Mahnke. In that petition, the State alleged that his conduct constituted unprofessional conduct and practice beyond the authorized scope. But the State later moved to dismiss the allegation of practice beyond the authorized scope, leaving only the allegations of unprofessional conduct under Neb. Rev. Stat. § 71-148 (Reissue 2003) and 172 Neb. Admin. Code, ch. 88, § 013 (1999). At the hearing, the State's expert testified that Nebraska family practitioners or obstetrician-gynecologists would provide substandard care if they used dull curettage instead of suction on a second-trimester fetal demise.

Following the hearing, the director found that Mahnke's conduct was unprofessional conduct and practice outside the normal standard of care in Nebraska. The director entered an order suspending Mahnke's license for 90 days, requiring a refresher course in obstetrics, prohibiting him from performing D&C or dilation and evacuation procedures except to save the mother's life or in an emergency, and imposing a 2-year probation upon reinstatement.

Mahnke petitioned the district court for judicial review. The court granted his motion to stay the director's order, on the condition that he not engage in any obstetrical procedures while the case is pending.

Mahnke argued that in determining whether his conduct was unprofessional, the conduct must be judged by the locality rule that applies in professional negligence actions under the Nebraska Hospital-Medical Liability Act. The State argued that the locality rule does not apply to unprofessional conduct in disciplinary proceedings and that Mahnke's conduct should be judged by the national standard of care. The court agreed with Mahnke that the locality rule did apply in determining whether his acts constituted unprofessional conduct for the disciplinary action. Under that standard, the court concluded that the State failed to present clear and convincing evidence that Mahnke's

treatment of R.C. was unprofessional conduct under Nebraska's Uniform Licensing Law or § 013.18 of the Department's regulations. The court reversed the director's order.

III. ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) applying the locality rule from the Nebraska Hospital-Medical Liability Act when construing the "unprofessional conduct" discipline grounds and (2) concluding, after erroneously judging the evidence by the locality rule, that the State failed to prove unprofessional conduct by clear and convincing evidence.

IV. STANDARD OF REVIEW

[1,2] The State appealed the district court's order under Neb. Rev. Stat. § 71-159 (Reissue 2003). That statute provides that "[b]oth parties [to a disciplinary proceeding under the Uniform Licensing Law] shall have the right of appeal, and the appeal shall be in accordance with the Administrative Procedure Act." 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.[1] 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.[2]

[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.[3]

V. ANALYSIS

In its amended petition, the State alleged that Mahnke should be disciplined under Neb. Rev. Stat. § 71-147(10) (Reissue 2003) because his conduct constituted unprofessional conduct as defined in § 71-148 of the Uniform Licensing Law and

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[1] *Zwygart v. State*, 273 Neb. 406, 730 N.W.2d 103 (2007).

[2] *Id.*

[3] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

§ 013.18 of the Department's regulations. At all relevant times, the provisions in §§ 71-147 and 71-148 appeared in the Uniform Licensing Law in chapter 71 of the Nebraska Revised Statutes. The Legislature has since transferred these provisions to the Uniform Credentialing Act in chapter 38. We will retain the references to chapter 71. We begin by reviewing the framework of these statutory provisions and the Department's regulation.

1. Statutory and Regulatory Framework

Section 71-147 of the Uniform Licensing Law sets out the general grounds for disciplinary action against a professional license. It states in relevant part: "A license . . . to practice a profession may be . . . limited, revoked, or suspended . . . when the . . . licensee . . . is guilty of any of the following acts or offenses: . . . (10) Unprofessional conduct." Unprofessional conduct is defined in § 71-148 of the Uniform Licensing Law. The introductory paragraph of § 71-148 provides: "For purposes of section 71-147, unprofessional conduct means any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession or occupation or the ethics of the profession or occupation . . . ." The State's first charge alleged unprofessional conduct under this general definition in the introductory paragraph of § 71-148.

Following this opening paragraph of § 71-148 are 22 subsections. In subsections (1) through (21), § 71-148 sets out a nonexclusive list of 21 acts of unprofessional conduct. In its second unprofessional conduct charge, the State did not allege that any of these specific examples were applicable. Instead, it alleged unprofessional conduct under subsection (22). Under subsection (22), unprofessional conduct also includes "[s]uch other acts as may be defined in rules and regulations adopted and promulgated by the board of examiners in the profession of the . . . licensee . . . with the approval of the department." Thus, the State's second charge alleges unprofessional conduct under the Department's regulations.

Title 172, chapter 88, of the Nebraska Administrative Code contains the Department's regulations governing the practice of medicine and surgery. Within chapter 88 is § 013, which defines certain acts as "unprofessional conduct, pursuant to . . .

§71-148(22), and where applicable, further construes the unlawful or unprofessional acts listed in . . . §§ 71-147 and 71-148." Section 013.18 defines unprofessional conduct to include "[a]ny conduct or practice outside the normal standard of care in the State of Nebraska which is or might be harmful or dangerous to the health of the patient or the public." This is the only regulatory provision the State relies on. Section 013.18 provides no definition for "normal standard of care in the State of Nebraska."

In summary, § 71-147(10) provides that disciplinary action may be taken against a professional license for "[u]nprofessional conduct" by the licensee. Section 71-148 generally defines "unprofessional conduct" as "any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession." It also includes, under subsection (22), "acts as may be defined in rules and regulations." Finally, § 013.18 of the Department's regulations governing the practice of medicine and surgery defines "unprofessional conduct" to include "[a]ny conduct or practice outside the normal standard of care in the State of Nebraska."

2. The Threshold Question Is Whether the State May Discipline a Physician for a Single Act of Ordinary Negligence

The State argues on appeal that the district court erred in determining the locality rule is the standard of conduct in a disciplinary action for unprofessional conduct. Mahnke contends, however, that we should affirm the district court's decision regardless of the standard applied, because the State may not discipline him for a single act of alleged negligence. Mahnke argues that the relevant statutes do not provide for discipline against a physician based on ordinary negligence. He further argues that § 013.18 of the Department's regulations could subject a physician to discipline for an act of ordinary negligence and is therefore invalid as inconsistent with the statutes.

The State responds that it does not contend a single act of ordinary negligence would be grounds for discipline. The State argues that it "never charged . . . Mahnke with 'ordinary negligence,'" but instead charged him with unprofessional

conduct.[4] In fact, the State further concedes, "[N]or do the disciplinary statutory provisions of §§ 71-147 and 71-148 of the Uniform Licensing Law state that 'ordinary negligence' is grounds for disciplining a medical license."[5] The State apparently believes that any act of medical negligence may be grounds for discipline if the charge is couched as unprofessional conduct rather than in negligence terms. This artificial distinction is not convincing. We conclude that the threshold question is whether the State can subject a physician to discipline for a single act of ordinary negligence.

3. The General Definition of Unprofessional Conduct in § 71-148 Does Not Include a Single Act of Ordinary Negligence

As noted, in its first charge, the State alleged that Mahnke's conduct constituted unprofessional conduct as generally defined in the introductory paragraph of § 71-148: i.e., "any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession." We recognize that this broad definition could be interpreted to include as unprofessional conduct a physician's breach of a standard of care in treating a patient. We believe, however, that a 1994 amendment to § 71-147 shows that this general definition in § 71-148 does not include as unprofessional conduct a single act of ordinary negligence.

[4-6] To extract meaning from statutes and regulations, we are guided by familiar statutory canons. We construe all statutes relating to the same subject as parts of a homogeneous system and later statutes as supplementary to preceding enactments.[6] Statutes relating to the same subject, although enacted at different times, are in pari materia, and we construe them together.[7]

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[4] Reply brief for appellant at 2.

[5] *Id.*

[6] *State v. Blevins*, 3 Neb. App. 111, 523 N.W.2d 701 (1994). See, also, *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988).

[7] *Blevins, supra* note 6. See, also, *Georgetowne Ltd. Part., supra* note 6.

To ascertain the proper meaning of a statute, we may refer to later as well as earlier legislation upon the same subject.[8]

Subsection (5) of § 71-147 is critical to our analysis. Besides subsection (10) (unprofessional conduct), § 71-147 contains 22 other subsections that provide grounds for professional discipline. Under subsection (5), the State may discipline a professional for "[p]ractice of the profession (a) fraudulently, (b) beyond its authorized scope, (c) with manifest incapacity, (d) with gross incompetence or *gross negligence*, or (e) in a *pattern of negligent conduct*."[9] Subsection (5) defines "pattern of negligent conduct" as "a continued course of negligent conduct in performing the duties of the profession."

The Legislature added subsection (e) to § 71-147(5) as a ground for discipline in 1994.[10] This addition was after the Legislature added the general definition of unprofessional conduct to the introductory paragraph of § 71-148 in 1993.[11] We find significant the Legislature's addition of "pattern of negligent conduct" in § 71-147(5)(e) *after* it had added the general definition in § 71-148.

If the Legislature had originally intended or inadvertently permitted the State to discipline a licensed professional for a single act of ordinary negligence under the general definition of unprofessional conduct in § 71-148, then adding subsection (e) to § 71-147(5) changed that intent or oversight. When the Legislature adopts an amendment, we presume that it intended to make some change in the existing law.[12] The only purpose for adding § 71-147(5)(e) would have been to clarify that the State may not base a disciplinary action on a single act of negligent conduct that fails to show a pattern.

Conversely, if the Legislature did *not* originally intend to allow the State to discipline a licensed professional for a single act of

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[8] See *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000).

[9] § 71-147(5) (emphasis supplied).

[10] See 1994 Neb. Laws, L.B. 1223.

[11] See 1993 Neb. Laws, L.B. 536.

[12] See *Kalisek v. Abramson*, 257 Neb. 517, 599 N.W.2d 834 (1999).

ordinary negligence under the general definition in § 71-148, then adding "a pattern of negligent conduct" in § 71-147(5)(e) only clarified that original intent.

Therefore, regardless of the Legislature's original intent or oversight about whether the general definition of unprofessional conduct in § 71-148 included a single act of ordinary negligence, we conclude that its addition of § 71-147(5)(e) makes clear that the definition does not currently encompass such a single act. Thus, the State's first charge fails to state a ground for discipline because the State may not discipline Mahnke under the general definition of unprofessional conduct in § 71-148 for his single allegedly negligent act.

4. Section 013.18 of the Department's Regulations, Defining Unprofessional Conduct, Is Invalid as Inconsistent With the Authority Granted to the Department Under the Uniform Licensing Law

In its second unprofessional conduct charge, the State alleged that Mahnke's conduct constituted unprofessional conduct as defined in § 013.18 of the Department's regulations. As noted, § 013.18 defines unprofessional conduct to include "[*a*]*ny conduct or practice outside the normal standard of care* . . . which is or might be harmful or dangerous to the health of the patient or the public." (Emphasis supplied.) We agree with Mahnke that this regulation is broad enough to subject a physician to discipline for ordinary negligence. We also agree that this result is inconsistent with the authorizing statutes in the Uniform Licensing Law.

[7] We have stated that to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.[13] Section 71-148(22) authorizes the relevant board of examiners, with the approval of the Department, to adopt rules and regulations defining acts that constitute unprofessional conduct. Therefore, the Department's adoption of specific acts constituting unprofessional conduct in § 013 was clearly within the Legislature's contemplation if the acts are

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[13] *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

consistent with the statute's standards. But only § 013.18 of the regulation is at issue. So our focus is limited to whether this much broader and undefined provision is consistent with the authorizing statutes.

(a) Section 71-147 Does Not Include a Single Act of Ordinary Negligence as a Ground for Discipline

Mahnke argues that § 013.18 of the Department's regulations is inconsistent with the Uniform Licensing Law because the statutes do not contemplate ordinary negligence as a ground for discipline. Like Mahnke, we detect a tension between § 013.18 of the regulations and §§ 71-147 and 71-148.

As discussed, § 71-147(5) includes as grounds for professional discipline "gross negligence" and "a pattern of negligent conduct." Section 71-147 does not, however, provide that a single act of ordinary negligence may be grounds for discipline. Mahnke argues that if the Legislature intended ordinary negligence to be actionable as a disciplinary action, the Legislature would have included it in subsection (5). We agree that the Legislature's specific inclusion of "gross negligence" and "a pattern of negligent conduct," with no mention of ordinary negligence, is telling. But we also consider § 71-148 to determine whether the Legislature has shown a contrary intent to include ordinary negligence within the meaning of unprofessional conduct.

(b) A Single Act of Ordinary Negligence Does Not Come Within the Meaning of Unprofessional Conduct Under § 71-148

We have decided that the general definition for unprofessional conduct in the introductory paragraph of § 71-148 does not encompass the single breach of a physician's standard of care.

Following the general definition, § 71-148 sets out a nonexclusive list of 21 acts that constitute unprofessional conduct. This list further shows that the Legislature did not intend for a single act of ordinary negligence to constitute unprofessional conduct. None of these 21 specific acts shows that the Legislature intended for a single act of ordinary negligence in the general treatment of patients to constitute unprofessional conduct. The

acts do not include the breach of a physician's standard of care in treating patients generally.

We recognize that § 71-148(13) could be interpreted to include as unprofessional conduct a physician's breach of a standard of care in treating a patient. That subsection defines unprofessional conduct to include "[p]erformance by a physician of an abortion . . . under circumstances when he or she will not be available for . . . at least forty-eight hours for postoperative care unless such postoperative care is delegated to and accepted by another physician." The Legislature added that subsection (originally enumerated (11)) as an act constituting unprofessional conduct in 1981.[14] This was before the Legislature added the general definition of unprofessional conduct in the introductory paragraph of § 71-148 in 1993 and before it added "a pattern of negligent conduct" to § 71-147(5) in 1994. Arguably, the Legislature intended here to impose a statutory standard of care for the treatment of patients seeking abortions, the breach of which would allow the State to discipline the physician. But even under that interpretation, the standard of care in § 71-148(13) would not extend to the treatment of patients generally. Subsection (13) is limited to the specific circumstance of postoperative care following abortions.

The legislative history of § 71-148(13) supports this analysis. During the committee hearing on L.B. 466,[15] the bill that added what is now subsection (13), the bill's principal introducer explained the bill's purpose:

> LB 466 gives us an opportunity to provide adequate postoperative care for young gir[l]s and women who obtained abortions. . . . We have a situation in this state of very poor followup care for abortions which is medically indefensible. To help remedy this situation, we as a group and myself urge you to advance LB 466 . . . .[16]

One problem discussed during the committee hearing concerned a doctor traveling to a town to perform abortions and then

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[14] See 1981 Neb. Laws, L.B. 466.

[15] *Id.*

[16] Public Health and Welfare Committee Hearing, L.B. 466, 87th Leg., 1st Sess. 2-3 (Feb. 23, 1981).

leaving town at the end of the day without arranging for proper followup care. The Legislature designed L.B. 466 to remedy the concern that a patient could be left without access to post-operative care should complications arise following an abortion. Therefore, when the Legislature added the subsection at issue to § 71-148, it intended to create only a specific standard of care for the treatment of patients seeking abortions. It did not enlarge the Legislature's previous concept of unprofessional conduct to include single acts of ordinary negligence in treating patients generally. Nor do we read any of the other subsections in § 71-148 as defining unprofessional conduct to include ordinary negligence in the treatment of patients generally.

Thus, the 21 acts of unprofessional conduct under § 71-148 support the conclusion that the Legislature did not intend to include a single act of ordinary negligence as a ground for disciplinary action. Although § 71-148(22) includes as unprofessional conduct "such other acts as may be defined in rules and regulations," those rules and regulations are confined to the standards set out in §§ 71-147 and 71-148.

[8,9] We have held that it is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority.[17] An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes the agency is to administer. The agency may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.[18] We do not interpret § 71-148(22) as granting the Department authority to enact a regulation defining unprofessional conduct to include single acts of ordinary negligence in the treatment of patients generally. Allowing the State to discipline a physician for such acts under § 013.18 would enlarge the provisions in §§ 71-147 and 71-148 and would be inconsistent with the authority granted to the Department under the Uniform Licensing Law. We conclude that § 013.18 does not authorize the State to discipline a

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[17] *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006).

[18] See, *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

physician for a single act of ordinary negligence. Therefore, the State may not discipline Mahnke under § 013.18 for the allegedly negligent act of using a dull curette rather than suction for a second-trimester fetal demise. The State's second unprofessional conduct charge fails to state a ground for discipline.

VI. CONCLUSION

Although a physician's single act of ordinary negligence can lead to tragic consequences, the law must not turn on the facts of a single case. The Legislature in §§ 71-147 and 71-148 has concluded that a physician should not be subject to discipline for a single act of ordinary negligence. Therefore, we conclude that § 013.18 of the Department's regulations is invalid to the extent it can be interpreted to permit discipline for a single act of ordinary negligence. The State has not alleged gross negligence or a pattern of negligent conduct and may not discipline Mahnke for his single act of alleged ordinary negligence. Thus, we affirm the district court's reversal of the Department's order disciplining Mahnke.

AFFIRMED.

CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, AND CITY OF OMAHA MAYOR MICHAEL FAHEY, APPELLEES, V. CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, AND FRATERNAL ORDER OF POLICE LODGE NO. 53, APPELLANTS.

CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, AND CITY OF OMAHA MAYOR MICHAEL FAHEY, APPELLEES, V. CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

752 N.W.2d 137

Filed July 11, 2008. Nos. S-07-174, S-07-263.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.

2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Constitutional Law: Courts.** The construction of the Constitution is a judicial function, and the Constitution is interpreted as a matter of law.
5. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
6. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
7. ____: ____. Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
8. ____: ____. If the party bringing the suit lacks standing, the district court is without jurisdiction to decide the issues in the case.
9. **Actions: Jurisdiction.** If an action is not ready, or "ripe" for judicial determination, then the district court lacks subject matter jurisdiction to consider the case.
10. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination.
11. **Declaratory Judgments.** An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.
12. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
13. ____: ____. Ripeness involves both jurisdictional and prudential concerns. When making a ripeness determination, a court must consider, as a jurisdictional matter, whether it can act at a certain time and also, as a prudential matter, whether it should act at that time.
14. ____: ____. A court can take into account all information available to it at the time a ripeness challenge is considered and decide whether an issue is ripe for determination.
15. **Constitutional Law: Employment Contracts: Time.** When the services for which compensation is granted are rendered prior to the date on which the terms of compensation are determined, the benefits awarded are not compensation but are a gratuity, and the payment of such benefits violates Neb. Const. art. III, § 19. It follows that when the services for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity, and the payment of such benefits does not violate Neb. Const. art. III, § 19.
16. **Contracts: Consideration.** Consideration is sufficient to support a contract if there is any detriment to the promisee or any benefit to the promisor.

Appeals from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Jeff C. Miller, Duncan A. Young, and Keith I. Kosaki, of Young & White, for appellants.

William M. Lamson, Jr., Lawrence F. Harr, and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., and Paul D. Kratz, Omaha City Attorney, and Alan M. Thelen for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

These two cases, Nos. S-07-174 and S-07-263, consolidated for appeal, arise from an annexation dispute. In these appeals, we are asked to determine whether certain contract provisions requiring continued employment and allowing for the payment of severance benefits in the event the City of Elkhorn, Nebraska (Elkhorn), was annexed by the City of Omaha, Nebraska, appellee (Omaha), are valid and enforceable. In each case, Omaha sought a declaration in the district court for Douglas County that the agreements, which had been negotiated by Elkhorn prior to its annexation by Omaha, were not valid because they violated Neb. Const. art. III, § 19, which generally prohibits paying a gratuity or "extra compensation" to a public employee. The district court concluded it had jurisdiction, declared the severance provisions invalid and unenforceable, and granted summary judgment in favor of Omaha. Case No. S-07-174 involves Elkhorn and the Fraternal Order of Police Lodge No. 53. Case No. S-07-263 involves Elkhorn and management employees Donald Eikmeier, Wendy Anderson, Kevin Daly, Timothy Dempsey, Cheryl Eckerman, Steven Morrissey, Jesse Robinson, and "Jane Does" and "John Does."

We conclude that jurisdiction exists over these cases. However, contrary to the district court's ruling, we conclude that because the severance provisions were determined prior to the services rendered by the police and management appellants and are

supported by adequate consideration, the severance provisions are enforceable and the payments made under the severance provisions are not unconstitutional gratuities. Accordingly, we reverse the district court's grant of summary judgment in each case, and we remand the causes for further proceedings consistent with this opinion.

II. FACTS

The material facts are essentially undisputed. Beginning in 2003, the Fraternal Order of Police Lodge No. 53 (hereinafter the police appellants); and Eikmeier, as Elkhorn's city administrator; Anderson; Daly; Dempsey; Eckerman; Morrissey; Robinson; and Jane and John Does, as management personnel within Elkhorn's government (hereinafter collectively the management appellants), entered into contracts that provided for the payment of severance benefits. The severance provisions in these contracts provided generally that in exchange for their agreement to remain employed, the police and management appellants would be entitled to the payment of severance benefits if Elkhorn was annexed and if at the time of the annexation, the individual police and management appellants were still employed by Elkhorn.

Specifically, the police appellants' severance provision provided that they would be paid compensation equal to 52 weeks in monthly installments beginning with the month after the police appellants' last day of employment with Elkhorn. The police appellants' severance provision further stated that if, during the 52-week compensation period, the police appellants were employed as law enforcement officers by any political subdivision of the State of Nebraska, the right to compensation under the severance provision terminated.

Eikmeier's agreement provided that Eikmeier would receive 6 months' pay as severance benefits, which could be paid in one lump sum at Eikmeier's election. The agreement of the remaining management appellants provided that they would receive 10 weeks' pay as severance benefits, which could be paid in one lump sum at the individual management appellant's election. There was no provision in the management appellants' contracts that their severance benefits would be terminated if they

found employment subsequent to their last day of employment with Elkhorn.

Beginning in early 2005, Omaha and Elkhorn each passed annexation ordinances. Omaha annexed Elkhorn, and Elkhorn sought to annex surrounding communities in an effort to immunize itself from Omaha's annexation. On March 9, 2005, Elkhorn filed a complaint in the district court for Douglas County, seeking to prevent Omaha's annexation of Elkhorn from taking effect (the annexation case). Following a trial, the district court determined that Omaha's annexation ordinance was valid and that Elkhorn's annexation ordinance was invalid. In an opinion filed January 12, 2007, this court affirmed the district court's order in the annexation case and noted that Omaha's annexation of Elkhorn was effective March 24, 2005. See *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

On March 31, 2006, Omaha filed two separate actions, which are the cases presently before this court. In these cases, Omaha sought declaratory judgments that the severance provisions were invalid and unenforceable under Neb. Const. art. III, § 19, which prohibits paying extra compensation to a public employee after services have been rendered. In each case, Omaha filed a motion for summary judgment, and in each case, appellants filed oppositions to the motion. Omaha's motions and appellants' opposition to the motions came on for evidentiary hearings.

During the hearings, appellants challenged the district court's subject matter jurisdiction, claiming that Omaha lacked standing to bring its declaratory judgment actions and further claiming that the issues raised therein were not ripe. The police appellants' evidence included an affidavit from Eikmeier in his capacity as city administrator. Eikmeier stated as follows:

> 10. In July 2003, [the police appellants] presented to me, as the chief negotiator for . . . Elkhorn, a proposed Labor Agreement . . . .
>
> 11. As part of the proposal by [the police appellants, they] requested a severance provision . . . .
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> . . . .
>
> 13. [The police appellants] maintained that such a severance provision was necessary to insure the ability to

> provide qualified police officers, in the event of annexation . . . of Elkhorn by any other political entity.
>
> . . . .
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> 19. The [severance provision] requires the [police appellants] to continue employment with [Elkhorn] until such time as [Elkhorn] no longer exists, in exchange for an agreement of [Elkhorn] to pay a retention incentive . . . .
>
> 20. [The p]olice [appellants] are promised a retention incentive payment in exchange for such employees foregoing [sic] any opportunity of employment in other entities during any period of potential annexation, or any transition required because of annexation, in order to receive any of the severance incentive payments.

The management appellants also introduced into evidence an affidavit from Eikmeier in his capacity as city administrator. In his affidavit, Eikmeier stated as follows:

> 10. [As part of negotiations in] July 2003 . . . [the management appellants] presented demands regarding job security and incentive payments as a condition for them to continue their employment until such time as . . . Elkhorn ceased to exist as a result of . . . annexation.
>
> . . . .
>
> 14. In the summer of 2003 I presented and recommended to the Elkhorn City Council and Mayor that . . . Elkhorn take the necessary steps designed to assist . . . Elkhorn in retaining the services of . . . employees, and to address the concerns of losing employment as a result of . . . annexation . . . .
>
> 15. In September 2003, the City Council approved the recommendation to provide for compensation to those [employees] in exchange and in consideration for their continued service to . . . Elkhorn.
>
> 16. The Severance Agreement is, in reality and by its terms, a retention incentive agreement whereby the employee agrees to continue in the employment of . . . Elkhorn in exchange for [Elkhorn's] promise of a payment upon the completion of the service.
>
> . . . .

> 18. Without the retention incentive . . . Elkhorn would have lost many of its key employees . . . because of the uncertainty of Elkhorn's continued existence.

Eikmeier's affidavit testimony in both cases was essentially uncontroverted by Omaha.

By entry of an order in each case, the district court sustained Omaha's summary judgment motions. The district court determined in each case that it had subject matter jurisdiction and declared that the severance provisions were void because they violated Neb. Const. art. III, § 19. The district court enjoined enforcement of the provisions. Appellants appeal from the district court's orders.

III. ASSIGNMENTS OF ERROR

Appellants raise several assignments of error that we summarize and restate as two. Appellants claim, restated, that the district court erred (1) in determining that it had subject matter jurisdiction over Omaha's declaratory judgment actions and (2) in sustaining Omaha's motions for summary judgment based upon its determination that the severance provisions violated Neb. Const. art. III, § 19.

IV. STANDARDS OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[2,3] 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. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (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.*

[4] The construction of the Constitution is a judicial function, and the Constitution is interpreted as a matter of law. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

V. ANALYSIS

1. The District Court Had Subject Matter Jurisdiction

Appellants raise issues of standing and ripeness before this court and contend that the district court erred when it concluded that it had subject matter jurisdiction in these cases. Appellants argue that because Omaha was not a party to the severance provisions, it lacked standing to seek a declaratory judgment concerning the validity of those provisions. Appellants also argue that because the annexation case was on appeal at the time Omaha filed its declaratory judgment actions, the lawsuits were not ripe. As explained below, we conclude that appellants' assignment of error challenging jurisdiction is without merit.

(a) Omaha Had Standing to Seek Declaratory Judgments as to the Enforceability of the Severance Provisions

[5-8] With regard to standing, this court has recognized that standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). We have further stated that the defect of standing is a defect of subject matter jurisdiction. *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007). Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. See, *id.*; *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). If the party bringing the suit lacks standing, the district court is without jurisdiction to decide the issues in the case. See *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

In the instant cases, Omaha had standing to seek a judicial determination regarding the enforceability of the severance provisions. Omaha filed its lawsuits pursuant to Nebraska's Uniform

Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2006). A section of that act, § 25-21,150, provides that "[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract[.]"

Omaha became interested in the severance provisions when it annexed Elkhorn, and pursuant to Neb. Rev. Stat. § 14-118 (Reissue 1997), it succeeded to the contracts. Section 14-118 provides in pertinent part that

> [w]henever any city of the metropolitan class shall extend its boundaries so as to annex or merge with it any city or village, the laws, ordinances, powers, and government of such metropolitan city shall extend over the territory embraced within such city or village so annexed or merged with the metropolitan city from and after the date of annexation. The date of annexation or merger shall be set forth in the ordinance providing for the same, and after said date the metropolitan city shall succeed to all the property and property rights of every kind, contracts, obligations, and choses in action of every kind held by or belonging to the city or village annexed or merged with it, and the metropolitan city shall be liable for and recognize, assume, and carry out all valid contracts, obligations and licenses of any city or village so annexed or merged with the metropolitan city.

In accordance with § 14-118, Omaha, a city of the metropolitan class, see *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007), succeeded to and became liable for the severance provisions on March 24, 2005, the date Omaha's annexation ordinance became effective. See *id*. Compare *Airport Authority of City of Millard v. City of Omaha*, 185 Neb. 623, 177 N.W.2d 603 (1970) (citing § 14-118 and stating that Omaha's annexation of Millard did not impair contracts entered into by Millard airport authority prior to annexation date, because Omaha incurred obligation to carry out contract by virtue of annexation). Once the annexation ordinance became effective, Omaha was liable under the severance provisions and Omaha became "interested" in those provisions. See § 25-21,150. Thus,

contrary to appellants' jurisdictional challenge, Omaha's interest gave it standing to seek a declaratory judgment regarding the enforceability of the severance provisions.

(b) The Issues in These Cases Are Ripe for Determination

[9-12] With regard to ripeness, we have recognized that if an action is not ready, or "ripe" for judicial determination, then the district court lacks subject matter jurisdiction to consider the case. See *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998). In the context of declaratory judgment actions, we have stated generally that "[a] court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination. . . . An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain." *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 1003, 679 N.W.2d 235, 241 (2004). Accord *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). In a similar vein, we have noted that although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

A determination with regard to ripeness depends upon the circumstances in a given case. This is because "'[t]he difference between an abstract question and a [case ripe for determination] is one of degree . . . .'" See *Nebraska Public Power Dist. v. MidAmerican Energy*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

[13] It has been recognized that a determination of judicial ripeness often involves a two-part analysis. The Texas Supreme Court described this two-part approach by stating that "[r]ipeness . . . involves both jurisdictional and prudential concerns." See *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001). The court explained that when making a ripeness determination, a court must consider, as a jurisdictional matter, whether it can act at a certain time and also, as a prudential matter, whether it should act at that time.

A similar approach was adopted by the U.S. Court of Appeals for the Eighth Circuit. In *Nebraska Public Power Dist. v. MidAmerican Energy, supra*, a federal declaratory judgment action case, the Eighth Circuit stated that the ripeness inquiry required an examination of both the jurisdictional question of the "'fitness of the issues for judicial decision'" and of the prudential question concerning the "'hardship to the parties of withholding court consideration.'" 234 F.3d at 1038 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). The Eighth Circuit explained that

> [t]he "fitness for judicial decision" inquiry goes to a court's ability to visit an issue. . . . [I]t safeguards against judicial review of hypothetical or speculative disagreements. . . .
>
> In addition to being fit for judicial resolution, an issue must be such that delayed review will result in significant harm. "Harm" includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.

Nebraska Public Power Dist. v. MidAmerican Energy, 234 F.3d at 1038. We consider this two-part analytical approach to be appropriate when evaluating a ripeness challenge and employ it in the present cases.

With regard to the jurisdictional aspect of ripeness, we disagree with appellants' argument that posits that these cases were not ripe at the time Omaha filed its declaratory judgment actions due to the existence of the appeal in the annexation case and that as a result, these cases remained immutably unripe through their pendency. Appellants' contention ignores this court's prior decisions involving Omaha's annexation of the former city of Millard, wherein we filed opinions on the same day that, first, affirmed the district court's determination that the annexation was valid and, second, notwithstanding the pendency of the annexation appeal, considered and resolved issues involving whether contracts entered into by the annexed airport authority were affected by the annexation. See *City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970) (affirming district court's decision that Omaha's annexation of Millard was

valid), and *Airport Authority of City of Millard v. City of Omaha*, 185 Neb. 623, 177 N.W.2d 603 (1970) (determining airport authority's contracts were not impaired by Omaha's annexation of Millard).

[14] Appellants' argument presumes that ripeness is an unchanging characteristic of a lawsuit. However, just as a court can consider the issue of mootness during the pendency of litigation, see *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006) (determining issue on appeal challenging statute became moot when Legislature repealed statute after filing of litigation), a court can take into account all information available to it at the time a ripeness challenge is considered and decide whether an issue is ripe for determination, see 13A Charles Alan Wright et al., Federal Practice and Procedure § 3532.1 at 136-37 (2d ed. 1984) (stating that "[r]ipeness should be decided on the basis of all the information available to the court. Intervening events that occur after decision in lower courts should be included, just as must be done with questions of mootness"). The U.S. Supreme Court has said "since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974).

These cases were filed in district court on March 31, 2006. This court's decision in the annexation case was filed on January 12, 2007, and stated that Omaha's annexation of Elkhorn was effective March 24, 2005. Thus, although the appeal in the annexation case was resolved during the pendency of the present litigation, as a matter of law, Omaha annexed Elkhorn and succeeded to its contracts on March 24, 2005, which is prior to the filing of these cases in the district court. Taking into consideration all information available to us, as we must, we reject appellants' jurisdictional argument regarding ripeness.

With respect to the prudential aspect of ripeness, we believe there can be no reasonable dispute as to the "harm" that would result from a delayed review in the instant cases. As noted above, the annexation is complete and final. Dismissing these appeals at the present time would result in delay and the unnecessary expense of judicial resources. Compare *CenTra, Inc. v. Chandler*

Ins. Co., 248 Neb. 844, 854, 540 N.W.2d 318, 327 (1995) (discussing appellate court's attempt to avoid relitigating issues "at the costs of greater delay . . . and needless waste of judicial resources"). The issue in these cases is essentially legal in nature and may be resolved without further factual development. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). Omaha's challenge to and our consideration of the severance provisions are limited to a constitutional analysis. Continued uncertainty regarding the enforceability of the severance provisions is undesirable and unnecessary. After consideration of both the jurisdictional and prudential aspects of ripeness, we conclude the instant cases are ripe for judicial consideration.

Accordingly, appellants' assignment of error challenging jurisdiction is without merit.

2. The Severance Provisions Are Not an Unconstitutional Gratuity

For their substantive assignment of error, appellants contend that the district court erred in sustaining Omaha's motions for summary judgment based upon its conclusion that the severance provisions violated Neb. Const. art. III, § 19. Appellants' arguments are addressed solely to the constitutionality of the provisions under Neb. Const. art. III, § 19, and our analysis is similarly circumscribed. Appellants claim that the district court's determination that the severance provisions are invalid because they grant "extra compensation" after services have been rendered is contrary to existing Nebraska case law and ignores the evidence in these cases. We find merit to appellants' argument. Because the uncontroverted evidence demonstrates that the terms of the severance provisions were determined before services were rendered and are supported by adequate consideration, we conclude that the provisions do not violate Neb. Const. art. III, § 19, and are enforceable. We therefore reverse the district court's orders and remand the causes for further proceedings consistent with this opinion.

[15] Article III, § 19, provides in pertinent part that "[t]he Legislature shall never grant any extra compensation to any

public officer, agent, or servant after the services have been rendered . . . .” Article III, § 19, applies to the State and its political subdivisions. See *Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). We have said that when the “services” for which compensation is granted are rendered prior to the date on which the terms of compensation are determined, the “benefits awarded are not compensation but are a gratuity.” See *Wilson v. Marsh*, 162 Neb. 237, 252, 75 N.W.2d 723, 732 (1956). It follows that when the “services” for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity.

In the instant cases, Omaha argued and the district court agreed that the moneys to be paid to police and management appellants under the severance provisions constituted an improper gratuity because the moneys were payable only in the event of and after Elkhorn’s annexation. The district court determined that “annexation, rather than continued employment, is the key factor” that led to the payment of the severance benefits. This determination is contrary to the significance of the material facts and of the applicable law.

In *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998), we considered whether an amount that the Nebraska Equal Opportunity Commission (NEOC) had agreed to pay Lawrence R. Myers, an NEOC employee, to resign his position with the NEOC and to relinquish certain other rights constituted an unconstitutional gratuity in violation of Neb. Const. art. III, § 19. We framed the issue in that case as being whether Myers’ resignation and relinquishment of rights constituted adequate consideration to support a binding contract and a legal obligation to pay. In *Myers*, we stated that if the consideration was adequate, the NEOC was obligated to pay under the contract, and that the payment to Myers was not an unconstitutional gratuity.

[16] In resolving the issue posed in *Myers*, we characterized consideration as being “sufficient to support a contract if there is any detriment to the promisee or any benefit to the promisor.” 255 Neb. at 163, 582 N.W.2d at 367. We then reviewed the record and observed that the NEOC had entered into the

agreement with Myers "to prevent any impairment in its operation." *Id.* at 165, 582 N.W.2d at 368-69. We noted that Myers had relinquished his right to try to clear his name after certain allegations had been leveled against him and that the relinquishment of this right constituted a detriment to Myers and served as a benefit to the NEOC, which had a "'legitimate interest in avoiding disruption'" at the NEOC. *Id.* at 165, 582 N.W.2d at 369. We concluded that because the agreement provided a detriment to Myers and a benefit to the NEOC, the agreement was supported by adequate consideration, and that thus, the payment to Myers under the agreement was not an unconstitutional gratuity. *Id.*

Contrary to the district court's focus on the timing of the payment of the severance benefits in the instant cases, the focus under Neb. Const. art. III, § 19, is more appropriately on when the compensation is granted and whether there is consideration to support the compensation. If adequate consideration supports the severance provisions, then the payments are not gratuities and the severance provisions are enforceable. See *id.*

The records in the instant cases present evidence of a benefit to the promisor and a detriment to the promisee. The records contain affidavits setting forth, without dispute, that the severance provisions were entered into to enable Elkhorn to retain key employees who, when faced with the possibility of Elkhorn's annexation and the corresponding possibility of losing their jobs, might have sought other employment rather than remain in their positions. The record further reflects that the police and management appellants were only entitled to receive payments under the severance provisions if they agreed to continue their employment and they were still employed by Elkhorn at the time of Elkhorn's annexation and if their positions were effectively eliminated as a result of the annexation. Thus, Elkhorn and, subsequently, Omaha benefited from the appellants' decisions to remain in their positions and to carry out their employment responsibilities up to and until the time that their services were no longer needed, and the police and management appellants suffered the detriment of forgoing new employment opportunities until after their employment was terminated. The evidence further shows that the date it was determined to provide severance was

before services were rendered. This record demonstrates that the severance provisions were supported by adequate consideration and did not violate the provisions of Neb. Const. art. III, § 19. See *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

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. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008). The uncontroverted evidence demonstrates that the severance provisions were determined before service was rendered and were supported by adequate consideration. We conclude that the severance provisions did not violate Neb. Const. art. III, § 19, and are valid and enforceable. Omaha, as the moving party that sought to invalidate the agreements, was not entitled to judgment in its favor. The district court's ruling to the contrary was error.

VI. CONCLUSION

In these consolidated appeals, we conclude that the district court correctly exercised subject matter jurisdiction over these cases but that it erred in granting summary judgment in favor of Omaha. We conclude that the severance provisions did not violate Neb. Const. art. III, § 19, and are valid and enforceable. We reverse the district court's grant of summary judgment in favor of Omaha in each case, and we remand the causes for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARY A. STEFFENSMEIER AND PAT STEFFENSMEIER, WIFE AND HUSBAND, APPELLANTS, V. LE MARS MUTUAL INSURANCE COMPANY, APPELLEE.

752 N.W.2d 155

Filed July 11, 2008. No. S-07-429.

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: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Insurance: Contracts: Intent: Appeal and Error.** In appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
5. **Insurance: Claims: Notice.** Failure to give timely notice is not a defense to an insurance claim unless there is evidence of collusion or it is shown that the insurer has been prejudiced in its handling of the claim.
6. **Insurance: Notice: Proof.** Prejudice from an unreasonable and unexcused delay in giving notice of a claim is established by examining whether the insurer received notice in time to meaningfully protect its interests.

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

James D. Gotschall, of Strope & Gotschall, P.C., for appellants.

Timothy A. Clausen, of Klass Law Firm, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This matter has its origin in an automobile accident in Norfolk, Nebraska, that occurred on February 16, 2001. In this

case, Mary A. Steffensmeier and Pat Steffensmeier filed suit in the district court for Madison County to collect a claim pursuant to the underinsured motorist provisions of an automobile insurance policy issued to them by Le Mars Mutual Insurance Company (Le Mars). Le Mars denied coverage on the basis that the Steffensmeiers had failed to give Le Mars the required notice that the Steffensmeiers had filed an earlier suit against the other motorist. The earlier suit resulted in a judgment against the other motorist which exceeded the limits of the tort-feasor's policy, thereby implicating the underinsured provisions of the policy issued by Le Mars to the Steffensmeiers. In the present case, the district court granted Le Mars' motion for summary judgment and dismissed the Steffensmeiers' complaint. The Steffensmeiers appeal and claim that there were genuine issues of material fact regarding whether they gave reasonable notice of their earlier lawsuit and whether Le Mars was prejudiced by any failure on the part of the Steffensmeiers to give the required notice. We conclude that the pleadings and evidence disclose no genuine issue of material fact and that Le Mars was entitled to judgment as a matter of law. We affirm.

STATEMENT OF FACTS

Mary Steffensmeier was involved in an automobile accident in which her vehicle was struck by a vehicle driven by Dustin Graham on February 16, 2001. Graham had an automobile insurance policy with Allstate Insurance Company (Allstate) that had a liability limit of $50,000 per person. The Steffensmeiers had an automobile insurance policy with Le Mars that included underinsured motorist coverage of $100,000 per person. The Steffensmeiers notified Le Mars of the accident. After contacting an Allstate representative and being advised that Graham's policy limits were adequate to cover the Steffensmeiers' claim, a Le Mars claims representative determined that the Steffensmeiers would not have a claim for underinsured motorist coverage.

The Steffensmeiers filed a suit against Graham on September 9, 2004. The Steffensmeiers did not give Le Mars notice that they had filed suit against Graham. The Steffensmeiers' case against Graham went to trial. On February 21, 2006, the court entered judgment based on a jury verdict in favor of Mary

Steffensmeier in the amount of $175,000. Allstate subsequently paid the $50,000 limit of Graham's policy plus interest and court costs.

Because the $50,000 payment from Allstate fell short of the $175,000 judgment, on March 8, 2006, the Steffensmeiers made demand on Le Mars for the $100,000 limit of the underinsured motorist coverage in the Le Mars policy. On March 30, Le Mars denied the claim on the basis that contrary to the policy, the Steffensmeiers had failed to give Le Mars notice that they had filed the earlier suit against Graham. Le Mars relied on provisions of the policy that required the insured to give reasonable notice of the pendency of a suit and to promptly send Le Mars copies of legal papers if suit was brought.

The Steffensmeiers filed the present action against Le Mars seeking a judgment of $100,000 plus interest and costs. The Steffensmeiers admitted that they gave no written notice to Le Mars until after the verdict was rendered and judgment was entered, but they asserted that such failure "was in no way prejudicial" to Le Mars and was therefore not a valid reason to deny coverage. Le Mars answered and alleged as an affirmative defense that the Steffensmeiers had failed to provide reasonable notice of the suit as required under the policy and that Le Mars did not have a reasonable opportunity to protect its interests in the action against Graham. In their reply to Le Mars' answer, the Steffensmeiers asserted that they did not have a duty to notify Le Mars at the time they filed the suit against Graham because they did not know this earlier suit would result in a judgment in excess of Graham's $50,000 coverage limits until after the jury returned its verdict and that they promptly gave notice to Le Mars after the judgment was entered. In this regard, the evidence showed that the Steffensmeiers had made a settlement demand of $80,000 from Allstate prior to trial and that during trial, they asked the jury to award more than $50,000 in damages.

The district court sustained Le Mars' motion for summary judgment. The court noted that there was no dispute that the Steffensmeiers failed to provide notice that they had filed suit against Graham. The court cited *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 584 N.W.2d 805 (1998), and *Laravie v. Battle Creek Mut. Ins. Co.*, No. A-04-909, 2005 WL 2007200

(Neb. App. Aug. 23, 2005) (not designated for permanent publication), for the proposition that under policy language similar to that in the present case, an insurance company is deemed to have been prejudiced as a matter of law when a policy holder fails to notify the insurance company that the policy holder has filed a lawsuit. The court therefore concluded that Le Mars was entitled to judgment as a matter of law and dismissed the Steffensmeiers' action.

The Steffensmeiers appeal.

ASSIGNMENTS OF ERROR

The Steffensmeiers generally assert that the district court erred in sustaining Le Mars' motion for summary judgment. They specifically argue that there were genuine issues of material fact as to whether their duty to provide notice to Le Mars was triggered before the verdict was returned in their suit against Graham, whether Le Mars was actually prejudiced by their failure to give notice, and whether Le Mars had actual notice of the Steffensmeiers' claim against Graham.

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. See *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (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.*

[3] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Alsobrook v. Jim Earp Chrysler-Plymouth*, 274 Neb. 374, 740 N.W.2d 785 (2007).

ANALYSIS

The Steffensmeiers generally assert that summary judgment was not proper in this case because there were genuine issues

of material fact and Le Mars was not entitled to judgment as a matter of law. There appears to be no dispute of fact that the Steffensmeiers filed suit against Graham on September 9, 2004, that the Steffensmeiers' case against Graham went to trial, that the court in the Steffensmeiers' case against Graham entered judgment in Mary Steffensmeier's favor in the amount of $175,000 on February 21, 2006, and that the Steffensmeiers did not give Le Mars notice of the suit against Graham until March 8, when they made demand on Le Mars for underinsured motorist coverage. Instead, the Steffensmeiers argue that there were genuine issues of material fact regarding (1) whether they gave reasonable notice to Le Mars that they had filed suit against Graham and (2) whether Le Mars was prejudiced by any failure to give reasonable notice.

We must therefore review the pleadings and evidence regarding reasonable notice and prejudice. Based on such review, we conclude that the Steffensmeiers failed to give the notice required under the policy, that Le Mars was prejudiced by such failure, that there were no genuine issues of material fact related to such issues, that Le Mars was entitled to judgment as a matter of law, and that the district court did not err in granting summary judgment in favor of Le Mars.

The Steffensmeiers Failed to Give Notice of Their Suit Against Graham as Required Under the Policy Issued by Le Mars.

The Steffensmeiers assert that there were genuine issues of material fact regarding whether they gave Le Mars reasonable notice of their suit against Graham. In denying the Steffensmeiers' claim for underinsured motorist coverage, Le Mars relied on a provision of the policy that stated:

> No judgment for damages arising out of a suit brought against the owner or operator of an "uninsured motor vehicle" or "underinsured motor vehicle" is binding on us unless we:
>
> 1. Received reasonable notice of the pendency of the suit resulting in the judgment; and
>
> 2. Had a reasonable opportunity to protect our interests in the suit.

Le Mars further relied on a provision that stated that "[a] person seeking Underinsured Motorists Coverage must also promptly . . . [s]end us copies of the legal papers if suit is brought."

The Steffensmeiers argue that the policy required them to give only "reasonable notice" of the lawsuit and that the notice they gave was reasonable. They assert that they did not need to give notice to Le Mars until after they knew they had a claim for underinsured motorist coverage and that they did not know they had such claim until they knew the amount of their judgment against Graham exceeded the limits of Graham's insurance policy. They argue that they gave notice to Le Mars promptly after they learned the judgment of $175,000 exceeded the $50,000 limit of Graham's policy.

[4] We look to the language of the policy to determine what notice was required under the policy. In appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. *Alsobrook v. Jim Earp Chrysler-Plymouth*, 274 Neb. 374, 740 N.W.2d 785 (2007). Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Id*. The policy required the Steffensmeiers to give "reasonable notice of the pendency of the suit" and to promptly send copies of legal papers if suit were brought.

The Steffensmeiers argue that there is an issue of fact as to whether the notice they gave was "reasonable." They claim that reasonable persons would not have given notice of a claim for underinsured motorist coverage until after they knew with certainty that they had such a claim. To the contrary, with respect to the underinsured feature of the policy, the policy requires reasonable notice not of a claim for underinsured motorist coverage but of "notice of the pendency of the suit resulting in the judgment." The policy defines what notice is reasonable where it provides that Le Mars must be given "a reasonable opportunity to protect [its] interests in the suit" and where it further provides that the insured must "promptly" send Le Mars "copies of the legal papers if suit is brought." The notice provisions of the policy taken together therefore indicate that the required reasonable notice is prompt notice of the pendency of the suit, if suit is

brought, prior to judgment and notice that gives the insurer the opportunity to protect its interests in the suit.

Because the policy required the Steffensmeiers to promptly send legal papers if suit is brought prior to judgment rather than notice that the Steffensmeiers had a matured underinsured motorist claim, we reject the Steffensmeiers' argument that they did not need to give notice until after they knew that their judgment against Graham exceeded the limits of Graham's policy. See, also, *Matter of Preferred Mut. Ins. Co.*, 199 A.D.2d 719, 605 N.Y.S.2d 450 (1993) (rejecting argument that notice requirement was not triggered until insured became aware that other driver's liability coverage was to be exhausted).

Although the parties on appeal rely primarily on policy language, for completeness we refer to the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004), and observe that the notice provisions at issue in this case appear to be within the parameters of the act. In this respect, we note that § 44-6413(1)(a) provides in part that the "uninsured and underinsured motorist coverages provided" in the act "shall not apply to [damages] with respect to which the insured or his or her representative makes, without the written consent of the insurer, any settlement with or obtains any judgment against any person who may be legally liable for any injuries." Because the act effectively allows an insurer to require its written consent before the insured obtains any judgment against another motorist, it appears that a policy which requires notice of the pendency of a suit would be consistent with the act and that underinsured coverage does not apply in the absence of the written consent of the insurer.

In the present case, because Le Mars did not learn of the suit until after a judgment had been obtained, it is clear that the notice given by the Steffensmeiers was not "prompt" notice they had filed suit and that such notice did not give Le Mars the opportunity to protect its interests in the suit. The Steffensmeiers did not give notice that was reasonable under the policy, and we reject the Steffensmeiers' argument that there was a genuine issue of material fact regarding whether they gave reasonable notice of the suit against Graham.

Le Mars Was Prejudiced by the Steffensmeiers' Failure to Give Reasonable Notice Because Le Mars Was Denied the Opportunity to Protect Its Interests in the Suit Against Graham.

[5] The Steffensmeiers further argue that even if they failed to give the required notice, there remains a genuine issue of material fact as to whether Le Mars was prejudiced by such failure. The policy provides that "[n]o judgment for damages arising out of a suit brought against . . . an . . . 'underinsured motor vehicle' is binding on [Le Mars] unless [Le Mars h]ad a reasonable opportunity to protect [its] interests in the suit." With respect to notice, we have held that "[f]ailure to give timely notice is not a defense to an insurance claim unless there is evidence of collusion or it is shown that the insurer has been prejudiced in its handling of the claim." *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 386, 584 N.W.2d 805, 809 (1998). Given the foregoing, Le Mars would not be entitled to summary judgment in the present case unless Le Mars was prejudiced by the Steffensmeiers' failure to give the notice required under the policy.

[6] In the context of a liability insurance claim, we have said that prejudice from an unreasonable and unexcused delay in giving notice of a claim "is established by examining whether the insurer received notice in time to meaningfully protect its interests." *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 828, 716 N.W.2d 87, 102 (2006). In *Deprez, supra*, which was an uninsured motorist case, we concluded that "the inability of [the insurer] to intervene was prejudicial as a matter of law." 255 Neb. at 387, 584 N.W.2d at 809.

We similarly conclude in the present case that Le Mars was prejudiced as a matter of law because it was not given notice of the suit against Graham in time for it to intervene in the suit and did not have a reasonable opportunity to protect its interests. We have held that an insurer providing uninsured motorist coverage "may intervene in an action between its insured and the uninsured tort-feasor in order to protect itself on the issues of liability and damages arising under the uninsured motorist's provisions of its insurance policy." *Heisner v. Jones*, 184 Neb. 602, 611, 169 N.W.2d 606, 611-12 (1969). See, also, *Eich v.*

State Farm Mut. Automobile Ins. Co., 208 Neb. 714, 305 N.W.2d 621 (1981) (interest of insurer on damages issue may properly be protected by insurer's intervention in action against tort-feasor), *overruled on other grounds, Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), and *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985). The reasoning in *Heisner* applies equally to an underinsured circumstance.

We have recognized that intervention by an insurer in a suit between its insured and the tort-feasor who is arguably insufficiently covered places the insurer in "an inconvenient position," *Heisner*, 184 Neb. at 611, 169 N.W.2d at 612. Nevertheless, under the policy and our jurisprudence, Le Mars, upon reasonable notice, could have intervened in the action between the Steffensmeiers and Graham in order to protect itself on the issues of liability and damages relative to the underinsured motorist provisions of the insurance policy Le Mars issued to the Steffensmeiers. However, because the Steffensmeiers failed to give Le Mars reasonable notice of the suit as required under the policy, Le Mars did not learn of the suit until after a judgment had been entered which exceeded the tort-feasor's policy limits. Le Mars therefore did not have the opportunity to intervene in the Steffensmeiers' case against Graham in order to protect its interests and was prejudiced as a matter of law.

The Steffensmeiers argue that Le Mars had actual notice because the Steffensmeiers notified Le Mars of the accident shortly after it occurred. We reject this argument. The notice required by the policy relative to Le Mars' underinsured obligations was notice of the suit, not notice of the accident, and it has been held that notice of an accident does not give notice that a suit has been or will be filed. See *Beck v. Farmers Ins. Co. of WA.*, 113 Wash. App. 217, 53 P.3d 74 (2002) (knowledge of facts of accident did not give notice of suit and did not give insurer information necessary to determine how it might protect its interests in suit). In the present case, notice of the accident did not serve as "notice of the pendency of the suit resulting in the judgment" as required by the policy.

Because Le Mars was denied the opportunity to intervene to protect its interests in the suit against Graham, it was prejudiced

as a matter of law by the failure to give notice. There is no genuine issue of material fact with regard to prejudice to Le Mars in this matter.

CONCLUSION

We conclude that the pleadings and evidence in this case establish that the Steffensmeiers failed to give reasonable notice of the suit against Graham as required by the policy and that Le Mars was prejudiced by such failure. There was no genuine issue of material fact with respect to either matter. Le Mars was entitled to judgment as a matter of law. We therefore affirm the district court's order granting summary judgment in favor of Le Mars and dismissing the complaint.

AFFIRMED.

McCORMACK, J., participating on briefs.

ELIZABETH A. NOTHNAGEL, APPELLEE, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, AND DEPARTMENT OF MOTOR VEHICLES, APPELLANTS.

752 N.W.2d 149

Filed July 11, 2008. No. S-07-551.

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. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** The arresting officer's sworn report triggers the administrative license revocation process by establishing a prima facie basis for revocation.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** In an administrative license revocation proceeding, the sworn report of the arresting officer must indicate (1) that the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) and the reasons for the arrest, (2) that the person was requested

to submit to the required test, and (3) that the person refused to submit to the required test.

5. **Administrative Law: Appeal and Error.** When a petition for review of an administrative decision is presented to the district court, review shall be conducted by the court without a jury de novo on the record of the agency.
6. ____: ____. In a review for sufficiency of the evidence, an appellate court does not make its own factual findings, but in a true de novo review, the court uses assignments of error as a guide to the factual issues in dispute, but makes independent factual determinations based on the record.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Andee G. Penn for appellants.

G. Peter Burger, of Burger & Bennett, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

The director of the Department of Motor Vehicles (Director) appeals from a decision of the Red Willow County District Court. The court reversed the decision of the Director to revoke the driver's license of Elizabeth A. Nothnagel for 1 year pursuant to Neb. Rev. Stat. § 60-498.02 (Reissue 2004).

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. *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court

reaches a conclusion independent of that reached by the lower court. *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

FACTS

Nothnagel was stopped by Trooper Theodore Gans, an officer of the Nebraska State Patrol, in Red Willow County after Gans received several reports of a car being driven erratically. Gans observed the vehicle as it struck a curb. When the vehicle was stopped, the right front tire was off the rim and the right rear tire was flat.

Upon making contact with Nothnagel, Gans noted an odor of alcoholic beverage coming from the vehicle and from Nothnagel's breath. In addition, her speech was slurred and her eyes were red and bloodshot. Gans asked Nothnagel to exit her vehicle to perform a field sobriety test. When Gans asked Nothnagel to follow him to the rear of her vehicle, she fell to the pavement, striking her face.

Gans then asked Nothnagel to submit to a preliminary breath test, but she verbally refused. Gans placed Nothnagel under arrest and transported her to a local hospital for examination as to her well-being and to perform a chemical test. At the hospital, Nothnagel refused to submit to a chemical test.

Gans read a verbal notice of revocation to Nothnagel, completed a "Notice/Sworn Report/Temporary License," and signed it in the presence of a notary. At a hearing held pursuant to the administrative license revocation (ALR) procedures, the sworn report was received into evidence over Nothnagel's objection. She moved to dismiss the proceeding on the ground that there was no evidence that she was requested by an officer to submit to a chemical test. She argued that the officer merely testified that he transported her to the hospital for the purpose of giving a test. She also argued there was no competent evidence that she was advised of the consequences of refusing a chemical test.

The hearing officer noted that admission of the arresting officer's sworn report is prima facie evidence for the Director's order of revocation. The hearing officer concluded that Nothnagel had not met her burden of proof to show there was (1) no evidence that the arresting officer requested a formal chemical test and

(2) no evidence that the officer advised her of the consequences of refusing to submit to the test. The hearing officer stated that absent proof to the contrary, the statements in the sworn report were considered definitive.

The hearing officer recommended the Director find that the arresting officer had probable cause to believe Nothnagel was operating a motor vehicle while under the influence and while having a blood alcohol content in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The hearing officer proposed that Nothnagel's license be revoked for the statutory period. The Director adopted the hearing officer's recommendations and ordered revocation of Nothnagel's driver's license for 1 year.

Upon a petition for review filed by Nothnagel, the Red Willow County District Court entered an order finding that the evidence did not support the hearing officer's determination that Nothnagel "refused to allow the blood draw" and that there was no evidence to establish that Nothnagel refused to submit to a chemical test of her blood, breath, or urine upon the direction of a peace officer. The court noted that at the ALR hearing, the arresting officer testified that he transported Nothnagel to the hospital for examination and to perform a chemical test. When asked if Nothnagel had submitted to a chemical test, the officer responded, "No, she did not."

The district court also found the record devoid of evidence that any chemical test was performed. The court implied the hearing officer was incorrect in determining that Nothnagel had a blood alcohol content in violation of the statute, when no chemical test was performed. Before the court, the Director acknowledged that the hearing officer "misstated her order." The court noted that the Director assigned the misstatement to a "'cut-and-paste error'" and asked the court to find that the hearing officer's findings and recommendations were a "'scrivener['s] error.'" The court concluded that the order of revocation was based upon findings and conclusions not supported by the evidence or the law and that the revocation order should be reversed. It dismissed the revocation proceedings.

The Director reinstated Nothnagel's operating privileges and filed a notice of appeal.

ASSIGNMENTS OF ERROR

On appeal, the Director assigns two errors: The district court erred (1) in finding that the record of the ALR hearing contained no evidence that Nothnagel refused to submit to a chemical test as requested and (2) in failing to make independent findings of fact following a de novo review of the record of the ALR hearing and to determine whether revocation of Nothnagel's driver's license pursuant to Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) was supported by the court's independent findings.

ANALYSIS

The Director first argues that the district court erred in failing to find evidence that Nothnagel refused to submit to a chemical test when requested to do so by the arresting officer. The issue, therefore, is whether there was sufficient evidence that Nothnagel refused to submit to a chemical test.

[3,4] The arresting officer's sworn report triggers the ALR process by establishing a prima facie basis for revocation. *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007). In an ALR proceeding, the sworn report of the arresting officer must indicate (1) that the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) and the reasons for the arrest, (2) that the person was requested to submit to the required test, and (3) that the person refused to submit to the required test. § 60-498.01(2). See, also, *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

The sworn report here indicates that Nothnagel was arrested pursuant to § 60-6,197 after a report of reckless driving. The officer found the vehicle "driving on rims" and observed it strike a curb. Nothnagel could not perform field sobriety tests and "fell on her face." The officer detected alcohol on Nothnagel's breath and found an open container. The officer also noted that Nothnagel refused a preliminary breath test. He checked the box on the sworn report indicating that Nothnagel refused to submit to a chemical test, and she was read the verbal notice of revocation.

The sworn report was received into evidence at the ALR hearing. It satisfies the requirements of § 60-498.01 and provides a

prima facie basis for revocation. The district court erred when it concluded there was no evidence that Nothnagel refused to submit to a chemical test. The sworn report is prima facie evidence that Nothnagel refused to submit to a chemical test.

The Director claims that the district court also erred in failing to make independent findings of fact following a de novo review of the record of the ALR hearing and failing to determine whether revocation of Nothnagel's driver's license pursuant to § 60-498.01(2) was supported by the court's independent findings.

For some reason, the hearing officer's recommendations did not address the issue whether Nothnagel refused to submit to a chemical test. The Director adopted the erroneous finding by the hearing officer that Nothnagel was operating a vehicle while having an alcohol concentration in violation of § 60-6,196(1). The record supports a finding that Nothnagel refused a chemical test, but obviously, it does not support a finding that Nothnagel was driving while over the legal limit, in violation of § 60-6,196(1). In the district court, the Director claimed the error by the hearing officer was a result of cutting and pasting the document.

[5,6] When a petition for review of an administrative decision is presented to the district court, review shall be conducted by the court without a jury de novo on the record of the agency. See Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006). See, also, *Betterman v. Department of Motor Vehicles, supra*. "In a review for sufficiency of the evidence, an appellate court does not make its own factual findings, but in a true 'de novo' review, the court uses assignments of error as a guide to the factual issues in dispute, but makes independent factual determinations based on the record." *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 408, 693 N.W.2d 539, 546 (2005).

The district court reviewed the bill of exceptions from the administrative hearing and the transcript of the ALR proceedings. It concluded the evidence did not support a finding that Nothnagel refused to submit to a test. The court recognized the Director's claim that the hearing officer misstated the recommendation and that the error was caused by cutting and pasting. It found that the order of revocation was based on findings and

conclusions not supported by evidence, and it reversed the order of revocation.

In appellate review of the district court's order, we do not focus on the findings of the hearing officer. Instead, we review the order of the district court for errors appearing on the record. We consider whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007). Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

We infer from the district court's order that it refused to accept the Director's assertion that the hearing officer's recommendation was a typographical error made by cutting and pasting from other documents. In conducting its de novo review, the district court should have made independent findings of fact without relying on the recommendations of the hearing officer. The court's review of the evidence should have included the sworn report, which was received into evidence and which satisfied the requirements of § 60-498.01.

On a question of law, we must reach a conclusion independent of the lower court's decision. The sworn report of the officer established a prima facie case for license revocation because it contained the statutorily required recitations. See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). The sworn report indicated that Nothnagel was arrested and the reasons for the arrest. It indicated that Nothnagel refused to submit to a chemical test. The report was signed and sworn in front of a notary.

Upon the showing of a prima facie case for license revocation, the Director is not required to prove the recitations in the sworn report are true. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). Instead, the burden is passed to the motorist to prove that one or more of the recitations in the sworn report are false. *Id.* Nothnagel did not present evidence to rebut the sworn report, nor did she prove that the recitations in the sworn report were false. Thus, the only conclusion that can be reached after a

de novo review of the record before the agency is that Nothnagel refused to submit to a chemical test and that her license should be revoked pursuant to § 60-498.01. It was error for the district court to find that the evidence did not support the order of revocation. The court's dismissal of the revocation proceeding must be reversed.

CONCLUSION

The judgment of the district court dismissing the revocation proceeding is reversed, and the cause is remanded to the district court with directions to reinstate the decision of the Director to revoke Nothnagel's driver's license for the period of time remaining on the revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

TODD THROWER, APPELLANT, V. JEREMY ANSON AND THE PROGRESSIVE CORPORATION, AN OHIO CORPORATION DOING BUSINESS AS PROGRESSIVE NORTHERN INSURANCE COMPANY, APPELLEES.

752 N.W.2d 555

Filed July 11, 2008. No. S-07-566.

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. **Contracts.** The construction of a contract is a question of law.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
6. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
7. **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.

8. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
9. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
10. ____: ____. Unless a contract is ambiguous, parol evidence cannot be used to vary its terms.
11. **Subrogation: Words and Phrases.** Subrogation involves the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities.
12. **Insurance: Subrogation.** An insurer's subrogation rights can be no greater than the rights of an insured against a third party.
13. **Insurance: Subrogation: Compromise and Settlement.** If a third party is judgment-proof, such that he or she has no assets that the insurance company can pursue under its right of subrogation, then the insurance company is not adversely affected by a settlement between the insured and the third party.
14. **Summary Judgment: Proof.** The party moving for summary judgment has the burden of showing no genuine issue of material fact exists.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Terry M. Anderson and Melany S. Chesterman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Rex A. Rezac and Todd C. Kinney, of Fraser Stryker, P.C., L.L.O., for appellee Jeremy Anson.

Thomas M. Locher and Michelle Epstein, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee Progressive Corporation, doing business as Progressive Northern Insurance Company.

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

MILLER-LERMAN, J.

NATURE OF CASE

This matter has its origins in an automobile accident that occurred on October 31, 2003. Todd Thrower, who had underinsured coverage with the Progressive Corporation (Progressive),

was injured and settled with Jeremy Anson, who had liability coverage with State Farm Insurance Company (State Farm), which agreed to pay policy limits in exchange for a complete release. After Thrower executed the release, Progressive denied Thrower's claim for underinsured motorist benefits.

Thrower filed suit in the district court for Sarpy County against Anson and Progressive. Upon cross-motions for summary judgment filed by all parties, the district court concluded that the release of Anson was valid and enforceable and that Progressive did not have to provide underinsured coverage. The district court sustained Anson's and Progressive's motions, denied Thrower's motion, and dismissed Thrower's complaint. Thrower appeals.

We conclude that the release is unambiguous, valid, and enforceable, and that as a result of the release, Thrower discharged Anson from liability relative to the accident. We further conclude that because Progressive failed to carry its burden of showing that Thrower's release of Anson "adversely affected" its subrogation right as required under Neb. Rev. Stat. § 44-6413(1)(a) (Reissue 2004), it was not entitled to summary judgment. We therefore affirm the district court's order in part, and in part reverse and remand the cause for further proceedings.

STATEMENT OF FACTS

On October 31, 2003, a vehicle driven by Thrower was struck from behind by a vehicle driven by Anson, and Thrower was injured. At the time of the accident, Anson had an automobile insurance policy with State Farm that had a liability limit of $25,000. Thrower had an automobile insurance policy with Progressive that included underinsured motorist coverage.

In June 2004, Thrower hired legal counsel to represent him in a claim against Anson for the damages he sustained as a result of the accident. On or about November 15, 2005, a State Farm representative offered to pay the policy limits of $25,000 in exchange for Thrower's release of claims against Anson. On November 16, Thrower's counsel provided Progressive with notice under Neb. Rev. Stat. § 44-6412(2) (Reissue 2004), advising Progressive of State Farm's settlement offer and notifying

Progressive that, in accordance with the statute, it "ha[d] thirty (30) days from the receipt of this correspondence within which to substitute its funds if it wishe[d] to preserve its subrogation claim." In the letter, Thrower advised Progressive of his intent to pursue an underinsured motorist claim under his insurance policy. The letter was not in conformity with the statute, in that it was not sent by certified mail and did not contain a signed authorization from Thrower allowing Progressive to obtain his medical records.

On November 17, 2005, 1 day after sending the notification letter to Progressive, Thrower's counsel obtained a release form from State Farm and forwarded it to Thrower and his wife for their signatures. Under the terms of the release, Thrower,

> [f]or the Sole Consideration of Twenty five thousand and 00/100 ($25,000.00) Dollars . . . release[d] and forever discharge[d] . . . Anson[,] his heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or, who might be claimed to be liable, none of whom admit any liability to [Thrower] but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 31st day of October . . . 2003.

Thrower and his wife executed the release on or about December 4, 2005, and their signatures were witnessed by Thrower's counsel. In a letter dated December 5, 2005, Thrower's counsel forwarded the signed release to State Farm, stating, "Enclosed please find the executed release signed by [Thrower and his wife]. I look forward to receiving the settlement check in the very near future." Thrower's counsel received the settlement check from State Farm on or about December 10.

On December 15, 2005, 2 days prior to the expiration of the § 44-6412 30-day period, Thrower's counsel received a letter from Progressive stating that Progressive intended to substitute its funds for the settlement offered by State Farm and to pursue its subrogation rights against Anson. A substitution check

in the amount of $25,000 was also delivered by Progressive on December 15. Shortly thereafter, Progressive learned that Thrower had executed and returned the release to State Farm prior to the expiration of Progressive's 30-day response period and that State Farm intended to rely upon the release. On January 6, 2006, Progressive notified Thrower that in view of the fact that Thrower had executed the release, Progressive was "unable to provide any Underinsured Motorist Coverage for you as a result of the [October 31, 2003] accident, since you eliminated and prejudiced Progressive[']s right of recovery."

Thrower filed suit in the district court against Anson and Progressive. In his amended complaint, Thrower alleged that Anson was liable to him in negligence for injuries Thrower had received as a result of the October 31, 2003, accident. As to Progressive, Thrower effectively alleged that as a result of the accident, Progressive was liable to him for underinsured motorist benefits. Anson's answer denied that he was liable to Thrower and effectively alleged that Thrower's claims were barred by the release. Progressive's answer denied Thrower's claims and alleged as part of its affirmative defense that Thrower's release "adversely affected and harmed Progressive's rights in that [Thrower] has destroyed Progressive's . . . right to subrogation and right of recovery against . . . Anson."

On November 15, 2006, Thrower filed a motion for partial summary judgment, seeking the dismissal "of any and all defenses of [Anson and Progressive] based on the [release]." On March 8, 2007, Progressive filed a cross-motion for summary judgment based upon its affirmative defense alleging that its subrogation rights had been destroyed and that it was not liable on the underinsured provisions of the policy. On March 9, Anson filed a motion seeking enforcement of the release and dismissal of Thrower's claims against him.

The motions came on for an evidentiary hearing on March 19, 2007. During the hearing, the district court ruled without objection that it would treat Anson's motion as a motion for summary judgment. On April 23, the district court filed an order in which it determined that the release was valid and enforceable and that as a result of the release, Thrower's claim against Anson should be dismissed. With regard to Thrower's claim for

underinsured motorist coverage under his Progressive policy, the district court agreed with Progressive that, as provided for in § 44-6413(1)(a), Thrower's execution of the release "adversely affected" Progressive's rights by extinguishing Progressive's right of subrogation and recovery against Anson and that as a result, Thrower was not entitled to underinsured motorist coverage under his Progressive policy. The district court denied Thrower's motion for partial summary judgment, granted Anson's and Progressive's motions for summary judgment, and dismissed Thrower's complaint.

Thrower appeals.

ASSIGNMENTS OF ERROR

Thrower claims that the district court erred in granting Anson's and Progressive's motions for summary judgment, because a genuine issue of material fact exists as to Thrower's claims against both Anson and Progressive. As to Anson, Thrower claims there is a fact question regarding the validity of the release. As to Progressive, Thrower claims there is a fact question as to whether Progressive was adversely affected by the release. Because Thrower did not appeal the district court's denial of his motion for partial summary judgment, we do not directly consider the propriety of that ruling.

STANDARDS 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. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (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.*

[3-5] The construction of a contract is a question of law. See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008). Statutory interpretation presents a question of law. *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d

653 (2008). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co., supra*.

ANALYSIS

The Release Is Valid and Enforceable.

Thrower contends that the district court erred in sustaining Anson's motion for summary judgment, because a genuine issue of material fact exists concerning the validity and enforceability of the release. In support of this assignment of error, Thrower admits that "a signed . . . release was sent to Anson's insurer, State Farm, on or about December 5, 2005 . . . pursuant to an . . . agreement reached between [Anson's] liability insurer and [Thrower's] attorney." Brief for appellant at 7. Nevertheless, Thrower argues that a genuine issue of material fact remains as to whether the release was subject to an oral condition that it was not effective unless and until Progressive elected not to substitute its funds for the settlement offered by State Farm. We conclude that this assignment of error is without merit.

[6-8] We have recognized that a settlement agreement is subject to the general principles of contract law. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). The construction of a contract is a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co., supra*. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. See, *Katherine R. Napleton Trust v. Vatterott Ed. Ctrs.*, 275 Neb. 182, 745 N.W.2d 325 (2008); *Gary's Implement v. Bridgeport Tractor Parts, supra*.

In exchange for $25,000, Thrower "release[d] and forever discharge[d] . . . Anson . . . from any and all claims" related to the October 31, 2003, automobile accident. This release language is unequivocal, and the release contains no written conditions restricting the effectiveness of the release on the happening of some other event.

Thrower argues that despite the unequivocal and unconditional language of the release, evidence offered at the summary judgment hearing indicated a genuine issue of material fact remained as to whether the parties had orally agreed the release was dependent upon Progressive's election not to substitute its own funds for the settlement offered by State Farm, and that therefore, the district court erred in dismissing his claim against Anson. We disagree.

[9,10] Thrower's contention that the parties had an oral agreement ignores the parol evidence rule, which renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. *Sack Bros. v. Tri-Valley Co-op.*, 260 Neb. 312, 616 N.W.2d 786 (2000). As stated above, the release is clear, unambiguous, and unconditional. Thrower's proposed oral condition would alter the terms of the release. Under the parol evidence rule, Thrower cannot rely upon evidence of a purported oral agreement to vary the written terms of the release, and therefore, Thrower's argument is without merit.

We conclude that in accordance with the unambiguous language of the release, Thrower settled with, released, and discharged Anson from all liability related to the accident in exchange for the receipt of $25,000. We conclude as a matter of law that the release is valid and enforceable. There is no genuine issue as to a material fact, and Anson was entitled to judgment as a matter of law. Therefore, we affirm that portion of the district court's order that sustained Anson's motion for summary judgment and dismissed Thrower's complaint against Anson.

A Genuine Issue of Material Fact Remains as to Whether Progressive Was Adversely Affected by the Release.

Having determined that the release is valid and enforceable, we now consider the implication of this settlement on Thrower's claim against Progressive for underinsured motorist benefits. Thrower contends that Progressive must supply underinsured coverage to him unless, as provided in § 44-6413(1)(a), it can show that it was adversely affected by the settlement and release. Thrower claims that the district court erred in sustaining Progressive's motion for summary judgment, because a genuine issue of material fact exists as to whether Progressive was adversely affected by Thrower's release of Anson. We conclude this assignment of error has merit.

This assignment of error implicates Progressive's policy and is governed by the provisions of Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. § 44-6401 et seq. (Reissue 2004). Pursuant to § 44-6413(1)(a), if an insured enters into a settlement with an underinsured driver with respect to bodily injury claims without having given his or her insurance carrier proper notice, the insurer may deny benefits if the settlement "adversely affect[ed] the rights of the insurer." Specifically, § 44-6413(1)(a) provides that an insured is not entitled to receive underinsured motorist coverage for "[b]odily injury [claims] with respect to which the insured . . . makes, without the written consent of the insurer, any settlement with . . . any person who may be legally liable for any injuries if such settlement adversely affects the rights of the insurer . . . ."

[11,12] In the instant case, Progressive argues that its right of subrogation against Anson was adversely affected by Thrower's release. Subrogation involves the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). An insurer's subrogation rights can be no greater than the rights of an insured against a third party. See *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005). See, also, *Querrey & Harrow v. Transcontinental Ins.*, 885 N.E.2d 1235, 1237 (Ind. 2008) (Sullivan, J., dissenting, stating that

"'"[o]ne who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce"'").

Section 44-6412(2) concerns uninsured and underinsured motorist coverage and expressly provides for the rights of the underinsured motorist insurer with respect to subrogation, stating, inter alia, that

> [i]f a tentative agreement to settle for liability limits has been reached with the owner or operator of an underinsured motor vehicle, written notice shall be given by certified or registered mail to the underinsured motorist coverage insurer by its insured. Such notice shall include written documentation of lost wages, medical bills, and written authorization to obtain reports from all employers and medical providers. Within thirty days of receipt of such notice, the underinsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The underinsured motorist coverage insurer shall then be subrogated to the insured's right of recovery to the extent of such payment and any settlement under the underinsured motorist coverage.

This statutory provision is consistent with the language of Thrower's insurance policy with Progressive. Under the policy, Progressive agreed to pay Thrower's personal injury damages caused by an accident with an underinsured driver, so long as Thrower would

> notify [Progressive] in writing at least thirty (30) days before entering into any settlement with the owner or operator of an underinsured auto, or any liability insurer. In order to preserve [its] right of subrogation, [Progressive] may elect to pay any sum offered in settlement by, or on behalf of, the owner or operator of an uninsured auto or underinsured auto. If [Progressive does] this, [Thrower] agree[d] to assign to [Progressive] all rights that [he had] against the owner or operator of an uninsured auto or underinsured auto.

Thus, both the statute and the insurance policy in this case contain a subrogation provision requiring notice to the insurer of

any settlement entered into by the insured with a tort-feasor. The purpose of the notice requirement in the statute and the policy is to prevent an insured from entering into a settlement that would extinguish the underinsured motorist carrier's right of subrogation. See *Bacon v. W. Am. Ins. Co.*, 115 Ohio App. 3d 433, 685 N.E.2d 781 (1996).

[13,14] We have previously considered whether an insured's settlement with a third party "adversely affected" the underinsured motorist carrier as that term is used in § 44-6413(1)(a). In *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995), we noted that if the third party was judgment-proof, such that he or she had no assets that the insurance company could pursue under its right of subrogation, then the insurance company was not adversely affected by a settlement between the insured and the third party. In *Horace Mann Cos.*, the insurance company moved for summary judgment, arguing that because the insured had not provided it with proper notice of the settlement, the insurance company had been adversely affected by its insured's settlement with the third party and therefore it was not obligated to provide its insured with underinsured motorist coverage. We noted that because the insurance company was the moving party, it "ha[d] the burden to show that no genuine issue of material fact exist[ed]," and we reviewed the evidence offered by the insurance company to determine whether the third party had assets or was judgment-proof. *Id.* at 649, 538 N.W.2d at 174. In *Horace Mann Cos.*, we determined that because the insurance company had adduced evidence of certain assets owned by the third party, it had carried its burden of demonstrating the third party was not judgment-proof, and that as a result, it demonstrated that it had been adversely affected by its insured's settlement with the third party.

In the instant case, Thrower notes that Progressive has not offered any evidence that Anson does or does not have assets. Thrower argues that such an evidentiary showing is required under the court's decision in *Horace Mann Cos*. We agree.

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. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

As the party moving for summary judgment seeking to be relieved of its underinsured obligations to Thrower, Progressive had the burden of showing that its subrogation rights were adversely affected by Thrower's release of Anson. See § 44-6413(1)(a). Because it failed to introduce evidence demonstrating that Anson possessed assets that it could have reached under its right to subrogation, Progressive failed to carry its burden of showing it was adversely affected by the settlement. Therefore, a genuine issue of material fact exists as to whether Progressive has been adversely affected by Thrower's release of Anson, and the district court erred in sustaining Progressive's motion for summary judgment. We reverse that portion of the district court's order that sustained Progressive's motion for summary judgment and dismissed Thrower's complaint against Progressive, and we remand the cause for further proceedings.

CONCLUSION

In this appeal following proceedings on cross-motions for summary judgment, we affirm that portion of the district court's order in which it found a valid release, sustained Anson's motion for summary judgment, and dismissed Thrower's complaint against Anson with prejudice. However, contrary to the district court's ruling, we further conclude that a genuine issue of material fact exists as to whether Progressive was adversely affected by Thrower's release of Anson, and therefore, the district court erred in sustaining Progressive's motion for summary judgment. We reverse that portion of the district court's order that sustained Progressive's motion for summary judgment and dismissed Thrower's complaint against Progressive, and we remand the cause for further proceedings.

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

IN RE CHANGE OF NAME OF SLINGSBY.
HUNTER WADE SLINGSBY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, JESSIE M. WATTS, APPELLANT, V. DEVIN W. OXFORD, INTERVENOR-APPELLEE.

752 N.W.2d 564

Filed July 18, 2008. No. S-06-817.

1. **Minors: Names: Appeal and Error.** An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. Provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Minors: Names.** The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child.
3. **Minors: Names: Proof.** The party seeking the change in surname of a minor child has the burden of proving that the change in surname is in the child's best interests.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Marc J. Odgaard, Amy L. Parker, and Larry W. Beucke, of Parker, Grossart, Bahensky, Beucke & Odgaard, L.L.P., for appellant.

Jay A. Ferguson for intervenor-appellee.

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

MCCORMACK, J.

NATURE OF CASE

Jessie M. Watts, mother of Hunter Wade Slingsby, filed a petition seeking to change Slingsby's surname from Slingsby, Watts' maiden name, to her married name, Watts. Slingsby's biological father, Devin W. Oxford, intervened in the action and filed an objection to the name change. The district court found that Watts failed to meet her burden of proof and denied the requested name change. We affirm.

BACKGROUND

Slingsby was born out of wedlock on November 10, 2000, to Watts and Oxford. Oxford acknowledged paternity of Slingsby, but was not listed on Slingsby's birth certificate. Oxford testified that at the time of Slingsby's birth, he agreed that Slingsby's surname would be Slingsby. In September 2002, Watts, Oxford, and the State of Nebraska entered into a stipulation regarding paternity, custody, support, and daycare expenses. Watts was given custody of Slingsby subject to Oxford's right to reasonable visitation. Oxford was ordered to pay child support, one-half of uninsured medical costs, and one-half of daycare expenses.

In July 2003, Watts and Slingsby moved from Kearney, Nebraska, to Omaha, Nebraska. In July 2004, Watts got married. At that time, her new spouse was attending pharmacy school at the University of Nebraska Medical Center in Omaha. Watts testified that she and her new spouse planned to move back to Kearney in June 2006.

In October 2005, Watts filed a petition seeking to change Slingsby's surname from Slingsby to Watts. Oxford filed an objection to the name change. Trial on the matter was held in March and May 2006.

With regard to the name change, Watts testified she wanted to change Slingsby's surname to Watts because she and her new spouse were planning on having children and she did not want Slingsby to feel as though he was not part of the family. She also wants Slingsby to be closer to her new husband. Watts further testified that she did not want Slingsby to suffer embarrassment at school because his current surname is not the same as either of his biological parents' surnames. In addition, Watts testified that Slingsby had begun to tell his preschool teachers that his name was Watts and had been using the name Watts at school.

Oxford testified that he is concerned that Watts and her family are trying to substitute Watts' new spouse for him as Slingsby's father. Oxford testified that Watts had asked that Oxford relinquish his rights to Slingsby for adoption purposes, which he refused to do. Oxford further testified that he was concerned about the name change because Slingsby is his son and he is trying to have a relationship with Slingsby. Oxford acknowledged,

however, that he may have visitation with Slingsby despite a name change.

Testimony was also received at trial from Dr. Thomas Haley, a clinical psychologist. Haley testified that 2 days prior to trial, he met with Watts for approximately 1 hour, but did not meet with Slingsby regarding this matter. Based upon information provided to him during his meeting with Watts and what he heard in court, Haley opined that in light of the pattern of Slingsby's life thus far and Slingsby's relationship with his parents, changing Slingsby's surname to Watts would be in Slingsby's best interests. With regard to Slingsby's relationship with Watts, Haley testified that not allowing the change in surname would likely introduce a pattern of alienation on Slingsby's part. On cross-examination, however, Haley testified that this alienation was a possibility and that he could not state whether a refusal on the court's part to change Slingsby's surname to Watts would have a positive or negative effect on Slingsby as he grows up. Haley further testified that in the 1½ years that Watts had been married to her new husband, Slingsby had suffered no ill effects from having the surname Slingsby, that Haley was aware of. With regard to Slingsby's relationship with Oxford, Haley testified that changing Slingsby's surname from Slingsby to Watts would be a "non-event." Haley also testified that changing Slingsby's surname to Watts would not necessarily result in Slingsby's more closely identifying Watts' new husband as his father rather than Oxford.

In June 2006, the district court entered an order denying Watts' petition to change Slingsby's surname. The court noted that the burden is to prove that the name change is in the child's best interests, not the parents', and determined that Watts had failed to meet that burden. The court noted that the factors to be considered in determining whether a change in name is in the child's best interests include whether there has been any misconduct by the parent toward the child. The court found that in this case, there is neither evidence of such misconduct nor evidence of Oxford's failure to maintain contact with Slingsby to any serious degree. The court also noted that Haley could not opine with reasonable certainty that changing Slingsby's surname would have any positive or negative effect. Watts now appeals.

ASSIGNMENTS OF ERROR

Watts asserts that the district court erred in failing to find that she met her burden of proof and in failing to grant her request to change Slingsby's surname from Slingsby to Watts.

STANDARD OF REVIEW

[1] An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. Provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[1]

ANALYSIS

[2,3] The sole issue in this appeal is whether the district court erred in denying the petition to change Slingsby's surname. The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child.[2] The party seeking the change in surname has the burden of proving that the change in surname is in the child's best interests.[3] We have noted that cases considering this question have granted a change of name only when the substantial welfare of the child requires the name to be changed.[4]

In *In re Change of Name of Andrews*,[5] we set forth a list of nonexclusive factors upon which the question of whether a change of a minor's surname is in the best interests of the child may depend. These factors are (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child;

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[1] See *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990).

[2] See *id.*

[3] See *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988).

[4] See *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977).

[5] *In re Change of Name of Andrews, supra* note 1.

(5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.[6]

In *In re Change of Name of Andrews* and other cases before this court and the Nebraska Court of Appeals, these factors have been applied in determining whether a name change is in a minor's best interests in situations where the minor's surname is the same as one of his or her parents'.[7] The present case, however, presents a situation factually distinct from prior cases. Here, Slingsby's surname is different from both his parents' surnames. This difference is of paramount importance in this case.

Watts testified at trial that she wanted to change Slingsby's surname because she was concerned about Slingsby's potential embarrassment at having a surname different from Watts' and Oxford's, because she desired Slingsby to feel closer to her new husband, because she wanted Slingsby to feel as though he was part of her and her husband's family, and because Slingsby had begun telling his teachers at preschool that his surname is Watts.

We have recognized that factors in allowing or denying a proposed name change include the difficulty, harassment, or embarrassment that a child may experience from bearing the present or proposed surname, and a child's identification as part of a family unit is a factor to be considered.[8]

The evidence presented at trial, however, does not support Watts' concerns. Aside from Watts' and Oxford's testimony,

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[6] See *id.*

[7] See, e.g., *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002); *In re Change of Name of Andrews, supra* note 1; *Minnig v. Nelson*, 9 Neb. App. 427, 613 N.W.2d 24 (2000).

[8] See, e.g., *In re Change of Name of Andrews, supra* note 1.

the only evidence presented at trial regarding Watts' concerns was the testimony of Haley. Haley testified, however, that he was unaware of any ill effects suffered by Slingsby by having a surname different from either of his parents'. As for Slingsby's identification with a family unit, there was no evidence presented that Slingsby would be more or less likely to identify himself with a family unit with or without a change in his surname. Another factor which we have identified as relevant to a court's determination regarding a change in name is the child's preference.[9] The only evidence presented at trial regarding Slingsby's preference was Watts' unsubstantiated testimony that Slingsby has been using the name Watts in preschool and telling his teachers that his surname is Watts. Watts' testimony does not, in and of itself, indicate Slingsby's preference. As for Watts' desire that Slingsby feel closer to her new husband, we do not believe that this is a relevant factor to be considered.

In her brief on appeal, Watts discusses each of the remaining factors set forth in *In re Change of Name of Andrews*.[10] She contends in her brief that each of those factors supports a finding that a change in surname is in Slingsby's best interests. We disagree. Upon our review of the record in this case, we conclude that the evidence presented at trial does not support a finding that it is in Slingsby's best interests to change his surname to Watts. We, therefore, conclude that the district court did not err by denying Watts' petition for a change in Slingsby's surname.

CONCLUSION

For the reasons discussed above, we affirm the decision of the district court.

AFFIRMED.

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[9] *Id.*

[10] *Id.*

GERRARD, J., dissenting.

I respectfully dissent. In my opinion, based on the evidence presented at trial, Watts has proved that it would be in the minor child's best interests to have his name changed from Slingsby to Watts.

I agree that the principles set forth in *In re Change of Name of Andrews*[1] govern our disposition of this appeal. And the majority correctly notes that this case involves the unique circumstance where the minor child's surname is different from both of his biological parents'. The majority explains that "[t]his difference is of paramount importance in this case." Yet, despite this difference, the majority concludes that Slingsby's name should remain unchanged—thus leaving Slingsby with a surname that is different from not only one, but both, of his natural parents'.

A child with a surname that is different from both parents' surnames is a significant factor that *must be* considered when determining whether a name change is appropriate. For example, in *R.W.B. v. T.W. ex rel. K.A.W.*,[2] the father of a minor child sought to have the minor child's surname changed from the natural mother's maiden name to the father's surname. At the time of trial, the mother had remarried, and as a result, the minor child's surname was neither the mother's nor the father's. The trial court denied the father's request. The Missouri Court of Appeals reversed that decision, noting that "in denying [the] Father's request to change [the child's] surname to that of [the] Father, the trial court has countenanced a situation in which [the child] now bears *neither* his mother's new surname nor the surname of his father."[3] The court further explained that it "fail[ed] to see how the best interest of this child is served by setting him apart from other children in the community who may carry either their father's or mother's surname."[4] I agree, as have several other courts to have considered comparable circumstances.[5] Indeed,

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[1] *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990).

[2] *R.W.B. v. T.W. ex rel. K.A.W.*, 23 S.W.3d 266 (Mo. App. 2000).

[3] *Id.* at 268.

[4] *Id.*

[5] See, e.g., *Ostermiller v. Spurr*, 968 P.2d 940 (Wyo. 1998); *Carter v. Reddell*, 75 Ark. App. 8, 52 S.W.3d 506 (2001); *Daniel v. Moats*, 718 So. 2d 949 (Fla. App. 1998); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *M.L.M. ex rel. Froggatte v. Millen*, 28 Kan. App. 2d 392, 15 P.3d 857 (2000); *Learn by Houck v. Haskell*, 194 A.D.2d 859, 598 N.Y.S.2d 595 (1993).

where the child bears neither the mother's new surname nor the biological father's surname, the child will likely be questioned in the future as to why he does not carry the last name of either his mother or his father.

Furthermore, nothing in the record before us indicates that the proposed name change would in any way be harmful to Slingsby. In essence, the only argument presented by Oxford as to why he opposes the requested name change is that he is worried his relationship with Slingsby will somehow be affected. Specifically, when asked what his concerns were, Oxford testified, "He's my son. I am the father, it's been proven." Oxford further testified, "I'd like my right of visitation" and "I'm trying to have a relationship with my son." Later, Oxford explained that he was worried that Watts was trying to substitute her new husband for Oxford as Slingsby's father.

However, the record does not support Oxford's contention that his relationship with Slingsby will somehow be affected if a name change were to occur. I first note that the appropriate consideration here is what is in *the minor child's best interests*—not Oxford's. But, while maintaining Slingsby's relationship with Oxford is in Slingsby's best interests, there is a complete lack of evidence to support Oxford's argument that a name change would harm this relationship. Rather, the evidence indicates that both Oxford's rights to visitation and his relationship with Slingsby would not be harmed. Obviously, a court's determination of Oxford's visitation rights would not be affected by the child's surname. And Dr. Thomas Haley testified that, as to the effect the change would have on Slingsby's relationship with Oxford, it would be "neutral" or a "non-event." Haley further testified that a name change would not "drive a wedge" between Slingsby and Oxford or "alienate" Slingsby from Oxford.

Watts testified that she is not seeking to change Slingsby's name in an attempt to distance Slingsby from Oxford and that it has nothing to do with Oxford's relationship with Slingsby. Watts agreed that Slingsby and Oxford should maintain a relationship with each other. Furthermore, Oxford and the minor child, Slingsby, have never shared the same surname, and there is no evidence in the record to indicate that this difference has had an adverse impact on their relationship to this point. Nor

is there evidence in the record to suggest that Oxford cannot maintain a positive relationship with his son without the benefit of the name Slingsby, a name that was never associated with Oxford in the first place. Accordingly, Oxford's concerns relating to the impact a name change would have on his relationship with Slingsby are not supported by the record.

Finally, the evidence indicates that changing Slingsby's name to Watts would help Slingsby identify as a part of a family unit, including potential siblings. In this regard, Watts testified that she and her husband are planning on having children, and Watts does not want Slingsby to feel that he is not part of the family because his surname is different from his siblings'. There is no question that sharing the same surname within a family unit provides security, stability, and a feeling of identity and limits the potential difficulties, confusion, and embarrassment that may arise relating to the paternity of the child.[6] On this note, Haley opined that if Slingsby's name is not changed, it is likely that "a pattern of alienation" might be introduced and "depression or anxiety or forms of acting-out behavior" may result in the future. Haley testified, to a reasonable degree of professional certainty, that he believed changing Slingsby's name to Watts was in Slingsby's best interests.

On the record before us, the evidence establishes that the requested name change is in Slingsby's best interests. Watts presented competent evidence relevant to the factors set forth in *In re Change of Name of Andrews*,[7] and Oxford presented no evidence to substantiate his claims to the contrary. I would reverse the judgment and remand the cause with directions to grant Watts' petition.

MILLER-LERMAN, J., joins in this dissent.

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[6] See, *In re M.C.F.*, 121 S.W.3d 891 (Tex. App. 2003); *Learn by Houck v. Haskell, supra* note 5; *Hamby v. Jacobson*, 769 P.2d 273 (Utah App. 1989).

[7] *In re Change of Name of Andrews, supra* note 1.

PENNFIELD OIL COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. W.L. WINSTROM, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF R.W. WINSTROM, APPELLEE, AND ANDREW L. WINSTROM, APPELLANT.

752 N.W.2d 588

Filed July 18, 2008. No. S-06-1268.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
2. ____. On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
4. ____: ____. When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon.
5. **Actions: Judicial Notice.** A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.
6. **Actions: Judicial Notice: Appeal and Error.** In interwoven and interdependent cases, an appellate court may examine its own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.
7. **Actions: Judicial Notice: Records: Appeal and Error.** An appellate court may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.
8. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.
9. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated in a later stage.
10. ____: ____. The law-of-the-case doctrine promotes judicial efficiency and protects parties' settled expectations by preventing parties from relitigating settled issues within a single action.
11. **Appeal and Error.** The law-of-the-case doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.
12. **Courts: Appeal and Error.** Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.
13. **Waiver: Appeal and Error.** A decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal, but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.
14. ____: ____. An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.

15. **Appeal and Error.** An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court.
16. **Presumptions: Appeal and Error.** A point incidentally raised, vaguely referred to, or given cursory treatment on appeal is insufficient to preserve an unassigned error.
17. **Waiver: Appeal and Error.** Issues that an appellant waives on appeal are not part of an appellate court's mandate on remand.
18. **Appeal and Error.** An appellate court will not consider an issue on appeal that the trial court has not decided.
19. **Courts: Justiciable Issues.** Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
20. **Courts.** The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.
21. **Actions.** Generally, a case is ripe when no further factual development is necessary to clarify a concrete legal dispute susceptible to specific judicial relief, as distinguished from an advisory opinion regarding contingent future events.
22. **Judgments: Appeal and Error.** The law disfavors piecemeal appeals because multiple appeals interfere with efficient judicial administration and impose on the parties costs and risks associated with protracted litigation.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., and Robert J. Routh, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

John R. Douglas, Brien M. Welch, Daniel J. Epstein, and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee W.L. Winstrom.

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

CONNOLLY, J.

I. SUMMARY

Over the past several years, W.L. Winstrom (Bill) and his son, Andrew Winstrom, have waged war over 8.49 shares of Pennfield Oil Company (Pennfield), a closely held corporation. Pennfield's board of directors consisted of Bill; Sydney Winstrom, Bill's wife and Andrew's mother; and Andrew. This is the second appeal concerning the disputed shares. The battle

centered on redemption agreements. Bill is Pennfield's chief executive officer and controlling shareholder. Andrew was Pennfield's president until October 2006. Control of Pennfield hinged upon the disposition of the remaining 8.49 shares in the estate of R.W. Winstrom, Bill's father. Bill inherited the shares and had controlled them as the estate's personal representative. Together with the shares he owns, Bill controlled the majority of shares in Pennfield. If Pennfield had redeemed the estate's 8.49 shares, Andrew would have been the majority shareholder.

In *Pennfield Oil Co. v. Winstrom* (*Pennfield I*),[1] Andrew and Pennfield appealed from the district court's order that the estate's shares were not subject to Pennfield's demand for redemption. We reversed. We determined that the shares were subject to a valid demand for redemption. We held, however, that the record failed to show Andrew and Pennfield were equitably entitled to specific performance ordering redemption of the shares. We concluded that the directors had not yet decided whether to waive Pennfield's right of redemption under the repurchase agreement.

This appeal presents a couple of issues: Did our mandate allow the district court on remand to reconsider issues raised by Andrew that the court had decided against him before the first appeal? Did Andrew and Pennfield waive several issues because they failed to raise them in the district court? We conclude that Pennfield's redemption of the estate's shares was not mandatory under our decision in *Pennfield I*. We further conclude that Andrew has waived his claims that Pennfield could not waive redemption by failing to raise them on appeal in *Pennfield I*. Because Andrew waived these issues in his first appeal, the district court correctly determined they were not part of our mandate. We affirm.

II. BACKGROUND

1. Division of Pennfield's Shares Between R.W.'s Estate, Bill, and Andrew

R.W. was one of Pennfield's founders; by 1951, he held all of its 70 outstanding shares. In 1960, R.W. gifted 20 shares each to

[1] *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

his sons, W.D. Winstrom (Dean) and Bill. That same year, the three shareholders and their wives signed an agreement regarding disposition of their stock (the 1960 agreement). The 1960 agreement stated that if a shareholder died or wished to dispose of his stock, Pennfield "shall" buy the stock at the book value, to be determined at a shareholders' meeting within 30 days of death or intent to dispose. Pennfield redeemed Dean's 20 shares in 1969. In 1987, R.W. gifted 5.27 shares to Bill, giving Bill a majority interest, or 25.27 shares out of the 50 outstanding shares. R.W. died later in 1987. In his will, R.W. devised all of his Pennfield shares to Bill. R.W. designated Bill as personal representative. Thus, although Bill, as personal representative, did not transfer the estate's shares to himself individually, he controlled all of Pennfield's shares.

In December 1987, Pennfield's board of directors elected to redeem the estate's shares. But the board elected to extend the time for redemption; the financial burden of redeeming them all at once created a financial hardship, and the estate also wished to defer estate tax liability. In June 1988, acting for the estate, himself, and Pennfield, Bill created a new "Restated Stock Repurchase Agreement" (the 1988 agreement). The 1988 agreement, like the 1960 agreement, provided that Pennfield "shall" redeem all the stock of a shareholder upon the shareholder's death or if the shareholder wanted to dispose of his or her shares. But unlike the 1960 agreement, the 1988 agreement did not require the shareholders to determine the shares' book value within 30 days. Instead, it required the parties to agree on a closing date for redeeming the shares within 15 months. When a shareholder died, it required Pennfield to defer redemption until the shareholder's estate had paid all deferred federal estate tax if the shareholder's personal representative requested deferral. In addition—and crucial to this appeal—the 1988 agreement allowed Pennfield to waive redemption of a shareholder's stock in specified circumstances. One circumstance was a shareholder's death when his or her shares had passed to a person who had signed onto the 1988 agreement and was employed by Pennfield. This provision clearly applied to the shares R.W. devised to Bill.

In 1988, Andrew was elected president. In January 1990, he signed on to the 1988 agreement. Later that month, the board redeemed 16.24 shares of the estate's shares and voted to sell 15.89 shares to Andrew, conditioned upon his acceptance of the 1988 agreement. Andrew also signed a separate "Stock Redemption Agreement" (the 1990 agreement). In the 1990 agreement, the parties confirmed and ratified all previous agreements as restated in the 1988 agreement. At this time, Bill held 25.27 shares, the estate held 8.49 shares, and Andrew held 15.89 shares. In 1992, Bill gifted 8.43 shares to Andrew, giving Andrew a total of 24.32 shares and Bill 16.84 shares. But because Bill controlled the estate's 8.49 shares as personal representative of R.W.'s estate, he still controlled the majority of Pennfield's shares.

2. Bill's Attempts to Transfer the Shares to Himself

In 1997, Bill attempted to transfer the estate's remaining 8.49 shares to himself. But after Andrew refused to sign the stock certificate, the board tabled the transfer. In December 2000, after the estate made its final estate tax payment, Bill again attempted to transfer the estate's shares to himself. But Andrew again refused to sign the stock certificate. In January 2001, Bill demanded a special meeting of the directors to vote on transferring the shares from the estate to Bill. Afterward, Andrew gave notice that Pennfield was redeeming the estate's remaining shares, effective May 2000. Andrew also directed the filing of this action against Bill before the scheduled special meeting. A week later, Pennfield filed an amended petition, adding Andrew as a defendant. In February, the district court issued a temporary injunction, enjoining Andrew and Bill from transferring the estate's shares.

3. District Court's 2004 Order

Following a bench trial in 2004, the district court ruled that the estate's shares were not subject to redemption. It reasoned that the 1960 agreement controlled at the time of R.W.'s death. Because the board did not hold a shareholders' meeting within the 30-day time limit for valuing the estate's shares, the court concluded that Pennfield had waived its right of redemption. It

further found that even if Pennfield had not waived this right, allowing it to redeem the estate's shares would be contrary to the parties' intent to give Bill majority ownership of Pennfield's shares. The court found this intent from the parties' 1960 agreement, R.W.'s gifts of shares to Bill over the years, and R.W.'s will, devising his remaining shares to Bill. It also found that Bill's agreements with Andrew showed that Bill did not intend for Andrew to be the majority shareholder. The court therefore concluded it would be inequitable to require Bill to surrender the estate's shares. In the light of these findings, the court denied "each and every other claim in W.L. and Andrew's counterclaim and cross-claims not specifically addressed herein."

4. This Court's Decision in *Pennfield I*

In *Pennfield I*, we reversed the district court's ruling that the estate's shares were not subject to redemption. We concluded that even if the board waived redemption under the 1960 agreement, the 1988 agreement controlled. We concluded that the 1988 agreement restated and clarified the earlier agreements and that the parties "were all bound by the 1988 agreement."[2] We further determined that (1) the 1988 agreement anticipated persons other than Bill owning Pennfield stock; (2) the 1988 agreement permitted the redemption of stock held by the estate; and (3) the 1988 agreement was enforceable despite R.W.'s will because R.W. and Bill had signed agreements specifically providing for the redemption of stock if a shareholder died. We also rejected the assignments of error in Bill's cross-appeal.

But, more important, we also determined that the record failed to show "Pennfield and Andrew [were] equitably entitled to a decree ordering the Estate to surrender the stock for redemption."[3] We stated that the 1988 agreement did not change the requirement in the 1960 agreement that the shareholders meet to determine the shares' book value before redeeming them. We further stated that the board of directors had not yet had the opportunity to consider whether the board should waive

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[2] *Id.* at 228, 720 N.W.2d at 896.

[3] *Id.* at 239, 720 N.W.2d at 903.

redemption under the waiver provision in the 1988 agreement. We concluded:

> Pennfield and Andrew are entitled to declaratory relief, establishing that Bill and the Estate are subject to a valid demand for redemption of the stock pursuant to the stock transfer restriction agreements. But the record does not affirmatively show that Pennfield took all the steps necessary to redeem the shares, and it appears that the district court's temporary injunction may have prevented Pennfield's shareholders and board of directors from exercising their duties with respect to the redemption agreements. Thus, we conclude on this record, it would be unjust to decree specific performance of the stock transfer redemption agreements.[4]

We remanded the cause for the district court to grant Pennfield and Andrew declaratory relief consistent with our opinion.

5. Proceedings Following Our Remand

On remand, Andrew and Pennfield moved for an order that (1) the 8.49 shares subject to redemption could not be voted at a shareholders' meeting and (2) Bill and Sydney were disqualified from voting on the redemption of the estate's shares because they were not disinterested directors. Bill countered. He moved for an order to dissolve the court's injunction and to require the shareholders and board of directors to meet. The district court overruled Andrew and Pennfield's motion and granted Bill's motion. So when the board met, Bill and Sydney voted to waive Pennfield's right to redeem the estate's shares. Thus, Bill maintained control over the majority of Pennfield's shares. They also voted to (1) transfer the disputed shares from the estate to Bill, (2) terminate Andrew's employment, and (3) disavow Pennfield's lawsuit against Bill.

After this meeting, Andrew moved for a temporary restraining order, injunction, case progression order, and trial date on unresolved issues. Andrew contended that the court had not resolved issues raised in Pennfield's original pleadings because they were "not mature for final adjudication" until the directors'

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[4] *Id.* at 239-40, 720 N.W.2d at 903.

2006 meeting. Those issues were that Bill and Sydney could not vote on Pennfield's waiver of the estate's shares because of their conflict of interest as directors and because Bill had breached his fiduciary duties to Pennfield. Andrew also alleged that this court had required further proceedings to determine whether Pennfield could waive redemption after the estate made its final payment of federal estate tax. He sought an order enjoining the enforcement of the directors' resolution until the court conducted further proceedings to determine whether Pennfield could waive redemption and whether Bill and Sydney were disqualified from voting.

The district court overruled Andrew's motion. It determined that this court was aware of the issues Andrew and Pennfield had raised in their earlier pleadings. The court interpreted our mandate as not requiring any further proceedings before dissolving its injunction and ordering shareholders' and directors' meetings. It further concluded that the record failed to show Bill would cause irreparable harm to Pennfield. It reasoned that the earlier injunctions had merely caused continuous disputes, which were best resolved by allowing the board to act.

III. ASSIGNMENTS OF ERROR

Andrew assigns, restated, that the district court erred in granting equitable relief to Bill when this court directed equitable relief for Pennfield and Andrew. He also assigns that the court erred in refusing to proceed to trial on previously unresolved claims: (1) whether the disputed 8.49 shares could be voted at the board meeting; (2) whether the board could waive Pennfield's right of redemption under any circumstances; (3) whether Bill and Sydney were interested directors and disqualified to vote on Pennfield's redemption of the shares; and (4) whether the redemption waiver was fair to Pennfield under the conflict of interest statutes for corporations.[5]

[5] See Neb. Rev. Stat. § 21-20,112 et seq. (Reissue 1997).

IV. STANDARD OF REVIEW

[1,2] The construction of a mandate issued by an appellate court presents a question of law.[6] On questions of law, we are obligated to reach a conclusion independent of the determination reached by the court below.[7]

V. ANALYSIS

1. Parties' Contentions

Andrew contends that Bill was not entitled to any equitable relief under our mandate in *Pennfield I*. He contends that the district court therefore failed to comply with our mandate in *Pennfield I*. He argues the district court ignored our mandate by failing to (1) grant equitable relief to Andrew and Pennfield and (2) complete the case on the "remaining issues" raised by Andrew's and Pennfield's pleadings.

Bill contends that both the pleadings and evidence in *Pennfield I* placed the issue of Bill and Sydney's alleged interested-director status before the district court. Bill also contends that the court decided those issues against Andrew. He argues that these issues were ripe for appeal in *Pennfield I* because declaratory judgments are binding on the parties in further adjudication. Bill further argues that Andrew is barred from raising issues now that he could have raised in *Pennfield I*. Bill contends that Andrew failed to assign the district court's determinations as error and did not ask for rehearing after this court issued its decision. Thus, Bill argues that Andrew is now barred from raising the issues he could have raised in *Pennfield I*.

[3] Simply put, the issue is whether this court's mandate permitted the district court to consider Andrew's "remaining issues" on remand. After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.[8] Andrew's "remaining issues" generally fall into three broad categories: claims that he (1) raised to the district court and raised to this court in *Pennfield I*,

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[6] See *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

[7] *Id.*

[8] See *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

(2) raised to the district court but failed to raise to this court in *Pennfield I*; and (3) failed to raise to the district court or this court in *Pennfield I*.

[4] In *Pennfield I*, we directed the district court to grant Pennfield and Andrew declaratory relief consistent with our opinion. When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate. This allows the lower court to determine the judgment to be entered or the action to be taken thereon.[9] Thus, we examine our opinion in *Pennfield I* to determine whether our mandate permitted the district court to consider the "remaining issues" raised by Andrew on remand.

2. Judicial Notice of the Parties' Pleadings and Briefs

This appeal requires us to determine whether we implicitly decided in *Pennfield I* some issues Andrew raises now. We must also decide whether Andrew and Pennfield's failure to raise any issues in *Pennfield I* waived those issues for further proceedings. To make these determinations, we must review our records of the previous appeals.

[5-7] A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.[10] In interwoven and interdependent cases, we may examine our own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.[11] We have further held that we may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.[12]

In this ongoing battle, this court has previously considered two appeals and two original actions arising out of this dispute. Besides *Pennfield I*, we have dismissed an interlocutory appeal

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[9] See *Pursley, supra* note 6.

[10] See, Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995); *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

[11] See *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000).

[12] *Id.*

from the parties' dispute over the retention of counsel to represent Pennfield.[13] We have also denied two original applications for a writ of mandamus.[14] Some of the parties' original pleadings in this action are contained in the transcripts of the related actions. So, we will judicially notice the parties' original pleadings in their related appeals and their appellate briefs filed in *Pennfield I*.

3. This Court Implicitly Decided Against Andrew on His Claims That Redemption Under the 1988 Agreement Was Mandatory and That Bill Was Estopped From Claiming Otherwise

Andrew contends that Pennfield's redemption of the estate's remaining shares was mandatory under the 1988 agreement and that this issue was not decided in *Pennfield I*. He argues that the 1988 agreement permitted Pennfield to only waive redemption during the federal tax deferral period. Andrew and Pennfield raised this argument to the district court and this court in *Pennfield I*. Andrew contends that our opinion indicates we agreed redemption was mandatory under the 1988 agreement. He concludes that this court's mandate required only that the shareholders determine the shares' book value on remand. We disagree.

We did not make the statements in *Pennfield I* that Andrew attributes to us. Instead, we pointed out facts that demonstrated the district court's error in relying solely on the 1960 agreement to determine that Pennfield had waived its right of redemption. As noted, we reasoned that the parties had modified the 1960 agreement by the 1988 agreement. We pointed out that Pennfield's deferred redemption of the estate's shares was only permitted under the 1988 agreement. We further stated that "it is plain from the 1988 agreement that it was intended to apply to the shares that were, at that time, held by R.W.'s estate" and that Pennfield's right to waive redemption had been extended by the 1988 agreement.[15] We did not state that Pennfield's right to waive

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[13] See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

[14] See *id.* (discussing parties' filing of original actions).

[15] *Pennfield I, supra* note 1, 272 Neb. at 229, 720 N.W.2d at 896.

redemption of the estate's shares was limited to the tax deferral period. More important, Andrew's argument that we recognized Pennfield's redemption of the shares was mandatory is inconsistent with our holding. In *Pennfield I*, we held that Andrew and Pennfield were not entitled to a decree of specific performance requiring Bill to transfer the estate's shares to Pennfield for redemption. Because we rejected Andrew and Pennfield's claim that they were entitled to this specific performance, redemption was not mandatory.

In their *Pennfield I* briefs, the main thrust of Andrew's and Pennfield's arguments was that Pennfield's redemption of the estate's remaining shares was mandatory under the 1988 agreement. While recognizing that the estate had made its final estate tax payment in 2000, we still denied specific performance. We concluded, in part: "[T]he record indicates that the redemption was not authorized by the board of directors, nor was the board of directors permitted to consider whether redemption should be waived pursuant to the waiver provision of the 1988 agreement."[16] Thus, we implicitly concluded that redemption of the estate's remaining shares was not mandatory under the 1988 agreement.

Bill created the 1988 agreement after Pennfield had elected to redeem the estate's shares over an extended period because of the financial hardship of redeeming them all at once. Despite this election, however, subsection 4(a) of the waiver provision applied to the shares R.W. had devised to Bill. The 1988 agreement did not preclude the board of directors from waiving Pennfield's right to redeem the estate's remaining shares.

[8] Moreover, even if we had incorrectly concluded in *Pennfield I* that redemption was not mandatory, Pennfield and Andrew did not move for a rehearing. Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly *or by necessary implication*.[17] So, our conclusion that Pennfield's redemption of the estate's remaining shares was not mandatory under the 1988 agreement was a final decision and the law

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[16] *Id.* at 239, 720 N.W.2d at 903.

[17] See *New Tek Mfg. v. Beehner*, 275 Neb. 951, 751 N.W.2d 135 (2008).

of the case. It was not an issue for the district court to decide on remand.

4. Issues That Andrew Raised to the District Court but Failed to Appeal Were Waived on Appeal and Not Part of Our Mandate on Remand

Andrew also contends that whether Bill and Sydney had a conflict of interest that precluded them from voting on Pennfield's right to waive redemption was not an issue before this court in *Pennfield I*. He argues that the district court had not yet decided the issues and that these issues were ripe for adjudication only on remand. For support, Andrew culls this sentence from *Pennfield I*: "Whether Pennfield can waive redemption under the 1988 agreement is not an issue in this appeal, given the record before us."[18] Andrew argues that this sentence shows our mandate required the district court to determine on remand whether waiver was permissible and, if so, whether Bill and Sydney could vote to waive redemption of the estate's shares.

We agree that the disqualification issues were not before us in *Pennfield I*. But we do not agree that the statement Andrew relies upon allowed him to relitigate issues that the district court decided against him in its 2004 order. The above statement merely reflects our recognition that the directors had not yet taken action on Pennfield's right to waive redemption at the time we decided *Pennfield I*. Initially, the directors had tabled Bill's 1997 attempt to transfer the stock to himself after Andrew refused to sign the stock certificate. Later, Andrew's filing of this action after Bill's second attempt to transfer the stock had prevented the directors from voting on the waiver of redemption. Consequently, the result of a directors' vote on the waiver was not certain when we decided *Pennfield I*. We first stated: "[T]he record reflects that while a waiver of Pennfield's right to redeem was prepared, none has been adopted."[19] Our second statement—"Whether Pennfield can waive redemption under the 1988 agreement is not an issue in this appeal, given the record before

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[18] *Pennfield I, supra* note 1, 272 Neb. at 229, 720 N.W.2d at 897.

[19] *Id.* at 229, 720 N.W.2d at 896-97.

us"[20]—was made in the context of rejecting Bill's argument regarding construction of the 1988 agreement. In other words, the issue we concluded was not before us in *Pennfield I* was that of Pennfield's legal rights under the 1988 agreement—not Bill and Sydney's right to vote on the disputed shares. We conclude that the statement does not support Andrew's argument that we remanded for the district court to reconsider whether Bill and Sydney had a conflict of interest. We could not have remanded the cause for this reason because Pennfield and Andrew did not raise these issues on appeal.

(a) Andrew and Pennfield Raised Bill's and Sydney's Alleged Disqualification to the District Court

The original pleadings show that before the district court issued its 2004 order, Pennfield and Andrew raised the specific issues that they now contend the district court never decided.

One of the claims in Pennfield's original and amended complaint was that Bill's attempt to transfer the shares to himself had violated his fiduciary duty to Pennfield. Pennfield sought a temporary and permanent injunction preventing Bill from taking any action regarding Pennfield's right to redeem the estate's shares.

Andrew made the same allegations in his original and amended counterclaim against Pennfield and in his crossclaim against Bill. Like Pennfield, he also sought a temporary and permanent injunction preventing Bill from taking any action regarding Pennfield's right to redeem the estate's shares. In addition, Andrew specifically alleged that Bill's acts constituted an unlawful preference of Bill's personal interests over Pennfield's best interests, that Bill and Sydney were not disinterested directors, and that Andrew was the only independent director who could act regarding Pennfield's rights in the 1988 agreement. Andrew joined Pennfield's requests for relief. In addition, he sought a declaration that Bill's actions were self-dealing and taken in bad faith.

As noted, in the district court's 2004 order, it concluded that Pennfield had waived its right to redeem R.W.'s shares under the

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[20] *Id.* at 229, 720 N.W.2d at 897.

1960 agreement. It reasoned that allowing Pennfield to redeem them would be inconsistent with R.W. and Bill's intent that Bill would remain the majority shareholder. The court denied Andrew's other claims regarding Bill and Sydney's conflicts of interest.

In *Pennfield I*, Andrew and Pennfield did not assign as error the district court's overruling of their claims that (1) Bill should be enjoined from taking any action regarding the estate's shares because he had breached his fiduciary duties to Pennfield or (2) Bill and Sydney had conflicts of interest that disqualified them from voting on the waiver.

Andrew and Pennfield's failure to assign as error the district court's adverse rulings on these issues was perhaps a tactical decision. As noted, in *Pennfield I*, they mainly argued that redemption of the estate's shares was mandatory. Raising on appeal Bill's and Sydney's alleged disqualification to vote on the redemption would have arguably been a concession that redemption was not mandatory. But, as discussed below, they are now bound by their failure to raise alternative arguments on issues that the district court decided against them.

(b) Andrew Has Waived Disqualification Issues Under the Law-of-the-Case Doctrine

[9-12] The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated in a later stage.[21] The doctrine promotes judicial efficiency and protects parties' settled expectations by preventing parties from relitigating settled issues within a single action.[22] The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.[23] Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.[24]

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[21] See *New Tek Mfg., supra* note 17.

[22] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[23] See *id.*

[24] See *VanHorn, supra* note 8.

[13] Under the mandate branch of the law-of-the-case doctrine, a well-recognized waiver rule has emerged:

> [A] decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision, for "[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."[25]

[14,15] An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.[26] But this condition was satisfied as Andrew clearly had incentive to raise the disqualification issues in *Pennfield I* after the district court ruled against him on these claims. Also, we have recognized that an exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court.[27] But Andrew did not allege any new facts to support his claims, and we need not decide whether to apply any exceptions here because Andrew did not raise any to the district court.

(c) Incidental Arguments on Appeal Are Insufficient to Raise a Claim That the Trial Court Erred

[16] We recognize that Andrew argued on appeal in *Pennfield I* that because of Bill's self-interest, the court erred in failing to put the burden on Bill to prove that waiver would not harm Pennfield. But this argument was firmly tethered to Andrew's assignment that the district court "[i]mposed the burden of proof on the wrong party." He did not argue or assign as error the

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[25] *County of Suffolk v. Stone & Webster Engineering*, 106 F.3d 1112, 1117 (2d Cir. 1997), quoting *Fogel v. Chestnutt*, 668 F.2d 100 (2d Cir. 1981). Accord, *Amado v. Microsoft Corp.*, 517 F.3d 1353 (Fed. Cir. 2008); *Nagle v. Alspach*, 8 F.3d 141 (3d Cir. 1993); *Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007); *U.S. v. Still*, 102 F.3d 118 (5th Cir. 1996); *U.S. v. Adesida*, 129 F.3d 846 (6th Cir. 1997); *Pope v. Ransdell*, 251 Kan. 112, 833 P.2d 965 (1992).

[26] See *U.S. v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002).

[27] See, *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

court's failure to (1) find that Bill and Sydney were disqualified from voting on the waiver or (2) declare Bill's actions were taken for purposes of self-dealing. Thus, we would not have addressed these issues. And the tangential nature of his burden-of-proof argument does not change our conclusion that he waived the disqualification issues by failing to raise them in his first appeal. A point incidentally raised, vaguely referred to, or given cursory treatment on appeal is insufficient to presume an unassigned error.[28]

[17] In sum, an appellant waives claims that were decided against it by the trial court if the appellant elects not to raise those issues on appeal. And the appellant cannot preserve those issues for further proceedings by indirect references to the claims. Because Andrew and Pennfield waived the disqualification issues, they were not part of our mandate on remand.

5. Andrew Failed to Raise to the District Court Alternative Theories of Estoppel Against Bill

[18] Andrew also contends that Bill is estopped from enforcing Pennfield's right to waive redemption because he breached the agreement by attempting to transfer shares to himself without first obtaining Pennfield's waiver. Andrew also claims that Bill's actions were inconsistent with waiver by failing to call a directors' meeting to waive redemption until 2001. These arguments are different from Andrew's claim in his original pleadings that Bill's statements to third parties that were inconsistent with waiver estopped him from preventing Pennfield's redemption of the shares. But they are not arguments based on new evidence. They seem to be different theories of estoppel that Andrew failed to raise to the district court in *Pennfield I*. In addition, he did not raise these arguments to the district court on remand. An appellate court will not consider an issue on appeal that the trial court has not decided.[29]

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[28] See, *McDonald v. Trihub*, 173 P.3d 416 (Alaska 2007); *McKissick v. Frye*, 255 Kan. 566, 876 P.2d 1371 (1994).

[29] See *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008).

6. All the Issues Raised by Andrew on Remand Were Justiciable in *Pennfield I*

We reject Andrew's claims that his "remaining issues" were not ripe for adjudication until after our remand in *Pennfield I*.

[19-21] Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[30] The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.[31] Generally, a case is ripe when no further factual development is necessary to clarify a concrete legal dispute susceptible to specific judicial relief, as distinguished from an advisory opinion regarding contingent future events.[32]

Andrew's claims that Bill had breached a fiduciary duty to Pennfield and that Bill and Sydney could not vote on Pennfield's waiver were based on undisputed facts—not contingent future events. In *Pennfield I*, we specifically stated that "Andrew's cross-claims, and Bill and his wife's petition in intervention, effectively raised the same issues, so the court had before it all the parties to *a legal dispute that was ripe for disposition*."[33] Andrew clearly raised these issues in his original pleadings. He specifically alleged that his claims were ripe for declaratory judgment, and obtained a judgment.[34] Similarly, Andrew's additional claims that Bill was not entitled to enforce the waiver

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[30] See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[31] See, *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985); *Texas v. United States*, 523 U.S. 296, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

[32] See, *Texas v. United States, supra* note 31; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937); *Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002).

[33] *Pennfield I, supra* note 1, 272 Neb. at 235, 720 N.W.2d 900-01 (emphasis supplied).

[34] Compare *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

provision could have been raised to the district court in the first proceeding.

[22] The law disfavors piecemeal appeals. Multiple appeals interfere with efficient judicial administration and impose on the parties costs and risks associated with protracted litigation.[35] We reject Andrew's arguments that his remaining issues were not "mature" for adjudication until after we had decided *Pennfield I*. Absent allegations of a material and substantial difference in the evidence, issues that the district court decided against Andrew that he failed to appeal, and justiciable issues that Andrew failed to raise to the district court in *Pennfield I*, were not open to consideration as part of our remand.[36]

7. The District Court Correctly Concluded That Our Mandate Did Not Reopen Waived Issues

Our mandate was not broad enough for the district court to permit Andrew to relitigate the issues he had waived on appeal. Although we recognized in *Pennfield I* that "Andrew filed an answer and cross-claims, generally alleging breaches of contract and fiduciary duties by Bill,"[37] we did not remand for a new trial, further proceedings, or reconsideration of these issues.[38]

We conclude that the district court correctly interpreted our mandate from *Pennfield I* when our instructions are read with the opinion. We instructed the court to grant Andrew and Pennfield declaratory relief "establishing that Bill and the Estate are subject to a valid demand for redemption of the [estate's] stock."[39] The term "subject to" in this context simply meant "liable to" a valid demand for redemption. Our opinion raised specific

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[35] See, e.g., *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

[36] See, generally, 18B Charles Alan Wright et al., Federal Practice and Procedure § 4478.6 (2d ed. 2002).

[37] *Pennfield I, supra* note 1, 272 Neb. at 225, 720 N.W.2d at 894.

[38] Compare, *McLeay v. Bergan Mercy Health Sys.*, 271 Neb. 602, 714 N.W.2d 7 (2006); *McKinstry v. County of Cass*, 241 Neb. 444, 488 N.W.2d 552 (1992).

[39] *Pennfield I, supra* note 1, 272 Neb. at 239, 720 N.W.2d at 903.

conditions that must be satisfied before a demand for redemption could be deemed valid:

> [T]he record does not affirmatively show that Pennfield took all the steps necessary to redeem the shares, and it appears that the district court's temporary injunction may have prevented Pennfield's shareholders and board of directors from exercising their duties with respect to the redemption agreements. Thus, we conclude on this record, it would be unjust to decree specific performance of the stock transfer redemption agreements.[40]

As set out in our opinion, those conditions or necessary steps included a shareholders' meeting to determine the book value of the estate's shares. They also included a requirement that the directors meet to "consider whether redemption should be waived pursuant to the waiver provision of the 1988 agreement."[41]

Our opinion required the district court to dissolve its injunction so that Pennfield would have an opportunity to take all the necessary steps for making a valid demand for redemption of the estate's shares. After the directors voted to waive redemption, of course, there could not be a valid demand for redemption. But there was no further action required by our mandate, and the district court's authority on remand was limited to these requirements. The court did not err in concluding that our mandate did not permit it to consider the additional issues raised by Andrew on remand.

VI. CONCLUSION

We conclude that we implicitly decided in *Pennfield I* that Pennfield's redemption of the shares in R.W.'s estate was not mandatory. Although we held that the shares were subject to Pennfield's valid demand for redemption, we also set out conditions for a valid demand. We remanded the cause to give the board of directors an opportunity to vote on whether to waive Pennfield's right to redeem the estate's shares and to give the shareholders an opportunity to determine the shares' book value. The district court did not err in concluding that our mandate

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[40] *Id.* at 239-40, 720 N.W.2d at 903.

[41] *Id.* at 239, 720 N.W.2d at 903.

required it to dissolve its prior injunction, which injunction had prevented the directors from voting, and to allow the waiver vote to take place.

We reject Andrew's contention that our mandate required the district court to consider Andrew's further claims for preventing the directors' vote on the waiver. We conclude that Andrew and Pennfield waived all claims decided in the district court's 2004 order that they failed to raise on appeal in *Pennfield I*. Because those issues were waived on appeal, they were not part of our mandate on remand to the district court.

AFFIRMED.

WRIGHT, J., not participating.

LYNN R. MCNEEL, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

753 N.W.2d 321

Filed July 18, 2008. No. S-07-155.

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 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. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
4. **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.
5. **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.
6. **Federal Acts: Railroads: Negligence: Proximate Cause: Proof.** To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.

7. **Federal Acts: Railroads: Trial: Juries: Negligence: Evidence: Proximate Cause.** In a case under the Federal Employers' Liability Act, a court cannot allow a jury to speculate concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence provides a basis for the reasonable inference that the employee's injury was caused by the employer's negligence.
8. **Courts: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. The first portion of the analysis establishes a standard of evidentiary reliability. The second inquiry, sometimes referred to as "fit," assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue by providing a valid scientific connection to the pertinent inquiry as a precondition to admissibility.
9. **Torts: Expert Witnesses: Proof.** Generally, scientific knowledge of the harmful level of exposure to a chemical plus knowledge that the plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case.
10. **Trial: Expert Witnesses.** Under the analysis in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), expert testimony lacks "fit" when a large analytical leap must be made between the facts and the opinion.
11. **Evidence: Intent: Words and Phrases.** Spoliation is the intentional destruction of evidence.
12. **Evidence: Intent.** The intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator. The inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct.
13. **Evidence: Jury Instructions.** In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.

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

Fredric A. Bremseth, of Bremseth Law Firm, P.C., and Terrance O. Waite and Keith A. Harvat, of Waite, McWha & Harvat, for appellant.

William M. Lamson, Jr., and Anastasia Wagner, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

STEPHAN, J.

Lynn R. McNeel brought this action under the Federal Employers' Liability Act (FELA),[1] alleging that he was injured when he inhaled fumes while employed as a conductor by Union Pacific Railroad Company (Union Pacific). The district court for Lincoln County granted Union Pacific's *Daubert*/*Schafersman*[2] motion to exclude McNeel's expert witnesses from testifying and subsequently entered summary judgment in favor of Union Pacific, from which McNeel appeals. We find no error and affirm.

BACKGROUND

On March 12, 2001, McNeel was working as a conductor on a freight train en route from North Platte, Nebraska, to Cheyenne, Wyoming. He was seated on the left side of the locomotive cab, and engineer LaVerne Golden was seated on the right side. McNeel noticed nothing unusual as the train left North Platte and proceeded through Hershey and Sutherland, Nebraska. As they passed another train approximately 23 miles outside of Ogallala, Nebraska, McNeel noticed what he characterized as "the smell of sticking brakes" which persisted for a few seconds. McNeel opened the side window of the locomotive unit to check both his train and the passing train for smoke, but saw none. There was never any smoke in the locomotive unit in which McNeel was working.

A short time later, McNeel detected "a light smell" which persisted for about 15 seconds. He described it as "more of a putrid smell" which was "different than anything I ever smelled." He detected the odor again several miles later, again for only a few seconds. A few minutes later, McNeel detected the odor for the third time and asked Golden, the engineer, if he could smell it. Golden replied that he could not. But then Golden came over to

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[1] 45 U.S.C. §§ 51 through 60 (2000).

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

the side of the unit where McNeel was sitting and confirmed that he could smell the odor. At that point, either McNeel or Golden contacted the dispatcher to advise that they needed to stop the train to investigate the odor. They eventually stopped the train at a pass on the west end of Ogallala and were transported by ambulance to a local hospital for evaluation.

McNeel alleged that the inhalation of these unidentified fumes caused him to suffer "headaches, nausea, and injury to his respiratory system, dizziness and other injuries not yet diagnosed." He has been seen by a number of health care providers, including William J. Rea, M.D., a cardiovascular surgeon who currently practices in the field of environmental medicine; Theodore R. Simon, M.D., a specialist in nuclear medicine; and Nancy Didriksen, Ph.D, a psychologist. These three providers submitted affidavits and depositions discussing McNeel's symptoms, condition, and treatment, and were the subject of the *Daubert/Schafersman* motion.

Rea diagnosed McNeel as suffering from toxic encephalopathy caused by his inhalation of an unspecified toxin while employed by Union Pacific on March 12, 2001. Rea described McNeel's symptoms as including "memory loss, confusion, brain fogg [sic] and imbalance." In reaching his diagnosis, Rea relied on a "positive [single photon emission computed tomographic (SPECT)] Scan" performed by Simon, a "positive" result from "pupillography" testing of the autonomic nervous system, and "positive thermography." Rea could not identify the substance responsible for McNeel's symptoms and diagnosis. Simon testified that SPECT scans are widely used and accepted in the diagnosis of toxic encephalopathy, when used in conjunction with other examination techniques.

Didriksen gave "Diagnostic Impressions" of "Cognitive Disorder Not Otherwise Specified" and "Adjustment Disorder with Mixed Anxiety and Depressed Mood" based upon her work with McNeel. Her tests revealed, inter alia, that McNeel's information processing speed was at the bottom of the average range and that his memory scores were "borderline and low average." Comparing her test results with previous results obtained by another doctor, Didriksen explained that her test results indicated a "significant difference" in McNeel's condition. Didriksen's

hypothesis is that McNeel experienced a toxic injury that led to declining cortical function over time.

Union Pacific moved to exclude the testimony of Didriksen, Rea, and Simon under *Daubert/Schafersman*. In support of its motion, it submitted affidavits and depositions from its own expert witnesses. These witnesses opined that the scientific techniques employed by McNeel's experts, specifically the SPECT scans performed by Simon and the psychological tests performed by Didriksen, were not validated, peer reviewed, or generally accepted by the scientific community for the purposes employed by McNeel's experts. The district court concluded that there was adequate foundation for the opinions of McNeel's experts, but nonetheless excluded the opinions as "not relevant, not linked by any evidence to a causative factor, and, therefore, inadmissible."

Union Pacific then moved for summary judgment. It offered and the court accepted the opinions of two expert witnesses who opined that there was no credible evidence causally linking McNeel's symptoms to his alleged exposure. The court determined that this evidence met Union Pacific's initial burden as the party moving for summary judgment, thus shifting the burden to McNeel to show that there remained a genuine issue of material fact. The court concluded that medical records offered by McNeel did not meet this burden, and therefore granted the motion for summary judgment. McNeel perfected a timely appeal, and we granted Union Pacific's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

McNeel assigns, restated, that the district court erred in (1) excluding the proposed testimony of his expert witnesses, (2) granting Union Pacific's motion for summary judgment because there were genuine issues of material fact as to whether his injuries were caused in whole or in part by exposure to toxic gases while employed by Union Pacific, and (3) granting Union Pacific's motion for summary judgment because Union Pacific failed to collect and preserve certain evidence.

Union Pacific cross-appeals and assigns that the district court erred in finding the opinions of Didriksen, Simon, and Rea to be scientifically reliable.

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.[3]

[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.[4]

[3,4] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.[5] The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.[6]

[5] 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.[7]

ANALYSIS

FELA Causation Standard

McNeel argues that in granting the motion for summary judgment, the district court did not appreciate the "lower evidentiary standard" applicable to a FELA plaintiff's burden of proof.[8] Federal law governs substantive issues in FELA claims litigated in state courts pursuant to concurrent jurisdiction.[9]

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[3] *Erikson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[4] *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

[5] *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). See *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[6] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[7] *Epp v. Lauby, supra* note 5.

[8] Brief for appellant at 12.

[9] See, *Monaghan v. Union Pacific RR. Co.*, 242 Neb. 720, 496 N.W.2d 895 (1993); *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991).

[6] Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.[10] This court has stated that to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.[11] We note that FELA causation standards apply where, as here, liability is premised in whole or in part on an alleged violation of the Locomotive Inspection Act, formerly known as the Boiler Inspection Acts.[12]

McNeel argues that proximate causation under FELA is subject to a different, more lenient standard than under the common law. Indeed, there are federal cases which would appear to support his argument.[13] Most are based on language in *Rogers v. Missouri Pacific R. Co.*,[14] in which the U.S. Supreme Court stated: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Based upon this language, some courts have stated that there is a "relaxed standard" for causation in FELA cases.[15] Other courts conclude from *Rogers* that the plaintiff in a FELA case "carries only a slight burden on causation."[16]

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[10] See 45 U.S.C. § 51.

[11] *Chapman v. Union Pacific Railroad, supra* note 9.

[12] 49 U.S.C. §§ 20102, 20701 to 20703, 21302, and 21304 (2000) (formerly 45 U.S.C. §§ 22 through 34 (1988 & Supp. V 1993)). See, *Green v. River Terminal Ry. Co.*, 763 F.2d 805 (6th Cir. 1985); *Elston v. Union Pacific R. Co.*, 74 P.3d 478 (Colo. App. 2003).

[13] See, e.g., *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255 (6th Cir. 2001); *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343 (M.D. Ga. 2007).

[14] *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

[15] See, e.g., *Hardyman v. Norfolk & Western Ry. Co., supra* note 13; *Bowers v. Norfolk Southern Corp., supra* note 13.

[16] *Paul v. Missouri Pacific R. Co.*, 963 F.2d 1058, 1061 (8th Cir. 1992). See *Harbin v. Burlington Northern R. Co.*, 921 F.2d 129 (7th Cir. 1990).

The existence of a "relaxed standard" for proving causation in FELA cases was called into question by the U.S. Supreme Court's decision in *Norfolk Southern R. Co. v. Sorrell*.[17] In that case, the Court held that in a FELA action, the same causation standard applies to the employer's negligence and the employee's contributory negligence, rejecting a contrary approach employed by Missouri state courts. In reaching this conclusion, the Court noted that the "fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against Missouri's disparate standards."[18] A concurring opinion noted that despite its interpretation by some courts, *Rogers* "did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury."[19] Another concurrence, however, noted that the Court's opinion "leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally."[20] Although the Court held that the causation standard for negligence and contributory negligence under FELA is the same, it did not articulate what the proper standard should be inasmuch as it did not grant certiorari on that issue.

[7] But even courts which have recognized a "relaxed standard" of causation have nevertheless held that a FELA plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one.[21] In *Chapman v. Union Pacific Railroad*, we cited the aforementioned language

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[17] *Norfolk Southern R. Co. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007).

[18] *Id.*, 549 U.S. at 168.

[19] *Id.*, 549 U.S. at 173 (Souter, J., concurring).

[20] *Id.*, 549 U.S. at 178 (Ginsburg, J., concurring in judgment).

[21] *Savage v. Union Pacific R. Co.*, 67 F. Supp. 2d 1021 (E.D. Ark. 1999); *Abraham v. Union Pacific R. Co.*, 233 S.W.3d 13 (Tex. App. 2007), citing *Edmonds v. Illinois Cent. Gulf R. Co.*, 910 F.2d 1284 (5th Cir. 1990).

from *Rogers* but interpreted other U.S. Supreme Court precedent as requiring that in a FELA case, "a court cannot allow a jury to speculate concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence provides a basis for the reasonable inference that the employee's injury was caused by the employer's negligence."[22] We conclude that this principle governs the causation issue here.

In common-law negligence cases where symptoms of an injury are subjective, Nebraska law requires medical testimony.[23] Federal courts apply the same principle in FELA cases where injury is alleged to have occurred as a result of exposure to a toxic substance.[24] In this case, expert testimony was necessary to establish the basis for an inference that McNeel's injuries were caused by the inhalation of fumes attributable to some negligent act or omission on the part of Union Pacific.

Exclusion of McNeel's Expert Witnesses

Our evidence rule governing expert opinion[25] is similar to the federal rule,[26] and in *Schafersman v. Agland Coop*,[27] we held prospectively that trial courts would be required to evaluate the admissibility of expert opinion testimony under the analytical framework first established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[28] As a principle of evidence, *Daubert*/*Schafersman* applies in a FELA case in the same manner as in other cases. As one federal court has explained in a FELA case involving alleged injuries from exposure to workplace chemicals:

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[22] *Chapman v. Union Pacific Railroad, supra* note 9, 237 Neb. at 627, 467 N.W.2d at 395.

[23] *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974).

[24] *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (9th Cir. 1994); *Savage v. Union Pacific R. Co., supra* note 21; *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F. Supp. 1119 (N.D. Ill. 1995).

[25] Neb. Rev. Stat. § 27-702 (Reissue 1995).

[26] Fed. R. Evid. 702.

[27] *Schafersman v. Agland Coop, supra* note 2.

[28] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 2.

> The standard of causation under FELA and the standards for admission of expert testimony under the Federal Rules of Evidence are distinct issues and do not affect one another. . . . It is true that under FELA the quantum of evidence sufficient to present a jury question of causation is less than it is in a common law tort action. . . . This does not mean, however, that FELA plaintiffs need make no showing of causation. Nor does it mean that in FELA cases courts must allow expert testimony that in other contexts would be inadmissible. It means only that in FELA cases the negligence of the defendant "need not be the sole cause or whole cause" of the plaintiff's injuries. . . . FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries.[29]

Other circuits have reached the same conclusion,[30] and the Nebraska Court of Appeals has recently applied the *Daubert/Schafersman* analysis in a FELA case involving an injury allegedly caused by exposure to diesel exhaust fumes.[31]

[8] Under the *Daubert/Schafersman* analytical framework, when a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[32] This entails a preliminary assessment whether the

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[29] *Claar v. Burlington Northern R. Co., supra* note 24, 29 F.3d at 503 (citations omitted).

[30] *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347 (5th Cir. 2007); *Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004) (noting expert testimony is necessary to establish causation, even in view of plaintiff's reduced burden to prove causation in Jones Act case); *Hardyman v. Norfolk & Western Ry. Co., supra* note 13; *Diefenbach v. Sheridan Transp.*, 229 F.3d 27 (1st Cir. 2000) (discussing *Daubert* challenge in a Jones Act case); *Summers v. Missouri Pacific R.R. System*, 132 F.3d 599 (10th Cir. 1997); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968 (8th Cir. 1995).

[31] *King v. Burlington Northern Santa Fe Ry. Co.*, 16 Neb. App. 544, 746 N.W.2d 383 (2008).

[32] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 2; *Schafersman v. Agland Coop, supra* note 2.

reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[33] The first portion of the analysis "establishes a standard of evidentiary reliability."[34] The second inquiry, sometimes referred to as "'fit,'" assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue by providing "a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[35] "'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.'"[36] "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[37]

After examining the affidavits of McNeel's proferred experts Didriksen, Simon, and Rea, and the affidavits submitted by Union Pacific's experts challenging the scientific reliability of their opinions, the district court concluded that "while . . . there is foundation for their 'shaky but admissible evidence', their opinions are not relevant, not linked by any evidence to a causative factor, and, therefore, inadmissible." McNeel assigns error to the determination of inadmissibility. In its cross-appeal, Union Pacific challenges the court's apparent determination of scientific reliability with respect to the experts' opinions.

The cross-appeal raises a significant issue. A number of courts have determined that toxic encephalopathy, also known as multiple chemical sensitivity or idiopathic environmental intolerance, is a controversial diagnosis unsupported by sound

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[33] *Id.*

[34] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 2, 509 U.S. at 590.

[35] *Id.*, 509 U.S. at 591-92.

[36] *Id.*, 509 U.S. at 591. Accord 4 Joseph M. McLaughlin, Weinstein's Federal Evidence § 702.02[5] (2d ed. 2007).

[37] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 2, 509 U.S. at 591.

scientific reasoning or methodology.[38] Some courts have specifically rejected or discredited the opinions of Rea and Didriksen on this subject.[39]

However, we need not reach the issue presented by the cross-appeal because we conclude that the district court correctly concluded that even if considered scientifically reliable, the opinions of McNeel's experts did not "fit" the issues of this case because they did not identify any specific causative agent for the diagnosis of toxic encephalopathy.

[9] Generally, "'"[s]cientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case."'"[40] Because McNeel's experts could not identify any toxic substance which caused the symptoms they diagnosed as toxic encephalopathy, their reasoning on causation was reduced to nothing more than post hoc, ergo propter hoc, which, as we said in *Schafersman*, "cannot be said to be helpful to the trier of fact under Neb. Evid. R. 702, even absent the application of a more stringent *Frye*[41] or *Daubert* analysis."[42] Didriksen admitted that this was her reasoning process. Rea testified that because McNeel experienced symptoms during and after his exposure to the unidentified fumes, the exposure caused the symptoms.

At least one court has specifically held in a FELA case that a causation opinion based solely on a temporal relationship is

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[38] See, e.g., *Summers v. Missouri Pacific R.R. System, supra* note 30; *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994); *Brown v. Shalala*, 15 F.3d 97 (8th Cir. 1994); *Coffey v. County of Hennepin*, 23 F. Supp. 2d 1081 (D. Minn. 1998); *Frank v. State of New York*, 972 F. Supp. 130 (N.D.N.Y. 1997); *Sanderson v. IFF*, 950 F. Supp. 981 (C.D. Cal. 1996). But see *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997).

[39] *Bradley v. Brown, supra* note 38; *Myhre v. Workers Compensation Bureau*, 653 N.W.2d 705 (N.D. 2002); *Jones v. Ruskin Mfg.*, 834 So. 2d 1126 (La. App. 2002).

[40] *Savage v. Union Pacific R. Co., supra* note 21, 67 F. Supp. 2d at 1035, quoting *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194 (5th Cir. 1996).

[41] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[42] *Schafersman v. Agland Coop, supra* note 2, 262 Neb. at 223, 631 N.W.2d at 871.

not derived from the scientific method and is therefore insufficient to satisfy the requirements of rule 702.[43] In *Carlson v. Okerstrom*,[44] we noted that when a person develops symptoms after encountering an agent which is known to be capable of causing those symptoms, courts have been more willing to admit expert testimony relying on the temporal connection between the exposure and the onset of symptoms. But here, no one can identify to which "agent," if any, McNeel was exposed on the date of his alleged injury.

[10] Under the *Daubert/Schafersman* analysis, expert testimony lacks "'fit' when 'a large analytical leap must be made between the facts and the opinion.'"[45] That is the case here. Assuming without deciding that the diagnosis of toxic encephalopathy was the product of scientifically reliable methodology, it is simply too great an analytical leap to conclude that it was caused by some act or omission on the part of Union Pacific, given that the experts could not identify any toxic agent. Due to this lack of "fit," the opinions of McNeel's experts would not have assisted the trier of fact in understanding the evidence or determining a fact in issue, and the district court did not abuse its discretion in determining that they were inadmissible.

Collection and Preservation of Evidence

McNeel assigns that the district court should not have entered summary judgment, because Union Pacific "failed to collect and preserve evidence." We find no motion or pleading in the record raising this issue. In its brief, Union Pacific states that the issue was raised in a reply brief filed by McNeel in response to its motion in limine. In the district court's order on the motion in limine, it stated that McNeel claimed that Union Pacific "destroyed or secreted evidence that would have shown the specific chemical agent and its source," but determined that there was no evidence to support the claim.

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[43] *Schmaltz v. Norfolk & Western Ry. Co., supra* note 24.

[44] *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[45] See *Bowers v. Norfolk Southern Corp., supra* note 13, 537 F. Supp. 2d at 1351.

[11-13] Spoliation is the intentional destruction of evidence.[46] It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator.[47] The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one's own case; thus, only intentional destruction supports the rationale of the rule.[48] The inference does not arise where destruction was a matter of routine with no fraudulent intent[49] because the adverse inference drawn from the destruction of evidence is predicated on bad conduct.[50] In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.[51] There is nothing in the record to support a claim that Union Pacific intentionally destroyed any evidence relevant to this case.

McNeel also argues that under *Trieweiler v. Sears*,[52] Union Pacific had an affirmative duty to preserve all relevant evidence. *Trieweiler* was a derivative action brought by a minority shareholder, alleging breach of fiduciary duties. The district court had made a finding that lost corporate financial records resulted in an adverse inference as to the party who had a fiduciary duty to maintain the records. We analogized the conduct in *Trieweiler* to spoliation, but noted it was not a case of spoliation because the record did not clearly establish that evidence had been intentionally destroyed by the majority shareholder. We noted that some principles of the rule of spoliation supported the district court's reasoning. *Trieweiler* has no application to this case, in that Union Pacific owed no general fiduciary duty to McNeel to maintain records which, as far as we can determine from the record, had not been requested by McNeel or his counsel.

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[46] *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[47] See *Richter v. City of Omaha*, 273 Neb. 281, 729 N.W.2d 67 (2007).

[48] *State v. Davlin, supra* note 46.

[49] *Richter v. City of Omaha, supra* note 47.

[50] *State v. Davlin, supra* note 46.

[51] *Id.*

[52] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

Summary Judgment

As the party moving for summary judgment, Union Pacific was required to produce enough evidence to demonstrate that it was entitled to judgment if that evidence was uncontroverted at trial. The burden then shifted to McNeel to produce evidence showing the existence of a genuine issue of material fact that would prevent judgment as a matter of law.[53]

Union Pacific met its initial burden by producing the affidavit of a licensed psychologist who stated that McNeel's symptoms "cannot be causally attributed to any alleged toxic exposure by any generally accepted or scientifically validated method" and the affidavit of a physician who stated that "there is no credible psychiatric, medical, or scientific evidence that . . . McNeel suffers from toxic encephalopathy, any mental disorder, any cognitive impairment, or any other medical or psychiatric consequence as a result of any alleged exposure to fumes in the course of employment with . . . Union Pacific."

The only evidence offered by McNeel in opposition to the motion was an affidavit of his attorney which identified various medical records attached to the affidavit. The district court determined that none of the records constituted expert medical testimony to show a link between the inhalation of fumes and the injuries allegedly suffered by McNeel. We agree. There was no genuine issue of fact as to the element of causation, and Union Pacific was entitled to judgment as a matter of law.

CONCLUSION

For the reasons discussed, we conclude that (1) the district court did not abuse its discretion in excluding the testimony of McNeel's expert witness as under *Daubert/Schafersman*, (2) the record does not support McNeel's spoliation of evidence claim, and (3) the district court did not err in entering summary judgment in favor of Union Pacific. Accordingly, we affirm.

Affirmed.

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[53] See, *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 739 N.W.2d 442 (2007); *Neiman v. Tri R Angus*, 274 Neb. 252, 739 N.W.2d 182 (2007); *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ADRIENNE S. DAVIS, RESPONDENT.

760 N.W.2d 928

Filed July 18, 2008. No. S-07-640.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On August 23, 2007, formal charges were filed by the office of the Counsel for Discipline, relator, against Adrienne S. Davis, respondent. The formal charges included allegations that respondent violated the following provisions of what are now codified as Neb. Ct. R. of Prof. Cond.: § 3-501.15(a) (maintaining trust account); § 3-501.15(b) (depositing lawyer's funds in trust account); § 3-501.15(d) (delivering trust account funds to client or third person); § 3-508.4(a) (violating disciplinary rule); and § 3-508.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The formal charges also alleged that respondent violated her oath of office as an attorney. See 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 April 15, 2008, in which the referee concluded, inter alia, that respondent's conduct had violated § 3-501.15(a), (b), and (d); § 3-508.4(a) and (c); and her oath as an attorney. In his report, the referee noted that as a result of the attorney misconduct that resulted in the present formal charges being filed against respondent, respondent had been temporarily suspended from the practice of law on July 11, 2007. The referee recommended that respondent remain indefinitely suspended from the practice of law with no possibility of reinstatement until July 11, 2008, such reinstatement to be followed by a 2-year period of monitored probation.

On April 30, 2008, respondent filed a motion for judgment on the pleadings, requesting that this court accept the referee's

recommendation and enter judgment thereon. We grant respondent's motion, and we impose discipline as indicated below.

FACTS

The referee's hearing was held on March 6, 2008. Respondent testified during the hearing, along with three other witnesses. A total of 54 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 2001. She has practiced in Lancaster County, Nebraska.

With regard to the allegations in the formal charges, in summary, the referee found that during the period from September 2006 to February 2007, respondent had used her attorney trust account as both a business account and a personal checking account and had failed to promptly deliver trust account funds to a client's health care provider.

In his report, the referee set forth several mitigating factors. The referee noted that respondent suffered from depression and anxiety and that she was an alcoholic. The referee found that respondent had received inpatient treatment for her alcoholism and regularly attended Alcoholics Anonymous meetings. The referee found that on May 10, 2007, respondent had entered into a monitoring contract with the Nebraska Lawyers Assistance Program (NLAP). In the contract, respondent agreed to abstain from alcohol, to submit to random drug testing, and to submit to an attorney monitor. The referee found that respondent was currently seeing a mental health counselor and was taking antidepressant medication. The referee also noted that respondent had had no prior disciplinary proceedings and that numerous attorneys had written letters of recommendation reflecting that respondent had a good reputation among her colleagues. The referee further noted that respondent had cooperated with relator during the disciplinary proceeding. The referee did not note any aggravating factors.

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 Nebraska Rules of Professional Conduct: §§ 3-501.15(a), (b), and (d) and 3-508.4(a)

and (c). The referee also 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 remain indefinitely suspended from the practice of law with no possibility of reinstatement until July 11, 2008, such reinstatement to be followed by a 2-year period of monitored probation.

No exceptions were filed to the referee's report. On April 30, 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.

ANALYSIS

We note that all 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. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008). 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. § 3-310(L), 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. Kratina*, 275 Neb. 401, 746 N.W.2d 378 (2008).

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 respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.15(a), (b), and (d) and 3-508.4(a) and (c). Finally, we conclude that by virtue of respondent's conduct, respondent has violated her oath of office as an attorney. See § 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. Wadman, supra*. Neb. Ct. R. § 3-304 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, § 3-310(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. Wadman, 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 suspended from the practice of law for a period of 1 year

and that the suspension should be retroactive to the date of respondent's temporary suspension from the practice of law on July 11, 2007. In the event respondent seeks reinstatement, she will be required to show compliance with her NLAP contract and compliance with any outpatient treatment plan relating to alcohol addiction or depression. Further, in the event respondent is reinstated, she will be required to submit to a 2-year probation plan, for the approval of this court, which plan will include continued compliance with her NLAP contract, compliance with any outpatient plan relating to alcohol addiction or depression, monitoring of her practice and trust account management by a practicing attorney approved by relator, and monitoring of her compliance with the Nebraska Rules of Professional Conduct by NLAP and relator.

CONCLUSION

We find by clear and convincing evidence that respondent violated the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.15(a), (b), and (d) and 3-508.4(a) and (c), as well as her oath as an attorney. It is the judgment of this court that respondent should be and hereby is suspended from the practice of law for a period of 1 year, with such suspension retroactive to July 11, 2007. In the event respondent seeks reinstatement following her suspension, her reinstatement will be subject to the terms set forth above. Respondent shall demonstrate compliance with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Furthermore, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), and § 3-310(P) and Neb. Ct. R. § 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

McCord & Burns Law Firm, LLP, appellee, v. Michael J. Piuze and Michael J. Piuze, P.C., doing business as Law Offices of Michael J. Piuze, appellants.

752 N.W.2d 580

Filed July 18, 2008. No. S-07-813.

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 interpretation of a contract involves a question of law.
4. **Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
5. **Contracts.** Instruments made in reference to and as part of the same transaction are to be considered and construed together.
6. **Contracts: Intent: Appeal and Error.** An appellate court construes a contract to give effect to the parties' intentions at the time the writing was made.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Reversed.

Robert W. Mullin, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellants.

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

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

Connolly, J.

This appeal presents a fee dispute between two lawyers. One claims that he is owed fees earned in appealing their client's underlying case. The other claims the fee-division agreement was limited to fees relating to trial work and did not include appellate fees.

SUMMARY

Penny Shipler hired Dan L. McCord, acting on behalf of McCord & Burns Law Firm, LLP (collectively McCord), to prosecute a case against General Motors Corporation (GM). Shipler sought damages for injuries she received in a vehicle rollover accident. Upon McCord's recommendation, Shipler also retained Michael J. Piuze, a California attorney with experience prosecuting rollover cases against vehicle manufacturers. Piuze and McCord agreed they would divide attorney fees, with 75 percent to Piuze and 25 percent to McCord.

Following a jury trial and appeal, Shipler settled with GM. After Piuze deducted the attorney fees from the settlement amount, he sent McCord what Piuze believed was McCord's share of the fees. The amount Piuze sent McCord represented 25 percent of the fees relating to the trial phase of the case; it did not include a portion of the fees Piuze received for his work on the appeal. In not sharing the fees relating to the appeal, Piuze relied on a letter he sent McCord stating that the fee-division agreement did not pertain to fees for an appeal or retrial.

McCord disputed the division. He argued that he was also entitled to 25 percent of the fees relating to the appeal. McCord sued Piuze. McCord alleged that Piuze breached the parties' fee-division agreement. The district court entered summary judgment for McCord and awarded him 25 percent of the fees relating to the appeal, and prejudgment interest.

We reverse because we conclude that the fee-division agreement did not include appellate fees and therefore Piuze did not breach the agreement.

BACKGROUND

In September 1997, Shipler, a passenger, was severely injured in a single-vehicle rollover accident. Kenneth Long, the driver of the Chevrolet S-10 Blazer, lost control of the vehicle, causing it to roll several times. Shipler hired McCord to sue Long and GM, the manufacturer of the Blazer, for damages relating to the injuries she sustained in the accident. McCord contacted other lawyers who had experience and expertise in actions against motor vehicle manufacturers for rollover accidents. Piuze was

one of the lawyers McCord contacted. McCord recommended to Shipler that she retain Piuze. After meeting with Shipler and McCord, Piuze agreed to represent Shipler in her suit against GM and Long.

Piuze sent McCord a letter dated April 4, 2000 (Referral Letter). The Referral Letter stated in relevant part:

> This letter will confirm our agreement regarding the division of attorney's fees, costs, and responsibilities. Your law firm will receive 25% of the attorney's fees, except in medical malpractice cases where the attorney's fees will be 10%.
>
> My office will be solely responsible for advancing costs and for prosecuting the action. *Neither my retainer agreement with . . . Shipler nor this agreement pertains to fees for an appeal or a retrial, if they become necessary.*
>
> This agreement regarding a division of fees, costs, and responsibilities shall apply to all future cases that your firm refers to my office unless a contrary agreement is reached.

(Emphasis supplied.) McCord signed the bottom of the Referral Letter and returned it to Piuze in June.

When Piuze sent McCord the Referral Letter, he enclosed other documents, including a "Retainer Agreement" (Retainer) and a "Referral Attorney Authorization" (Authorization).

The Retainer stated that Shipler retained Piuze to prosecute her claims against GM and Long. The Retainer also provided that Piuze would receive 40 percent of Shipler's gross recovery for compensatory damages. More important, the Retainer stated, "Fees for services on appeal, if any, . . . will be subject to a special agreement to be negotiated between [Shipler] and [Piuze]." Shipler signed the Retainer on April 16, 2000. Although he was not required to do so, McCord signed the Retainer on May 9. Piuze signed the Retainer on May 17.

Shipler signed the Authorization the same day she signed the Retainer. The Authorization stated that she agreed that Piuze would represent her in her claim against GM and Long. It further provided that she agreed "*any fee collected* for legal services in regard to [her] claim" would be divided with 75 percent going to Piuze and 25 percent going to McCord. (Emphasis supplied.)

McCord signed the Authorization on May 9, 2000, and Piuze signed on May 17.

In September 2003, a jury returned a verdict for Shipler, and the court entered a judgment for $18,583,900. After GM and Long filed appeals, Shipler signed a "Supplemental Retainer Agreement" (Supplemental Retainer). The Supplemental Retainer stated that Shipler retained Piuze to handle the appeal. The Supplemental Retainer further provided, "I agree that [Piuze] shall receive for such professional services an additional ten (10) percent of the amount recovered following the appeal. I understand that the total attorney's fees on the amount recovered will be fifty percent (50%)."

In March 2006, we affirmed the district court's judgment in Shipler's action against GM and Long.[1] After GM moved for rehearing, GM and Shipler entered a settlement agreement providing that GM would pay Shipler a confidential amount and would withdraw its motion for rehearing.

GM delivered a check for the settlement amount to McCord. McCord and Shipler endorsed the check and sent it to Piuze. After Piuze deducted case expenses, he took 50 percent of the net settlement amount. The 50 percent represented the 40 percent identified in the Retainer for trial work and the 10 percent allocated in the Supplemental Retainer for appellate work. Piuze wired funds to McCord's bank account to satisfy McCord's portion of the attorney fees. Although Piuze collected 50 percent of the net settlement amount as attorney fees, he did not send McCord 25 percent of those collected fees. Instead, Piuze sent McCord 25 percent of the 40 percent collected for the trial work. That is, Piuze did not send McCord 25 percent of the 10 percent he collected for the work on appeal.

McCord sued Piuze, alleging that Piuze breached the fee-division agreement. In deciding McCord's motion for summary judgment, the district court stated that the issue was whether the Referral Letter or Authorization was binding. The Referral Letter expressly provided that the fee-division agreement did not pertain to fees for an appeal or a retrial. But the Authorization

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[1] See *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

provided that "*any fee collected* for legal services in regard to [Shipler's] claim" would be divided with 75 percent to Piuze and 25 percent to McCord. (Emphasis supplied.)

The district court decided that the Referral Letter from Piuze to McCord was a fee-division agreement that was neither disclosed to Shipler in writing nor consented to by Shipler. According to the court, such an agreement violated the Nebraska Code of Professional Responsibility and the Nebraska and California Rules of Professional Conduct. The court therefore determined that the Referral Letter was an unenforceable fee division. The court concluded that the Authorization, which Shipler signed, was the only binding fee-division agreement.

The court further determined that the language, "any fee collected," in the Authorization included all fees, whether they were for trial or appellate work. Therefore, the court concluded that Piuze should have sent McCord 25 percent of all the attorney fees he collected for Shipler's case and not just 25 percent of the fees relating to the trial. The district court granted summary judgment for McCord, and Piuze appealed. We granted McCord's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

Piuze assigns, restated, that the district court erred in (1) determining the Referral Letter was unenforceable, (2) determining that the Authorization was an enforceable contract for division of attorney fees, (3) "applying the rules of professional conduct to rewrite the contract contrary to the intention of the parties," and (4) awarding prejudgment interest.

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, we view the evidence in the light most favorable to the

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[2] *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008).

party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] The interpretation of a contract involves a question of law.[4] When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[5]

ANALYSIS

District Court's Analysis

According to the district court, the issue it needed to decide was "whether the . . . Authorization or the Referral . . . Letter is binding." In making that decision, the court considered whether the individual documents complied with ethics rules. The court determined that the applicable ethics provisions were Canon 2, DR 2-107, of the Nebraska Code of Professional Responsibility; Neb. Ct. R. of Prof. Cond. § 3-501.5(e); and rule 2-200 of the California Rules of Professional Conduct. The court concluded that when read together, these provisions required five elements for an enforceable fee-division agreement:

> 1. Full disclosure in writing to the client including the terms of the division.
>
> 2. The client's written consent to any fee division.
>
> 3. The fee division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.
>
> 4. The total fee is not unreasonable or unconscionable.
>
> 5. The total fee is not increased solely by reason of the division.

The court decided that only the first two elements were at issue for the summary judgment determination.

According to the district court, McCord, Piuze, and Shipler created a contract to divide attorney fees when they signed the Authorization. The court then found that the Authorization was "the only document that disclosed the division of fees to Shipler

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[3] *Id.*

[4] See *id.*

[5] *Id.*

and the only division of fees to which she consented." The court further stated, "To the extent Piuze's Referral . . . Letter conflicts with the terms of the . . . Authorization, it is an agreement to divide a fee that is neither disclosed to the client in writing, nor consented to by the client." The court therefore concluded that the Referral Letter was an unenforceable fee division and that the Authorization was the only binding fee-division agreement.

The district court then considered whether the fee-division agreement in the Authorization pertained to fees for appellate work. The court concluded that the agreement included appellate fees, so Piuze owed McCord a portion of those fees.

Parties' Contentions

Piuze contends that the district court erred in deciding that the Referral Letter was unenforceable and in finding that the parties intended to split the fees for appellate work. Piuze argues that the parties' fee-splitting agreement, as evidenced by the Referral Letter, was limited to fees for trial work. Piuze disagrees with the district court's finding that the terms of this agreement were not fully disclosed to Shipler.

Piuze does not claim that Shipler saw the Referral Letter or consented specifically to that document. Instead, we interpret Piuze's argument to be that although Shipler did not see the Referral Letter, Piuze and McCord disclosed their agreement to her and obtained her consent through the Authorization and Retainer she signed. So, rather than considering the Referral Letter and Authorization in isolation as the district court did, Piuze argues that the two documents, and the Retainer, should be construed together. According to Piuze, the Authorization and Retainer fully disclosed to Shipler the terms of the fee-division agreement, including that the agreement was limited to fees for trial work. Piuze asserts that although the Authorization stated he and McCord would split "any fee collected," the only fee under consideration when the parties signed the Authorization was the 40-percent contingent fee for trial work that Shipler had agreed to in the Retainer. Piuze argues that because Shipler signed both the Retainer and the Authorization, she received full disclosure of the parties' agreement to split the fees for the trial work and consented to this agreement.

McCord, of course, disagrees with Piuze's analysis. McCord first contends that the Referral Letter is ambiguous and does not clearly exclude the division of appellate fees. McCord further contends that even if the Referral Letter is unambiguous, it is unenforceable as an undisclosed fee-division agreement. McCord argues that neither the Referral Letter nor "Piuze's interpretation" of the Referral Letter was disclosed to Shipler.[6] Like the district court, McCord maintains that the parties' fee-division agreement is found in the Authorization because that was "the only fee division disclosure actually made to Shipler."[7] McCord claims that the "plain, direct and unambiguous" language of the Authorization creates an agreement to split all attorney fees, including fees for the appellate work.[8] McCord contends that Piuze "breached the written agreement to divide attorney fees."[9]

The Fee-Division Agreement Did Not Include Appellate Fees

Because McCord alleges that Piuze breached the fee-division agreement when he failed to give McCord a share of the appellate fees, we must decide whether the fee-division agreement included fees for the appellate work. If the agreement did not include appellate fees, then Piuze has not breached the agreement. Without delving into specific ethics rules or whether the parties' agreements conformed to those rules, we conclude below that Piuze and McCord's fee-division agreement was limited in scope to fees for trial work and did not extend to fees for appellate work.

We first consider the Authorization. The Authorization was drafted from Shipler's viewpoint and states in relevant part:

> I understand and agree that my claim [against GM and Long] will be handled by the LAW OFFICES OF MICHAEL J. PIUZE.

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[6] Brief for appellee at 11.

[7] *Id.* at 18.

[8] *Id.* at 33.

[9] *Id.*

> I understand and agree that any fee collected for legal services in regard to my claim will be divided as follows:
>
> Seventy-five percent (75%) to the LAW OFFICES OF MICHAEL J. PIUZE
>
> Twenty-five percent (25%) to: Dan McCord (referring attorney).

Shipler signed the Authorization on April 16, 2000, McCord signed on May 9, and Piuze signed on May 17. The Authorization clearly sets out Piuze and McCord's agreement that they will divide the fee for services associated with Shipler's case.

[5] Instruments made in reference to and as part of the same transaction are to be considered and construed together.[10] The Authorization and Retainer were made as part of the same transaction. They concern attorney fees relating to Shipler's lawsuit against GM and Long. And although the Retainer was an agreement between Shipler and Piuze, and although Piuze did not ask McCord to sign the Retainer, McCord signed the document. Shipler, McCord, and Piuze all signed the Authorization on the same day they signed the Retainer. Therefore, to determine the scope of the fee-division agreement in the Authorization, we look to the Retainer.

The Retainer provides that Shipler retained Piuze to prosecute her claims relating to the rollover accident and that as compensation for these services, Piuze would receive 40 percent of Shipler's recovery. The Retainer expressly provides that any fees for services on appeal "will be subject to a special agreement to be negotiated between [Shipler] and [Piuze]." That is, the Retainer only deals with the compensation Piuze would receive for his services relating to the trial, and not compensation for appellate services.

[6] We construe a contract to give effect to the parties' intentions at the time the writing was made.[11] The same day they signed the Authorization, Piuze and McCord each signed the

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[10] *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). See, also, *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005); *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988).

[11] See *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

Retainer that provided the only fees to which Shipler had agreed were fees relating to the trial work. Therefore, we conclude that when Piuze and McCord agreed in the Authorization to split "any fees," the only fees under consideration were the trial fees. Contrary to McCord's argument and the district court's finding, we conclude that the fee-division agreement did not encompass appellate fees.

The Referral Letter reiterates that the parties' fee-division agreement did not include fees for appellate work. The Referral Letter expressly states, "Neither my retainer agreement with . . . Shipler nor [the fee-division] agreement pertains to fees for an appeal or a retrial, if they become necessary." McCord signed and returned the Referral Letter to Piuze a month *after* the parties signed the Authorization and Retainer. If McCord had a different understanding of the parties' agreement or disagreed with the terms as set out in the Referral Letter, he had a chance to object before signing this final document. Instead, McCord signed the Referral Letter, which makes clear that appellate fees are not included in the fee-division agreement.

Without deciding whether the district court correctly identified the elements of an enforceable fee-division agreement under the ethics rules, we note that the parties' agreement was disclosed and consented to by Shipler. Because we conclude that the Authorization and Retainer set out the fee-division agreement, the agreement was disclosed to Shipler when she saw the two documents. And by signing the Authorization and Retainer, she consented to the parties' agreement to split the fees for the trial work. So, any concerns regarding disclosure and consent are put to rest.

Because the parties' fee-division agreement was limited to fees for trial work and did not include appellate fees, Piuze did not breach the agreement when he sent McCord 25 percent of the trial fees but not 25 percent of the appellate fees. Therefore, the district court erred in granting McCord's motion for summary judgment.

We reverse the district court's entry of summary judgment. In light of our reversal, we do not reach Piuze's argument that the court erred in awarding prejudgment interest.

CONCLUSION

We conclude that Piuze and McCord's agreement to divide fees did not encompass the fees that Piuze received for the appellate work (i.e., the additional 10 percent of Shipler's recovery). Piuze did not breach the fee-division agreement when he declined to split the fees relating to the appellate work. We reverse because the district court erred in sustaining McCord's motion for summary judgment.

REVERSED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANDREW ROYER, APPELLANT.
753 N.W.2d 333

Filed July 18, 2008. No. S-07-834.

1. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
3. **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.
4. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo.
5. **Constitutional Law: Investigative Stops: Search and Seizure: Probable Cause.** The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.

6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **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.
8. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.
9. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion, but less than the level of suspicion required for probable cause.
10. **Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs.
11. **Blood, Breath, and Urine Tests: Evidence.** There are four foundational requirements which the State must establish before it may offer into evidence the results of a breath test: (1) The testing device or equipment was in proper working order at the time of conducting the test, (2) the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health and Human Services at the time of conducting the test, (3) the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health and Human Services, and (4) there was compliance with all statutory requirements.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Brad Roth, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Edward G. Vierk, George R. Love, and Amanda Spracklen-Hogan, Senior Certified Law Student, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Andrew Royer rapidly accelerated his vehicle from a stop sign and squealed his tires. He was stopped by a police officer and

given field sobriety tests. He was then transported to a detoxification facility and given a breath test. It showed that Royer had .234 of a gram of alcohol per 210 liters of breath. He was charged with and convicted of third-offense driving while under the influence of alcoholic liquor or drugs (DUI). He appealed to the Lancaster County District Court, which affirmed the county court's judgment.

SCOPE OF REVIEW

[1,2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court. See *State v. Jensen*, 269 Neb. 213, 691 N.W.2d 139 (2005).

[4] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

FACTS

Royer was stopped by Officer Bryan Hanson of the Lincoln Police Department after Royer accelerated his vehicle rapidly from a stop sign and squealed his tires. Upon contacting Royer, Hanson observed that Royer's eyes were watery and bloodshot,

and Hanson detected a strong odor of alcohol on Royer's breath. Royer stated that he had consumed four to five alcoholic beverages.

Royer submitted to field sobriety tests. After the tests were completed, Hanson took Royer into custody and walked him to the police cruiser. Hanson observed Royer swaying and stumbling. Based on Hanson's observations, training, and experience, and on Royer's performance on the field sobriety tests, Hanson believed that Royer was under the influence of alcohol. Hanson transported Royer to a detoxification facility. While in transit, Royer stated that this would be his third offense and that he knew he would "blow over the legal limit." At the facility, Hanson administered a formal breath test using an Intoxilyzer, which showed that Royer had .234 of a gram of alcohol per 210 liters of breath.

Royer was charged with third-offense DUI, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). Royer moved to suppress, asserting that (1) the stop and seizure were not based on a reasonable, articulable suspicion that a crime had been or was about to be committed; (2) the arrest was not based on probable cause; and (3) the arresting officer did not have knowledge based on information reasonably trustworthy under the circumstances that justified a prudent belief that Royer was committing or had committed a crime. Therefore, he argued that (1) there was no probable cause and the arrest was unlawful, (2) the search and seizure were not incident to a lawful arrest and exceeded the scope of searches incident to an arrest, (3) his statements were taken in violation of his rights under the 5th and 14th Amendments, and (4) all breath tests were taken in violation of Nebraska law and 177 Neb. Admin. Code, ch. 1 (2004).

After the suppression hearing, the county court found that the field sobriety tests were not coerced and that even if the administration of the field sobriety tests amounted to a search, the officer had a reasonable, articulable suspicion that Royer was under the influence based on his driving, the odor of alcohol, his admission of drinking, and his watery, bloodshot eyes.

The court determined that the officer followed title 177 in administering the breath test, because he reviewed the maintenance records of the Intoxilyzer and had access to the repair

records that indicated no repair work had been done on the machine during the relevant period. The court overruled Royer's motion to suppress.

Following a bench trial, the court found Royer guilty of third-offense DUI. At the enhancement hearing, Royer objected to one prior conviction because part of the file-stamp date on the order was not legible—it indicated "APR 30 20." He also argued that another conviction did not indicate whether Royer appeared with counsel or whether he waived counsel.

The court found the prior convictions to be valid. The April 30 date in question was on the same page in the record as the sentencing, which occurred on April 30, 2002, and the court found that the document met the file-stamp requirement. It also found that Royer was represented by counsel at the time of the plea and sentencing in question.

Royer was ordered to pay a fine of $600, sentenced to 10 days in jail, and placed on probation for 36 months. He was also ordered to pay costs and fees of $1,029, and his driver's license was revoked for 1 year.

Royer appealed to the district court, asserting that the county court erred in finding him guilty of third-offense DUI, in the admission of certain evidence, and in overruling the motion to suppress. Royer also claimed the court erred in considering certain prior convictions at the enhancement hearing, because the prior convictions were not properly file stamped and did not show that Royer was represented at arraignment.

The district court affirmed. It found no error in the determination that proper foundation was laid for the admission of the Intoxilyzer breath test results and that Hanson followed title 177. The court also concluded that the reckless acceleration of Royer's vehicle was sufficient to establish the reasonable suspicion necessary to justify the investigatory stop and that the officer's observations after the stop were sufficient to justify the request to perform the field sobriety tests.

As to the claimed error in the enhancement, the district court determined that the county court's written notations reflected that the sentencing order was entered on April 30, 2002. Although the final two numbers of the year were not legible on the file stamp, the court found no indication that the file stamp was

placed on the record at any time other than April 30, 2002. It concluded that the file-stamp date was April 30, 2002, and that the prior conviction could be used to enhance Royer's sentence. Royer's current conviction and sentence were affirmed.

ASSIGNMENTS OF ERROR

Royer argues that the district court erred in (1) finding that evidence of the field sobriety tests was admissible, (2) determining there was sufficient probable cause to arrest Royer, (3) affirming the county court's finding that the arresting officer followed title 177, and (4) finding that a prior conviction which was not properly file stamped was a final order and admissible for enhancement.

ANALYSIS

Field Sobriety Tests

[5] Royer claims that the field sobriety tests violated his right to be free from unreasonable search and seizure because field sobriety tests constitute a search within the scope of the Fourth Amendment to the U.S. Constitution. The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[6] Royer was stopped after the police officer observed Royer's vehicle squeal its tires and accelerate rapidly from a stop sign. Royer makes no argument that the officer lacked probable cause to stop his vehicle. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008). Therefore, we conclude that the officer had probable cause to stop Royer.

[7-9] 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. *Id*. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *Id*.

Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion, but less than the level of suspicion required for probable cause. *Id.* Reasonable suspicion to detain an individual following a traffic stop must be determined on a case-by-case basis. See *id.*

Hanson observed that Royer's eyes were watery and bloodshot. Hanson detected a strong odor of alcohol on Royer's breath, and Royer admitted to consuming four or five alcoholic beverages. Therefore, Hanson had a reasonable, articulable suspicion that Royer was under the influence of alcohol or drugs in violation of § 60-6,196.

Royer asks this court to hold that a field sobriety test is a full search and seizure and must be supported by probable cause. He cites *People v. Carlson*, 677 P.2d 310 (Colo. 1984), which this court previously considered in *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). We stated that other jurisdictions have determined that a roadside sobriety test "is more analogous to a limited *Terry* stop than to a formal arrest and may be justified by an officer's reasonable suspicion, based on specific articulable facts, that the driver is intoxicated." *State v. Thomte*, 226 Neb. at 664, 413 N.W.2d at 919.

In *State v. Thomte, supra*, we did not reach the issue whether probable cause was required to administer roadside sobriety tests, because following the initial stop, the officer's observations of the defendant constituted probable cause to believe that he was driving while under the influence of alcohol. Therefore, the sobriety tests were reasonable under the circumstances.

[10] The issue is again before us. We hold that field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs. In determining the reasonableness of a search for purposes of the Fourth Amendment, the court balances the intrusion upon an individual's privacy with the need to promote governmental interests. See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007). *State v. McKinney, supra*, set out the balancing test for determining the reasonableness of a search, and other courts have applied a similar test to determine the reasonableness of a field sobriety test.

In *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986), the defendant was stopped because his vehicle was meandering within its lane. His appearance and breath indicated intoxication, and the officer directed him to perform six roadside sobriety tests. Defense counsel asserted that any roadside sobriety test was a full search and must therefore be founded on probable cause. He relied on *People v. Carlson*, 677 P.2d at 317, in which the Colorado Supreme Court held that "[r]oadside sobriety testing constitutes a full 'search' in the constitutional sense of that term and therefore must be supported by probable cause."

The Arizona Supreme Court disagreed and held that the administration of roadside, performance-based sobriety tests does not require probable cause. The court stated that "the necessity of the search is balanced against the invasion of the privacy of the citizen that the search entails." *State v. Superior Court*, 149 Ariz. at 274, 718 P.2d at 176. The court noted that the state had a compelling interest in removing drunk drivers from the highways. This compelling interest must be weighed against the "substantiality of the intrusion" of roadside sobriety tests that measure the physical performance of the suspected drunk driver. *Id.*

In an analogy to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the court reasoned that the threat to public safety posed by a person driving under the influence of alcohol was as great as the threat posed by a person illegally concealing a gun. *State v. Superior Court, supra*. The battery of roadside tests was a limited search and was more analogous to a *Terry* stop than to a formal arrest. *State v. Superior Court, supra*.

As did the Arizona court, we conclude that field sobriety tests may be justified by an officer's reasonable suspicion based upon specific articulable facts that a driver is under the influence of alcohol or drugs. The reasonable suspicion must be determined on a case-by-case basis.

Other jurisdictions have also rejected the idea that probable cause is required before field sobriety tests may be administered. See, e.g., *Rogala v. District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998) (field sobriety test is such minimal intrusion on driver of car that only reasonable suspicion is required to conduct such

test); *Galimba v. Municipality of Anchorage*, 19 P.3d 609 (Alaska App. 2001) (field sobriety tests are not generally considered searches for constitutional purposes; police do not need probable cause sufficient for arrest before requesting typical field sobriety tests); *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Idaho App. 1999) (administration of field sobriety tests following traffic stop is but investigative detention). As the Montana Supreme Court stated in *Hulse v. State, Dept. of Justice*, 289 Mont. 1, 21, 961 P.2d 75, 87 (1998), "[W]e conclude that the State's interest in administering field sobriety tests based upon particularized suspicion rather than the more stringent standard of probable cause substantially outweighs the resulting limited intrusion into an individual's privacy."

A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). The county court determined that even if the field sobriety tests amounted to a search, the officer had a reasonable, articulable suspicion that Royer was under the influence based on his driving, the odor of alcohol, his admission of drinking, and his watery, bloodshot eyes. The district court determined that the reckless acceleration of Royer's vehicle was sufficient to establish the reasonable suspicion necessary to justify the investigatory stop and that the officer's observations after the stop were sufficient to justify a request to perform field sobriety tests. We agree.

Hanson was required to have only a reasonable, articulable suspicion that Royer was driving under the influence in order to expand the scope of the initial traffic stop and detain Royer for field sobriety tests. Hanson observed immediately upon contact with Royer that he had watery, bloodshot eyes and that he smelled of alcohol. Royer admitted to Hanson that he had consumed four or five alcoholic beverages.

As Hanson walked Royer to the police cruiser, Royer swayed and stumbled. Based upon his observation and Royer's performance on the field sobriety tests, Hanson believed that Royer was under the influence of alcohol. The county court was correct in finding that Hanson had a reasonable, articulable suspicion that Royer was driving under the influence, and the district court was correct in affirming the county court's decision.

Compliance With Title 177

Royer argues that the breath test was not conducted in accordance with the methods currently approved by the Nebraska Department of Health and Human Services (DHHS) and that, therefore, the test results should have been suppressed. The county court admitted the breath test results and overruled the motion to suppress, and the district court affirmed the county court's judgment.

State law concerning tests to determine if a party has been driving under the influence provides that blood or breath tests must be performed according to methods approved by DHHS and by an individual possessing a valid permit issued by DHHS. Neb. Rev. Stat. § 60-6,201(3) (Reissue 2004).

> A prerequisite to the validity of a breath test made under [Neb. Rev. Stat.] § 60-6,197(3), and consequently a prerequisite to the validity of an arrest, is that the test must be performed in accordance with the procedures approved by the Department of Health and "by an individual possessing a valid permit issued by such department for such purpose . . . ."

(Emphasis omitted.) *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 96, 568 N.W.2d 471, 474 (1997), quoting § 60-6,201(3).

Hanson testified that he held a valid Class B permit to administer a breath test. A Class B permit allows its holder to "perform a chemical test to analyze a subject's breath for alcohol content by an approved method." 177 Neb. Admin. Code, ch. 1, § 001.08B. The operating rules for the holder of a Class B permit provide that to determine the alcohol content in breath, the permit holder shall "[a]scertain that maintenance and calibration checks have been performed on devices prior

to testing" by reviewing "the current 40-day maintenance and calibration check performed on the testing device, including . . . the results of [DHHS]' report of the periodic 190[-]day device check sample." 177 Neb. Admin. Code, ch. 1, § 007.02A. The permit holder is also to maintain or have access to "the permit to perform chemical tests"; a current copy of the rules and regulations; "checklist technique forms, test record cards, or tapes produced by testing device"; and "the record of testing devices' repairs." 177 Neb. Admin. Code, ch. 1, § 007.02B. Under the rules, the permit holder is also directed to use the appropriate checklist to record the test. 177 Neb. Admin. Code, ch. 1, § 007.02C.

The checklist technique for the Intoxilyzer Model 5000 used by Hanson to test Royer's breath indicates that the first step is to verify that maintenance, repair, and calibration verification have been performed by reviewing the maintenance record. The tester then turns on the instrument and observes the subject for 15 minutes prior to testing. The "'START TEST'" button is then pushed, and the test record card is inserted. A clean mouthpiece is attached, and the subject blows into the breath tube until a sufficient sample is delivered. The digital reading is recorded, the used mouthpiece is discarded, the card is removed, and the tester turns off the instrument.

Hanson testified that he had been trained to administer the Intoxilyzer Model 5000. Prior to administering the test, Hanson observed Royer for 15 minutes, read Royer the postarrest chemical test advisement form, and completed the Intoxilyzer Model 5000 checklist. Royer agreed to provide a breath sample, and the sample was sufficient to obtain a result, which was recorded by Hanson.

The parties stipulated that the scheduled maintenance and calibration verification log included the record of maintenance for 40 days and 190 days, and they stipulated that no repairs had been made to the Intoxilyzer during the relevant time. The scheduled maintenance and calibration verification log received into evidence indicated that the maintenance and calibration checks were performed on July 15, 2005, and were valid until August 23. The Intoxilyzer was tested on May 3, 2005, using a "Simulator Check Sample." The results of this

testing fell within the target value range as provided in title 177 and were valid until November 14. No repair work had been done on the Intoxilyzer during the period included in the log. Royer's breath test was administered on August 9 and was within the period covered by the maintenance and calibration checks.

[11] Royer argues the State must prove that the officer administering the breath test checked the maintenance record in order to meet foundational requirements for the admission of the breath test. This court has held that there are four foundational requirements which must be met before the State may offer into evidence the results of a breath test:

> "(1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements."

State v. Dail, 228 Neb. 653, 661, 424 N.W.2d 99, 104 (1988).

Royer argues that Hanson did not follow the regulations, because he did not verify whether any repairs had been performed by reviewing the repair records and because he did not review the report of the periodic 190-day check of the Intoxilyzer. Although there may be a dispute about whether Hanson reviewed the repair records, any failure to do so does not invalidate the test under these circumstances. Royer stipulated that there had been no repairs to the instrument during the relevant period of time. Evidence in the record establishes that the calibration of the instrument was correct and that it was in proper working order.

We review the district court's decision for errors appearing on the record and, thus, consider whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005). The lower courts' findings concerning administration of the breath test are supported by

competent evidence, and we find no clear error related to the admission of the breath test evidence.

Enhancement to Third-Offense DUI

Royer argues that his conviction was improperly enhanced to third-offense DUI because there is no record that one of his prior convictions was a final order. He claims that because the file stamp on the journal entry showing the conviction cannot be read, it is not a record of a final conviction.

We note first that this is an attempt to collaterally attack the 2002 DUI conviction. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006). Royer's attack on the previous conviction is not based on jurisdiction and, thus, cannot be allowed.

Even if this was not a collateral attack, the document in question contains a file stamp that states "APR 30 20." The final two numbers of the year are not legible. However, the transcript also includes a date stamp of April 30, 2002, on other documents: the entry indicating that Royer pled guilty to the charge, the written order for the DUI plea, and the sentencing order. In addition, a waiver of rights document was signed and dated by Royer on April 30, 2002.

Under Neb. Rev. Stat. § 60-6,197.02(1)(a) (Reissue 2004), a conviction may be counted as a prior conviction for purposes of enhancement if it is for a violation that was committed within the previous 12 years. The document that Royer is attempting to challenge here clearly indicates the first two digits of a year: "20." Since the complaint in the current case was filed in 2005, it is obvious that the charges were filed within 12 years of the previous conviction, which occurred at some time in the 21st century.

Royer argues that the missing digits in the date could have been "06," meaning that the conviction occurred on April 30, 2006, which was after the date of the incident leading to the charges here. We find no basis for this suggestion in the record. The citation upon which the conviction was based is dated February 6, 2002, and it directed Royer to appear in court on

March 4. He waived arraignment and entered a not guilty plea on March 13. Royer entered a guilty plea on April 30.

The other basis upon which a prior conviction can be challenged is the claim that the conviction was obtained in violation of the due process requirements of the state and federal Constitutions. See *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). At the time of that case, state law allowed a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel. *State v. Louthan, supra*. However, Royer has made no such argument. In addition, the record of the prior conviction includes a waiver of rights signed by Royer and his attorney. We need not address this issue further.

The county court found the prior convictions to be valid, noting that the April 30 date in question was on the same page as the April 30, 2002, sentencing. The district court determined that although the final two numbers of the year were not legible on the file stamp, there was no indication that the file stamp was placed on the record at any time other than April 30, 2002. The district court concluded that the file-stamp date was April 30, 2002, and that the prior conviction could be used to enhance Royer's sentence. We find no error on the record concerning the prior convictions.

CONCLUSION

In order to compel a driver to submit to field sobriety tests, a law enforcement officer need only have a reasonable, articulable suspicion that the driver is under the influence of alcohol or other drugs in violation of § 60-6,196. The requirements of title 177 were followed in this case, and the enhancement to third-offense DUI was proper. The judgment of the district court, which affirmed the judgment of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRIELLE GRESHAM, APPELLANT.

752 N.W.2d 571

Filed July 18, 2008. No. S-07-1043.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and 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. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Lesser-Included Offenses: Jury Instructions: Appeal and Error.** It is not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings.
5. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
6. **Lesser-Included Offenses.** The fact that two offenses are of the same class and carry the same range of penalties does not affect the determination of whether one is a lesser-included offense of the other.
7. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
8. **Jury Instructions.** An instruction directing the jury to continue its deliberations does not require reversal if it cannot be shown that it tended to coerce the jury.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns 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

Darrielle Gresham was convicted of attempted murder in the second degree, use of a deadly weapon to commit a felony, and possession of a defaced firearm. Gresham appeals his convictions and asserts that the district court for Douglas County erred in overruling his motions for a mistrial relating to closing argument and jury deliberations and in instructing the jury on attempted murder in the second degree as a lesser-included offense of attempted murder in the first degree. With regard to the latter, Gresham argues that attempted murder in the second degree cannot be a lesser-included offense of attempted murder in the first degree because both crimes are Class II felonies and are punishable by the same range of penalties. We reject Gresham's argument, and we affirm.

STATEMENT OF FACTS

On March 20, 2005, an Omaha police officer initiated a traffic stop of a vehicle in which Gresham was a passenger. When the vehicle eventually came to a stop, Gresham and another passenger got out of the vehicle and ran in different directions. The driver remained inside the vehicle. The officer who initiated the stop stayed with the vehicle but sent out a radio alert to other officers regarding the individuals who had fled from the vehicle.

Various officers in the area, including Officers Zachary Petrick and Frank Platt, responded to the alert. Petrick and Platt came upon Gresham, who was being pursued on foot by Officer Matt Chandler. Petrick noted that Gresham was carrying a gun. Chandler caught up to Gresham and grabbed him around the waist. As Chandler struggled with Gresham, Gresham fired a shot at Petrick who was standing approximately 10 feet away. The bullet Gresham fired entered Petrick's thigh and exited through his buttocks. Petrick returned a shot at Gresham, who fell to the ground as a result of either Petrick's shot or the struggle with Chandler. Chandler fell with Gresham. As the two continued their struggle on the ground, Gresham fired two shots toward Platt. With the assistance of other officers, Chandler eventually gained control of Gresham and handcuffed him.

Gresham was arrested and was hospitalized as a result of injuries from the shot fired by Petrick. Officers found the gun Gresham had used, and it was later determined that the gun's serial number had been scratched or rubbed off.

Gresham was charged with attempted murder in the first degree, use of a deadly weapon to commit a felony, and possession of a defaced firearm. At trial, the State presented witnesses who testified to the facts set forth above. Gresham testified in his defense. He stated that he had the gun because he had taken it from a man who had threatened him earlier. He ran from the traffic stop because he was on probation and he was scared that if he was found with the gun, his probation would be revoked. Gresham testified that when Chandler caught up to him, Gresham was going to give up, and that he took the gun out of his pocket to let Chandler know that he had it. Gresham denied that he intentionally fired any shots; he testified that he did not remember firing his gun, nor did he remember anything from the time he was handcuffed until he awoke in the hospital.

The trial court instructed the jury on attempted murder in the second degree as a lesser-included offense of attempted murder in the first degree. Gresham objected to the lesser-included offense instruction and argued that because both offenses were Class II felonies, attempted murder in the second degree could not be a *lesser*-included offense. The court gave the instruction over Gresham's objection.

During the rebuttal portion of the State's closing arguments, the prosecutor commented on the jury's duty to assess the credibility of witnesses and reasonable doubt. The prosecutor stated in part:

> The Judge will give you an instruction on beyond a reasonable doubt and what that means. And that last sentence is proof beyond a reasonable doubt. It does not mean proof beyond all possible doubt. What I said before that is that proof beyond a reasonable doubt is similar to situation[s] in more serious and important transactions in life. So you can have some doubt and still decide this case, but the more serious and important transactions in life, for example hiring somebody to be your CEO for your corporation,

> hiring somebody to take care of your kids on a European vacation. Would you trust that man?

Gresham objected to the prosecutor's statement and moved for a mistrial. The court overruled the motion.

The case was submitted to the jury in the late morning of June 26, 2007. The jury deliberated through that afternoon and the next day. Late in the afternoon of June 27, the jury sent a note to the court stating that it was at an impasse. The court questioned the jury and determined that the jury had reached a unanimous decision regarding the charge of possession of a defaced firearm but was at an impasse with respect to the two other charges. The court asked the jurors whether they thought additional further deliberations, following an overnight break, might result in a just and unanimous verdict. The foreperson replied, "I don't think it's probable, no." However, other jurors disagreed and thought that the issues could be resolved. The court stated that it was "getting a sense from more persons that it would be appropriate to give this further thought and further reflection and further deliberation." The court therefore stated that the jury should break for the evening and return for further deliberations the next morning.

After the court so informed the jury, one juror reminded the court that, as she had noted during voir dire, she was scheduled to leave on vacation the next day, June 28, 2007. The court asked whether she had airplane tickets; she responded that the trip would be by car. The court asked the jury how the votes were divided as to the two counts that were not unanimous. The foreperson responded that the vote was 11 to 1. The court sent the jurors to the jury room to discuss whether they would prefer to continue deliberations that evening or return the next day. While the jury was outside the courtroom, Gresham moved for a mistrial and declaration of a hung jury based on the 11 to 1 split and the possibility that the juror who was to leave for vacation the next day would be subject to "serious outside pressure" to cause an end to deliberations. The court overruled Gresham's motion. The court excused the jury after being informed that the jurors preferred to return to deliberations the next morning rather than continuing that evening.

The jury continued deliberations on the morning of June 28, 2007. At approximately 10:45 a.m., the jury informed the court that it had reached unanimous verdicts. Before reading the verdicts, the court asked the jury foreperson whether, in light of the prior day's events, there was any undue pressure placed on the one dissenting juror. The foreperson responded that there was not. The verdict form stated that the jury found Gresham guilty of attempted murder in the second degree, use of a deadly weapon to commit a felony, and possession of a defaced firearm. The court polled the jurors, and each juror responded that he or she agreed with the verdicts.

The court accepted the verdicts and entered judgment against Gresham. The court later sentenced Gresham to imprisonment for 20 to 40 years on the attempted murder conviction, for 10 to 20 years on the weapon conviction to be served consecutive to the sentence on the murder conviction, and for 20 to 60 months on the defaced firearm conviction to be served concurrent with the sentence for the attempted murder conviction.

Gresham appeals his convictions.

ASSIGNMENTS OF ERROR

Gresham asserts that the district court erred in (1) instructing on attempted murder in the second degree as a lesser-included offense of attempted murder in the first degree, (2) overruling his motion for a mistrial based on the prosecutor's comments during closing arguments, and (3) overruling his motion for a mistrial based on the jury's initial impasse on two counts.

STANDARDS OF REVIEW

[1,2] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (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.*

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

ANALYSIS

Attempted Murder in the Second Degree Is a Lesser-Included Offense of Attempted Murder in the First Degree Even Though the Two Crimes Are of the Same Class and Carry the Same Penalty.

Gresham asserts that the district court erred in instructing on the lesser-included offense of attempted murder in the second degree. He argues that attempted murder in the second degree cannot be a lesser-included offense of attempted murder in the first degree because both crimes are Class II felonies and carry the same penalty. We reject Gresham's argument.

[4] We have held that it is not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings. *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). See, also, *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003). We noted in *Pribil* that while a trial court is not required to sua sponte instruct on lesser-included offenses, the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded fair notice of the lesser-included offense. *Id*. We further noted that either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. *Id*.

[5] The rule we have adopted for determining whether an instruction on a lesser-included offense is warranted is as follows: A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Blair, supra*. We have followed this rule since we readopted the rule in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In *Williams*, we described the rule as a statutory elements approach in which a court initially "looks only to the elements of the criminal offense" to determine if it is a lesser-included offense of another. 243 Neb. at 965, 503 N.W.2d at 565. If it is so determined, then the court looks to the

evidence in the case to determine whether the evidence justifies an instruction.

Gresham concedes that in prior cases, we have held that attempted murder in the second degree is a lesser-included offense of attempted murder in the first degree. See, *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000); *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). Gresham asserts, however, that in those cases, we did not address the argument he advances here to the effect that a lesser-included offense must also be an offense that carries a lesser penalty.

Attempted murder in the second degree does not carry a lesser penalty than attempted murder in the first degree. Under Neb. Rev. Stat. § 28-201(4)(a) (Cum. Supp. 2006), criminal attempt is a Class II felony when the crime attempted is a Class I, Class IA, or Class IB felony. Murder in the first degree is either a Class I or Class IA felony, Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006), and murder in the second degree is a Class IB felony, Neb. Rev. Stat. § 28-304(2) (Reissue 1995). Therefore, attempted murder in the first degree and attempted murder in the second degree are both Class II felonies subject to the same range of penalties under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

However, the relative penalties are not a factor in determining whether one offense is lesser included. As noted above, the rule we have adopted for determining whether an offense is a lesser-included offense employs a statutory elements approach in which we look only to the elements of two criminal offenses to determine whether one cannot commit one of the offenses, the "greater offense," without simultaneously committing the other offense, the "lesser offense." Under this approach, the "lesser offense" is the one for which fewer—or in the lesser-included vernacular "less"—elements are required to be proved. The approach focuses on the elements of the offenses, and comparison of the penalties associated with the offenses is not a factor.

In support of his argument, Gresham refers us to *Rivers v. State*, 425 So. 2d 101 (Fla. App. 1982), which he characterizes as supporting the proposition that no offense is deemed to be a lesser offense if it carries the same penalty as the crime under

consideration. However, we agree with the greater weight of authority to the contrary. We note that in *State v. Habhab*, 209 N.W.2d 73 (Iowa 1973), the Iowa Supreme Court rejected an argument similar to Gresham's that an offense could not be a lesser-included offense if the penalty were not lesser. The court in *Habhab* noted that its "definition of included offenses . . . has never made reference to a requirement of a lesser penalty" and that its "previous holdings negative any inference the possible penalty for a criminal violation is in any way material to a determination of whether one offense is included within another." 209 N.W.2d at 74. See, also, *Mungo v. U.S.*, 772 A.2d 240 (D.C. 2001) (under statutory elements test, court compares elements of two offenses without regard to punishment provisions); *Nicholson v. State*, 656 P.2d 1209 (Alaska App. 1982) (in connection with lesser-included offense analysis, "lesser" refers to relation between elements of offenses, not relation between their penalties); *State v. Caudillo*, 124 Ariz. 410, 604 P.2d 1121 (1979) (terms "lesser" and "greater" refer to number of elements in respective crimes and offense may be lesser-included whether penalty is less or same).

For completeness, we note that in *Brown v. State*, 261 Ind. 169, 301 N.E.2d 189 (1973), the Indiana Supreme Court held that the penalty for a lesser-included offense is not required to be less than that for the greater offense, but the court also commented that both the Indiana Constitution and the Eighth Amendment to the U.S. Constitution proscribe a *greater* penalty for a lesser-included offense. In the present case, attempted murder in the first degree and attempted murder in the second degree carry the same penalty; therefore, our decision in this case applies to circumstances where a lesser-included offense carries the same penalty as the greater offense, and we need not address the circumstance where a lesser-included offense might carry a penalty greater than that of the greater offense.

[6] Under the statutory elements test adopted by this court, the relative penalties are not a factor in identifying lesser-included offenses, and we conclude that the fact that two offenses are of the same class and carry the same range of penalties does not affect the determination of whether one is a lesser-included offense of the other. In the present case, Gresham does not argue

that the lesser-included offense instruction was improper either because the offenses failed the statutory elements test or because the instruction was not supported by the evidence. His sole argument is that the instruction was improper because the offenses carried the same penalty. Having rejected this argument as a matter of law, we conclude that the district court did not err in instructing the jury on the lesser-included offense of attempted second degree murder.

District Court Did Not Abuse Its Discretion by Overruling Motion for Mistrial Based on the Prosecutor's Comments.

Gresham asserts that the district court erred in overruling his motion for mistrial based on the prosecutor's statements during closing argument. He argues that the prosecutor's rhetorical question regarding whether the jurors would trust "that man" as a babysitter for their children was a reference specifically aimed at Gresham and, as such, was improper and highly inflammatory. We conclude that the district court did not abuse its discretion by overruling Gresham's motion for a mistrial on the basis of these comments.

[7] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). In *Barfield*, we found prosecutors' remarks to be improper based in part on personal invective aimed at the defendant. We noted that prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial and that prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused. *Id.*

Taken in the context in which it was delivered, we do not find the challenged comment in this case to be improper or to have had a prejudicial effect on Gresham's right to a fair trial. Gresham characterizes the prosecutor's rhetorical question, "Would you trust that man?" as conveying a message to the

jurors on a personal level that Gresham was a danger to their children because he was not the type of man they could trust to care for their children. Viewing the question in context, however, we do not read it as a specific reference to Gresham or to any danger he might pose to the children of the jurors. Instead, the prosecutor was explaining the concept of reasonable doubt and how proof beyond a reasonable doubt was such that one would rely on it in the most serious and important transactions of life. As examples of such serious and important transactions of life, the prosecutor used "hiring somebody to be your CEO for your corporation" and "hiring somebody to take care of your kids on a European vacation." We read the prosecutor's immediately ensuing rhetorical question, "Would you trust that man?" to be a reference to the hypothetical "somebody" that one would hire and the level of trust one would place on such person. We do not read the comment as a specific reference to Gresham.

We disagree with Gresham's characterization of the prosecutor's statements, and we determine that such statements were not improper and therefore did not have a prejudicial effect on Gresham's right to a fair trial. We conclude that the district court did not abuse its discretion by overruling Gresham's motion for a mistrial based on such statements.

District Court Did Not Abuse Its Discretion by Overruling Motion for Mistrial Based on Jury's Initial Impasse on Two Counts.

Gresham asserts that the district court erred in overruling his motion for mistrial with respect to the jury's initial impasse on the counts of attempted murder and use of a deadly weapon to commit a felony. He argues that the jury was deadlocked and that there was a danger that the dissenting juror could be subject to outside pressure to change his or her vote. Having reviewed the record, we conclude that the district court did not abuse its discretion by overruling the motion for a mistrial based on the initial jury impasse.

Gresham likens this case to *State v. Garza*, 185 Neb. 445, 446, 176 N.W.2d 664, 665 (1970), in which the jury, after having deliberated for some time, reported that it was "hopelessly deadlocked" at 11 to 1. The trial court admonished the jury with

what this court characterized as an "*Allen* charge" based on the case of *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). The trial court in *Garza* told the jury

> "in view of the fact that the vote is now 11 to 1, . . . this case should be disposed of by your verdict, and it is certainly my earnest hope and, likewise, my firm belief that this can be accomplished. . . . I just can't be convinced that there is no possibility of your agreeing."

185 Neb. at 446, 176 N.W.2d at 665 (emphasis omitted). The court then ordered the jury "'to retire to your jury room'" and "'to earnestly renew your efforts to come to a verdict in this case.'" *Id.* (emphasis omitted). Forty-five minutes later, the jury arrived at a verdict of guilty.

In *Garza*, we noted that in *Potard v. State*, 140 Neb. 116, 299 N.W. 362 (1941), this court had rejected the giving of an *Allen* charge as prejudicial error because its purpose was to peremptorily direct an agreement. This court also found that the instruction in *Garza* constituted reversible error because "the court made it very clear that in its judgment a verdict could and should be arrived at" and the instruction was "tantamount to telling the dissenting juror that he was wrong." 185 Neb. at 449, 176 N.W.2d at 667. Gresham asserts that the district court in this case gave a similarly improper order to the jury.

We note that the facts of this case are significantly different from those in *Garza*. The jury in this case reported to the court that it was at an "impasse" rather than that it was deadlocked, and the jury sought guidance from the court. The court questioned the jury in an apparent attempt to determine whether there was a deadlock. The court asked the jurors whether they felt that after the approximately 11 to 12 hours during which they had deliberated, taking an overnight break and returning the next day for further deliberations could result in unanimous verdicts. Although the jury foreperson answered that it was not probable, other jurors disagreed and stated that they thought that the impasse could be resolved. The court indicated that it had the sense that more jurors thought further deliberation would be worthwhile, and the court therefore ordered the jury to separate for the evening and to return for further deliberations the next day.

[8] We determine that the district court's actions in this case did not constitute an improper *Allen* charge. The court did not pressure the jury to reach unanimous verdicts; instead, the court determined that the jurors themselves thought they could reach unanimous verdicts with further deliberation and it therefore instructed the jury to take an overnight break and to continue deliberations the next morning. An instruction directing the jury to continue its deliberations does not require reversal if it cannot be shown that it tended to coerce the jury. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). In this case, there is no indication that the instruction tended to coerce the jury.

Gresham further argues that a mistrial should have been granted because of possible outside pressure on the juror who needed to leave on a scheduled vacation the next day. At the time Gresham moved for a mistrial, there was no indication that outside pressure would influence the verdict. The court allowed the jury to determine for itself whether it preferred to continue deliberations that night or to return the next day, and there was no indication that the juror who needed to leave was in fact the dissenting juror or could unduly influence the dissenting juror. Furthermore, after unanimous verdicts were returned, the court asked the jury foreperson without objection whether any undue pressure had been placed on the dissenting juror, and the foreperson responded that there had not. The court also polled the jurors, and all jurors indicated their agreement with the verdicts.

There was no indication that undue pressure was exerted or that the court's instruction to continue deliberations coerced the jurors to reach unanimous verdicts. We therefore conclude that the district court did not abuse its discretion by overruling Gresham's motion for a mistrial based on the jury's initial inability to reach unanimous verdicts on two counts.

CONCLUSION

We conclude that the district court did not err in instructing the jury on attempted murder in the second degree as a lesser-included offense of attempted murder in the first degree, and we conclude that the district court did not abuse its discretion by

overruling Gresham's motions for mistrial based on the prosecutor's statements in closing and on the jury's initial impasse with regard to the verdicts on two of the charges. We therefore affirm Gresham's convictions.

AFFIRMED.

MICHAEL HOWARD MARCOVITZ, NOW KNOWN AS AARON CHAIM MARCOVITZ, APPELLEE, V. MARY PATRICIA ROGERS, NOW KNOWN AS MARY PATRICIA ROGERS-FARKAS, APPELLANT.

AARON CHAIM MARCOVITZ, APPELLEE, V. MARY PATRICIA ROGERS-FARKAS, APPELLANT.

752 N.W.2d 605

Filed July 25, 2008. Nos. S-06-800, S-07-414.

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. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Good cause for modifying or revoking an alimony order means a material and substantial change in circumstances and depends upon the circumstances of each case.
4. **Modification of Decree: Alimony: Good Cause.** Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
5. **Divorce: Property Settlement Agreements: Modification of Decree.** The parties to a marriage may enter into a written settlement agreement to settle disputes attendant upon separation of their marriage, including a dispute over modification of a previous decree.
6. ____: ____: ____. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree, it will not thereafter be vacated or modified as to such provisions, in the absence of fraud or gross inequity.
7. **Property Settlement Agreements.** Pursuant to Neb. Rev. Stat. § 42-366 (Reissue 2004), the court has an independent duty to evaluate the terms of an agreement and ensure that they are not unconscionable before incorporating them into a decree.

8. **Promissory Notes: Words and Phrases.** A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person.
9. **Actions: Promissory Notes: Reformation.** While an action on a promissory note is an action at law, reformation of a promissory note sounds in equity.
10. **Equity: Courts.** A court of equity will look to the substance of a transaction, rather than give heed to the mere form it may assume.

Petitions for further review from the Court of Appeals, CARLSON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Courts for Dodge and Douglas Counties, DARVID D. QUIST and J RUSSELL DERR, Judges. Judgment of Court of Appeals in No. S-06-800 affirmed. Judgment of Court of Appeals in No. S-07-414 reversed, and cause remanded with directions.

Edmond E. Talbot III, of Talbot & Truhlsen Law Offices, L.L.P., for appellant.

Peter C. Wegman, of Rembolt Ludtke, L.L.P., for appellee.

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

GERRARD, J.

The issue presented in these appeals is whether Aaron Chaim Marcovitz, formerly known as Michael Howard Marcovitz, can enforce an acceleration clause contained in a "promissory note" signed by his former wife, Mary Patricia Rogers-Farkas, formerly known as Mary Patricia Rogers (Rogers-Farkas). We conclude that the acceleration clause is unenforceable, because it is inconsistent with the parties' modified decree of dissolution.

BACKGROUND

The parties to these consolidated appeals have been to this court before. As relevant, in *Marcovitz v. Rogers*,[1] we affirmed the decree of dissolution entered by the Dodge County District Court, but modified it, ordering Rogers-Farkas to pay alimony of $2,000 per month for 10 years, to terminate upon Marcovitz' remarriage or the death of either party.

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[1] *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

As a result of the alimony award, Marcovitz obtained an alimony lien on the former marital residence. Rogers-Farkas was trying to sell the residence and asked Marcovitz to release the alimony lien. Marcovitz only agreed to do so in August 2005, in exchange for a "promissory note" in the amount of $174,000—approximately the total amount remaining on the alimony award. Rogers-Farkas agreed and signed the note.

Because the provisions of the note are the subject of this appeal, we describe them in some detail. In the note, Rogers-Farkas promised to pay Marcovitz "the principal sum of One Hundred and Seventy-four Thousand Dollars ($174,000[.]00)," plus interest. The note required repayment as follows:

> Principal and interest shall be payable at the Nebraska Child Support Payment Center, or such other place as the Note holder may designate, in consecutive monthly installments of Two Thousand Dollars ($2,000.00), on the 1st day of each month beginning September 1, 2005. Such monthly installments shall continue until the entire indebtedness evidenced by this Note is fully paid, except that any remaining indebtedness[,] if not sooner paid, shall be due and payable on November 30, 2012[.] *The indebtedness is pursuant to an Order of Spousal Support entered by the District Court of Dodge County*[.]
>
> If any monthly installment under this Note is not paid when due and remains unpaid after said due date, the entire principal amount outstanding and accrued interest thereon shall at once become due and payable at the option of the Note holder[.]

(Emphasis supplied.) And the note did not provide for termination of the obligation upon Marcovitz' remarriage.

Alleging that Rogers-Farkas had missed some payments, Marcovitz invoked the acceleration clause and filed an action on the note in Douglas County District Court, for $174,000 plus interest. Rogers-Farkas answered, alleging duress as an affirmative defense and asserting a counterclaim seeking reformation of the note to remove the acceleration clause. Marcovitz filed a motion for summary judgment, which the court granted, entering judgment for Marcovitz in the amount of $174,000, less any payments already received.

A little over a month later, Marcovitz remarried. Marcovitz sought garnishment in aid of execution on the judgment, and Rogers-Farkas moved to vacate the judgment, arguing in part that Marcovitz' remarriage was supposed to terminate alimony. The court overruled Rogers-Farkas' motion and granted summary judgment against Rogers-Farkas' counterclaim.

Rogers-Farkas appealed, but the Nebraska Court of Appeals concluded, in a memorandum opinion, that the promissory note was enforceable.[2] The Court of Appeals found no evidence of duress, noting that Marcovitz' demands had been lawful and that he had provided adequate consideration for the note. And the Court of Appeals found no fraud or inequitable conduct supporting reformation, or a mutual or unilateral mistake. The Court of Appeals did not discuss Rogers-Farkas' argument that the award should have been vacated or the note reformed because it conflicted with the decree of dissolution. The Court of Appeals affirmed the district court's judgment. We granted Rogers-Farkas' petition for further review and ordered the case to be submitted without argument.[3]

ASSIGNMENTS OF ERROR

Rogers-Farkas assigns, consolidated and restated, that the Court of Appeals erred in (1) concluding that the note was not the result of duress, (2) not finding evidence of mutual or unilateral mistake warranting reformation of the note, (3) not finding that summary judgment was precluded by Rogers-Farkas' counterclaim for fraud and reformation, and (4) not finding that the note was controlled by the decree of dissolution.

The action on the note, in Douglas County District Court, is on appeal in case No. S-07-414. Rogers-Farkas also assigns error to issues unrelated to the note, which were presented to the Court of Appeals in a consolidated appeal, case No. S-06-800. But Rogers-Farkas did not argue those issues in her

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[2] *Marcovitz v. Rogers*, Nos. A-06-800, A-07-414, 2008 WL 373168 (Neb. App. Feb. 12, 2008) (selected for posting to court Web site).

[3] See Neb. Ct. R. App. P. § 2-111(B)(1).

memorandum brief, and we do not consider them.[4] Because none of Rogers-Farkas' assigned and argued errors relate to case No. S-06-800, the judgment in that case will be affirmed.

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.[5] 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.[6]

ANALYSIS

We begin with Rogers-Farkas' argument that the note is unenforceable to the extent it conflicts with the decree of dissolution, because we find that argument to be dispositive of this appeal.

[3,4] When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable.[7] If one party wants to modify an alimony award, a proceeding to modify or revoke an order for alimony for good cause shall be commenced by filing a complaint to modify.[8] Good cause for modifying or revoking an alimony order means a material and substantial change in circumstances and depends upon the circumstances of each case.[9] Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree,

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[4] See, Neb. Ct. R. App. P. § 2-102(G); *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

[5] *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

[6] *Id.*

[7] Neb. Rev. Stat. § 42-365 (Reissue 2004).

[8] See *id.*

[9] *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.[10]

[5-7] The parties to a marriage may enter into a written settlement agreement to settle disputes attendant upon separation of their marriage, including a dispute over modification of a previous decree.[11] Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree, it will not thereafter be vacated or modified as to such provisions, in the absence of fraud or gross inequity.[12] But the key to that proposition is that the agreement be "approved by the court." Pursuant to § 42-366, the court has an independent duty to evaluate the terms of an agreement and ensure that they are not unconscionable before incorporating them into a decree.

[8] The error committed by the trial court and Court of Appeals in this case was treating the "promissory note" as if it was simply part of a contractual arrangement between the parties. A promissory note is "[a]n unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person."[13] While that literal definition may have been met, the only debt that Rogers-Farkas promised to pay was the alimony obligation that she already owed. Rogers-Farkas simply promised to pay what she was to pay under the decree, in the manner generally required for making alimony payments—except that, according to Marcovitz, the alimony could be accelerated and no longer terminated on Marcovitz' remarriage.

The note, however, was absolutely clear that the underlying obligation was found in the decree of dissolution: the "Order of Spousal Support entered by the District Court of Dodge County." The intent and effect of the note were not to create a debt, but,

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[10] *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[11] See, Neb. Rev. Stat. § 42-366 (Reissue 2004); *Bevins v. Gettman*, 13 Neb. App. 555, 697 N.W.2d 698 (2005).

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

[13] Black's Law Dictionary 1089 (8th ed. 2004).

instead, to modify the terms of the preexisting obligation created by the decree—without the approval of the court.

[9,10] While an action on a promissory note is an action at law,[14] reformation sounds in equity.[15] And a court of equity will look to the substance of a transaction, rather than give heed to the mere form it may assume.[16] In this case, while the form of the transaction was a promissory note, the substance of it was an impermissible attempt to modify a decree of dissolution without the approval of the court, and without satisfying the statutory requirements for such a modification.

In the absence of a *valid* modification of the decree, the terms for payment of Rogers-Farkas' alimony obligation—the indebtedness that is the basis for the purported note—are still contained in the decree, not the note. To the extent that the note purports to modify the terms of Rogers-Farkas' alimony obligation in a manner that conflicts with the decree, the decree controls instead of the note. The acceleration clause, in particular, would have been of dubious validity even *had* it been ordered by the court.[17] But it was not, and it is clearly unenforceable. The district court, and Court of Appeals, erred in concluding otherwise.

We note the suggestion in the record that Marcovitz has remarried and Rogers-Farkas' belief that her alimony obligation should be terminated as a result. That issue is not before us. The appeal in case No. S-06-800 was taken from the Dodge County District Court before any request to terminate alimony was made, and the appeal in case No. S-07-414 is from Marcovitz' attempt in Douglas County District Court to collect on the note. Thus, although our reasoning with respect to the acceleration clause may be relevant to Rogers-Farkas' argument about remarriage, in these appeals, we do not directly reach the issue presented by Marcovitz' remarriage.

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[14] See *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[15] See *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994).

[16] *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

[17] Cf. *Gibson v. Gibson*, 147 Neb. 991, 26 N.W.2d 6 (1947).

CONCLUSION

As previously noted, the judgment in case No. S-06-800 is affirmed. The judgment in case No. S-07-414 is reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the district court.

JUDGMENT IN NO. S-06-800 AFFIRMED.
JUDGMENT IN NO. S-07-414 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

JENNIE L. YOUNG AND THOMAS J. YOUNG, WIFE AND HUSBAND, APPELLEES, V. MIDWEST FAMILY MUTUAL INSURANCE COMPANY, APPELLANT.

753 N.W.2d 778

Filed July 25, 2008. No. S-07-364.

1. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.
2. ____: ____. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
6. **Actions: Insurance: Attorney Fees.** A successful pro se litigant in an action on an insurance policy is not entitled to recover an attorney fee under Neb. Rev. Stat. § 44-359 (Reissue 2004), even if the pro se litigant is a licensed attorney.
7. **Attorney Fees.** To determine proper and reasonable attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 2004), it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
8. **Insurance: Attorney Fees.** An attorney fee awarded under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 2004) must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and vacated in part, and in part affirmed as modified.

William E. Gast and Gene M. Eckel, of Gast & McClellan, for appellant.

Thomas J. Young for appellees.

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

STEPHAN, J.

This case, before us for the second time, arose from a disputed insurance claim by homeowners Jennie L. Young and Thomas J. Young. In *Young v. Midwest Fam. Mut. Ins. Co.*,[1] we held that settlement offers made by Midwest Family Mutual Insurance Company (Midwest) were not equivalent to offers to allow judgment and thus did not preclude an award of attorney fees to the Youngs under Neb. Rev. Stat. § 44-359 (Reissue 2004). On remand, the district court awarded the Youngs attorney fees and costs, and Midwest has appealed the award. The principal question before us in this appeal is whether an attorney who successfully represents himself in an action on an insurance policy is entitled to fees under § 44-359.

BACKGROUND

We incorporate the following summary of pertinent facts and procedural history from our prior opinion:

> Midwest issued a homeowner's insurance policy to the Youngs. In April 2001, the Youngs' home sustained hail damage. Although the parties differed greatly as to the damage, Midwest estimated damages of $790 and issued a check to the Youngs for $561.02 ($790 less a deductible). The Youngs, however, claimed damages of $27,500.
>
> After the Youngs sued Midwest for breach of contract, Midwest sent the Youngs several letters offering to settle

[1] *Young v. Midwest Fam. Mut. Ins. Co.*, 272 Neb. 385, 722 N.W.2d 13 (2006).

> the dispute. The first offer was termed as "an offer of $22,000 in full settlement of this claim"; the second was a "settlement offer in the amount of $2,000.00, in consideration for a complete and final release"; the third was "an offer in the amount of $3,000, in lieu of going back to trial"; and the fourth was a "final offer of settlement to [the Youngs] in the amount of $9,000." The Youngs refused all of the settlement offers, and the case proceeded to trial. A jury returned a $940 verdict for the Youngs.
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> The Youngs moved for attorney fees under § 44-359. The district court denied their request stating that [Neb. Rev. Stat.] § 25-901 [(Reissue 1995)] precluded an award of attorney fees because the Youngs failed to obtain a judgment for more than the offers made by Midwest.[2]

The Youngs appealed, and we held that Midwest's settlement offers were not equivalent to offers to allow judgment and thus did not preclude an award of attorney fees to the Youngs. We reversed, and remanded for further proceedings.

On remand, the Youngs submitted billing records for three individuals: Matthew L. McBride, Thomas, and Jennie. McBride served as the Youngs' attorney until May 12, 2004. His billing records included fees in the amount of $20,484, representing 170.7 hours billed at $120 per hour. Thomas, an attorney licensed to practice law in Nebraska, took over the Youngs' case after McBride withdrew, although Thomas apparently performed some legal services on the case while still represented by McBride. Thomas' billing records for the period of October 18, 2001, through November 15, 2004, totaled $19,845, representing 113.4 hours billed at $175 per hour. Jennie, a "freelance paralegal," submitted billing records in the amount of $1,504 representing 37.6 hours billed at $40 per hour. The Youngs also submitted two exhibits itemizing "taxable" and "non taxable" costs, which totaled $2,518.55 and $5,123.17, respectively.

The district court determined that the Youngs were entitled to an award of taxable costs in the amount of $2,518.55, nontaxable costs in the amount of $5,123.17, and "a reasonable

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[2] *Id.* at 386, 722 N.W.2d at 15.

attorneys fee in the sum of $25,000." The order did not specify how this amount was determined.

Midwest perfected a timely appeal, which we moved to our docket on our own motion.

ASSIGNMENTS OF ERROR

Midwest assigns, restated, that the district court erred in awarding (1) any attorney fees or paralegal fees for pro se legal services performed by the Youngs on their own behalf, (2) more than a nominal amount of attorney fees for services performed by McBride prior to his withdrawal from the case, and (3) costs.

STANDARD OF REVIEW

[1,2] A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.[3] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[4]

[3,4] Statutory interpretation presents a question of law.[5] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[6]

ANALYSIS

Youngs' Attorney and Paralegal Fees

The $25,000 attorney fee award in this case does not include an itemization of the amounts attributable to the efforts of McBride and the Youngs. However, inasmuch as the award exceeds the total amount reflected on billing statements which McBride submitted to the Youngs, we conclude that a portion of the award must be attributable to the attorney and paralegal fees submitted by the Youngs for time spent working on their own case.

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[3] See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[4] *Id.*; *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[5] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

[6] *Id.*

[5] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[7] Section 44-359 is a fee-shifting statute which permits a successful litigant to recover attorney fees as a part of the judgment in certain actions against insurance companies. The statute provides in pertinent part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.[8]

In *Dale Electronics, Inc. v. Federal Ins. Co.*,[9] we held that under § 44-359, "a successful litigant is entitled to receive a reasonable attorney's fee for in-house counsel actually engaged in the preparation and trial of the litigation to the same extent as outside counsel." However, we have not previously decided whether § 44-359 permits the recovery of an attorney fee by a pro se plaintiff who is a licensed attorney.

The U.S. Supreme Court addressed a similar issue in *Kay v. Ehrler*,[10] decided in 1991. Richard Kay, an attorney, successfully represented himself in a civil rights action challenging Kentucky's election statutes. He sought attorney fees under a federal statute[11] which permitted an award of an attorney fee to the prevailing party in federal civil rights litigation. Noting that pro se litigants who were not lawyers were not entitled to recover fees, the Supreme Court framed the issue as "whether a lawyer who represents himself should be treated like other *pro se* litigants or like a client who has had the benefit of the advice

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[7] *Eicher v. Mid America Fin. Invest. Corp., supra* note 4; *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

[8] § 44-359.

[9] *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 124, 286 N.W.2d 437, 443 (1979).

[10] *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991).

[11] See 42 U.S.C. § 1988(b) (2000).

and advocacy of an independent attorney."[12] The Court resolved the issue in the negative based upon three principles. First, as a textual matter, the Court concluded that the term "attorney" assumed an agency relationship and that "it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award" of attorney fees.[13] Second, the Court observed that the purpose of fee-shifting statutes was "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights."[14] Third, the Court noted that a rule which awards fees only to those litigants who have retained independent counsel ensures "the effective prosecution of meritorious claims."[15]

After the *Kay* decision, federal courts have denied attorney fees to pro se attorneys under a variety of fee-shifting statutes, including the Equal Access to Justice Act, the Freedom of Information Act, and the Individuals with Disabilities Education Act.[16] State courts have generally followed suit.[17] While post-*Kay* decisions have continued to emphasize the incentive of retaining independent counsel[18] and the agency

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[12] *Kay v. Ehrler, supra* note 10, 499 U.S. at 435.

[13] *Id.*, 499 U.S. at 436.

[14] *Id.*

[15] *Id.*, 499 U.S. at 437.

[16] See, e.g., *Woodside v. School Dist. of Philadelphia*, 248 F.3d 129 (3d Cir. 2001) (Individuals with Disabilities Education Act); *Kooritzky v. Herman*, 178 F.3d 1315 (D.C. Cir. 1999) (Equal Access to Justice Act); *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684 (2d Cir. 1998) (Title VII); *Burka v. U.S. Dept. of Health and Human Services*, 142 F.3d 1286 (D.C. Cir. 1998) (Freedom of Information Act); *S.E.C. v. Waterhouse*, 41 F.3d 805 (2d Cir. 1994) (Equal Access to Justice Act).

[17] See, e.g., *Omdahl v. West Iron County Bd. of Educ.*, 478 Mich. 423, 733 N.W.2d 380 (2007); *Kehoe v. Saltarelli*, 337 Ill. App. 3d 669, 786 N.E.2d 605, 272 Ill. Dec. 66 (2003); *Mix v. Tumanjan Development Corp.*, 102 Cal. App. 4th 1318, 126 Cal. Rptr. 2d 267 (2002); *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999).

[18] *S.N. ex rel. J.N. v. Pittsford Cent. School*, 448 F.3d 601 (2d Cir. 2006); *Woodside v. School Dist. of Philadelphia, supra* note 16; *Hawkins v. 1115 Legal Service Care, supra* note 16.

relationship between an attorney and a client,[19] some have also noted that pro se attorneys do not actually incur fees for which they might be compensated.[20]

[6] We join the courts which have adopted the reasoning of *Kay*. Allowing a pro se attorney litigant to recover fees while barring nonlawyer litigants from collecting fees would "create disparate treatment of pro se litigants on the basis of their occupations,"[21] and we decline to adopt such rule. We hold that a successful pro se litigant in an action on an insurance policy is not entitled to recover an attorney fee under § 44-359, even if the pro se litigant is a licensed attorney. Accordingly, the fee award in this case was erroneous to the extent that it included the attorney fees claimed by Thomas and the paralegal fees claimed by Jennie.

McBride Fee

[7] McBride's fees are the proper subject of a fee award under § 44-359, but the issue presented in this appeal goes to the amount of the award. To determine proper and reasonable attorney fees under § 44-359, it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar

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[19] *Omdahl v. West Iron County Bd. of Educ., supra* note 17; *Mix v. Tumanjan Development Corp., supra* note 17.

[20] *Anderson v. Wheeler*, 214 Or. App. 318, 164 P.3d 1194 (2007); *Omdahl v. West Iron County Bd. of Educ., supra* note 17; *Mix v. Tumanjan Development Corp., supra* note 17; *Hopkins v. Hopkins*, 343 S.C. 301, 540 S.E.2d 454 (2000); *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000); *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239 (Ariz. App. 1995); *Trope v. Katz*, 11 Cal. 4th 274, 902 P.2d 259, 45 Cal. Rptr. 2d 241 (1995); *Hamer v. Lentz*, 132 Ill. 2d 49, 547 N.E.2d 191 (1989).

[21] *Mix v. Tumanjan Development Corp., supra* note 17, 102 Cal. App. 4th at 1323, 126 Cal. Rptr. 2d at 271, citing *Trope v. Katz, supra* note 20.

for similar services.[22] There is no presumption of reasonableness placed on the amount offered by the party requesting fees.[23] We examine these factors as they bear upon the reasonableness of McBride's fee.

[8] This was an action on a homeowner's insurance policy to recover for alleged storm damage to a roof, flashing, gutters, skylight, and air-conditioning units. The Youngs originally claimed damages of "approximately $35,000.00." Midwest took the position that its liability under the policy was no more than $561.02. The record reflects that between January 7, 2002, and April 5, 2004, McBride devoted a total of 170.7 hours to the case and billed his time at the rate of $120 per hour for a total of $20,484. But the record does not show that all of this time was devoted to the action on the policy. An attorney fee awarded under the provisions of § 44-359 must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question.[24] During some of the time reflected on McBride's billing records, the Youngs were pursuing a second count alleging a claim for damages based upon the tort of bad faith. This claim was not an "action upon any type of insurance policy" within the meaning of § 44-359,[25] and in any event, it was resolved against the Youngs by an order of partial summary judgment. Some of McBride's billing entries refer specifically to the bad faith claim, but the record does not permit any precise determination of what services were devoted solely and specifically to the breach of contract claim.

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[22] See, *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

[23] *Koehler v. Farmers Alliance Mut. Ins. Co., supra* note 22.

[24] *National Am. Ins. Co. v. Continental Western Ins. Co., supra* note 22; *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982); *Dale Electronics, Inc. v. Federal Ins. Co., supra* note 9.

[25] See, *Kirchoff v. American Cas. Co.*, 997 F.2d 401 (8th Cir. 1993) (denying plaintiff's request for attorney fees based on bad faith claim after she prevailed on her breach of contract claim); *Parker v. Southern Farm Bureau Cas. Ins.*, 326 Ark. 1073, 935 S.W.2d 556 (1996) (affirming trial court's reduction of awarded attorney fees to account for work performed on bad faith claim).

Although the record does not include specific evidence regarding the skill required to properly conduct the case, we note from the record that this was a contested case involving discovery and utilization of expert witnesses and that it was tried to a jury. The first trial, in which McBride represented the Youngs, ended with a mistrial after the opening statement. The second trial, in which Thomas represented himself and Jennie after McBride had withdrawn, resulted in a verdict in favor of the Youngs in the amount of $940. This was approximately $379 more than Midwest had admitted it was obligated to pay under the policy. The record does not include evidence upon which we can assess the remaining factors applicable to the reasonableness of McBride's fees as reflected on his billing statement, including responsibility assumed, care and diligence exhibited, character and standing of the attorney, and the customary charges of the bar for similar services.

Based upon our review of the record, we conclude that the district court abused its discretion in awarding an attorney fee of $25,000. We conclude that no more than $5,000 can be justified for McBride's services, given the amount at issue, the marginally favorable result obtained, and the uncertainty regarding the amount of McBride's time which was reasonably necessary for the prosecution of the action on the policy, as opposed to the bad faith claim. Accordingly, we modify the attorney fee award by reducing it from $25,000 to $5,000.

Costs

Under Neb. Rev. Stat. § 25-1708 (Reissue 1995), "costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." The total of $2,518.55 in "taxable costs" awarded to the Youngs included a filing fee, subpoena and service fees, deposition fees, and witness fees. We find no error in the taxation of these court costs.

However, we conclude that the court erred in awarding $5,123.17 in "non taxable costs" to the Youngs. These appear to be expert witness fees and other items of expense incurred by

the Youngs which are not taxable as court costs and not recoverable under § 44-359.[26]

CONCLUSION

For the reasons discussed herein, we reverse and vacate the award of "non taxable costs" in the amount of $5,123.17. We affirm the taxation of court costs in the amount of $2,518.55, but reduce the attorney fee awarded under § 44-359 from $25,000 to $5,000, and affirm as modified.

REVERSED AND VACATED IN PART, AND IN PART AFFIRMED AS MODIFIED.

MCCORMACK, J., not participating.

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[26] See *Dale Electronics, Inc. v. Federal Ins. Co., supra* note 9.

GARY C. SCOFIELD AND JOYCE E. SCOFIELD, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF NATURAL RESOURCES, ET AL., APPELLEES.

753 N.W.2d 345

Filed July 25, 2008. No. S-07-511.

1. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
2. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Administrative Law: Statutes.** The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
5. ____: ____. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
6. **Ordinances: Presumptions: Proof.** In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.

7. **Legislature.** Delegation of legislative power is most commonly indicated where the subject to be regulated is highly technical or where regulation requires a course of continuous decision.
8. **Statutes: Legislature: Intent.** When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature.
9. **Constitutional Law: Due Process: Case Disapproved.** A party's allegation that a regulation "goes too far" should be analyzed under the Takings Clause of the Fifth Amendment and not under principles of substantive due process. To the extent *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), reads otherwise, it is disapproved.
10. **Due Process: Property: Public Health and Welfare.** To establish a substantive due process violation, the government's land-use regulation must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.
11. **Actions: Property.** Relief is possible from a regulatory taking which does not deprive the owner of all economic use of the property, based on such factors as the economic impact of the regulation on the claimant and the character of the governmental action.
12. **Property.** The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Allan J. Eurek & Associates, P.C., for appellants.

Jon Bruning, Attorney General, and Katherine J. Spohn for appellees.

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

GERRARD, J.

Gary C. Scofield and Joyce E. Scofield sued the Department of Natural Resources (DNR) and other state officials, alleging that in establishing the boundaries for a state game refuge, the DNR exceeded its statutory authority, deprived them of their constitutional right to due process, and effected a taking of their property without just compensation. The Scofields' complaint was dismissed for failure to state a claim upon which relief could be granted. On appeal, we must determine whether the

DNR's establishment of the refuge boundaries complied with the relevant statutes and whether the Scofields have stated any claims upon which relief may be granted.

STATEMENT OF FACTS

The Legislature, pursuant to Neb. Rev. Stat. § 37-707(2)(a) (Reissue 2004), gave the DNR the authority to promulgate rules and regulations establishing the boundaries for the state game refuges. Land that is designated as a state game refuge has certain restrictions placed upon it. These restrictions include, among other things, a prohibition on hunting game birds, game animals, or other birds or animals within the boundaries of the refuge.[1]

The DNR's determination of the boundaries is governed by the definitions in Neb. Rev. Stat. §§ 37-701 to 37-708 (Reissue 2004). Section 37-706(1) directs that a state game refuge be established on "[a]ll that portion of the State of Nebraska on the North Platte River and for one hundred ten yards back of the banks of said stream on the land side in Garden County, Nebraska." Section 37-706(3) provides that "the banks of said stream means the banks of the river which are the elevation of ground which confines the water at a level not exceeding flood stage."

On April 25, 2005, the DNR adopted the "Rules Relating to Boundary of State Game Refuge—Garden County, Nebraska," which rules are codified as title 459, chapter 1, of the Nebraska Administrative Code (regulations). These regulations determined the boundaries of the Garden County game refuge. As relevant to this case, the regulations used the Midland-Overland Canal (Canal) to establish a part of the boundary.

The Scofields, residents of Keith County, filed a complaint in the Lancaster County District Court against the DNR and various other state officials (hereinafter collectively the DNR). They allege that both the North Platte River and the Canal pass through property they own in Garden County. They allege that the "Canal is an irrigation ditch which historically has been privately and regularly maintained as a ditch for the delivery

[1] See Neb. Rev. Stat. § 37-708(1) (Reissue 2004).

of irrigation water" and "is not a channel of the North Platte River," nor do its banks "constitute the banks of the North Platte River." The Scofields further allege that by the DNR's using the banks of the Canal to establish the boundary, approximately 53 acres of accretion ground on their property has been designated as part of the Garden County refuge that would not have been had the bank of the North Platte River been used as the boundary.

Given these factual allegations, the Scofields set forth five claims for relief that can be consolidated into three. First, the Scofields assert that the regulations, to the extent they use the Canal to establish the boundary for the refuge, should be declared invalid because the regulations were adopted in violation of the Nebraska and federal Constitutions and exceeded the DNR's statutory authority. With regard to their first claim for relief, the Scofields also allege that the use of the Canal to establish a boundary for the refuge is "contrary to prior legal precedent," in particular, *U.S. v. Wheeler*,[2] an opinion of the U.S. District Court for the District of Nebraska.

Second, the Scofields assert that under the Nebraska and federal Constitutions, their due process rights have been violated. Specifically, they allege that the regulations "are so egregious and irrational as to exceed standards of inadvertence and mere errors of law, and do not substantially advance a legitimate state purpose" and therefore "constitute a deprivation of [their] due process rights."

Third, the Scofields claim that the regulations resulted in an unlawful taking of their property without just compensation under the Nebraska and federal Constitutions. Regarding this claim, the Scofields allege that the regulations "have resulted in substantial damages." They further allege that the regulations have "significantly denied [them] their enjoyment and beneficial (or economically viable) use of a portion of [their] [p]roperty," have "precluded the viability and use of the property for reasonable hunting purposes," have "deprived [them] of recreational income," and have "resulted in a diminishment of the fair market value of such property."

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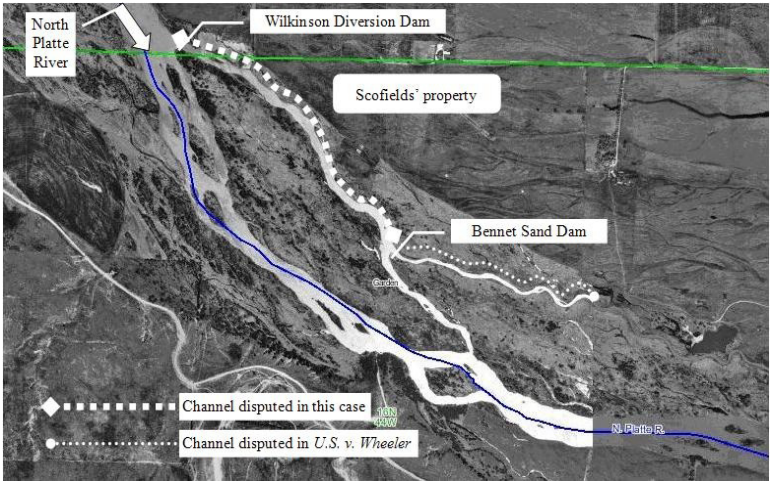
[2] *U.S. v. Wheeler*, 44 F. Supp. 2d 1030 (D. Neb. 1999).

ADDITIONAL INFORMATION REGARDING CANAL

In their brief, the Scofields clarify that the Canal at issue in this case begins at the point where the Wilkinson Diversion Dam diverts water from the North Platte River into the Canal. The Canal carries the water downstream until it reaches the Bennet Sand Dam. The Bennet Sand Dam then diverts some of the water from the Canal into a separate irrigation channel, while the water that was not diverted remains in the Canal and returns to the North Platte River. The Scofields' property is located between the Wilkinson Diversion Dam and the Bennet Sand Dam. For the reader's assistance, we have prepared a diagram depicting the North Platte River, the Scofields' property, and other features relevant to this appeal. The diagram is for illustrative purposes only and does not purport to be to scale.



As previously noted, the Scofields, in their complaint, referenced the case of *U.S. v. Wheeler*,[3] which, like the present case, involved a question relating to the location of the boundaries of the Garden County refuge. However, although dealing with the same general area, the specific boundary at issue in *Wheeler* is not the same section of the Canal that is at issue in the present case. The question in *Wheeler* involved the boundary along

[3] *Wheeler, supra* note 2.

what the *Wheeler* court termed the "disputed channel."[4] The disputed channel in *Wheeler* was the separate irrigation channel that is formed when some of the water from the Canal is diverted by the Bennet Sand Dam. And, as will be explained below, the legal definition of the refuge's boundary has been amended since *Wheeler*. But while the boundary dispute in *Wheeler* was different from the one at issue here, the *Wheeler* court's description of the area provides some helpful context for the current dispute.

As the *Wheeler* court explained, in the relevant area, the North Platte River generally flows south and east. The river has various channels, and it has a sandy bottom. The location of the numerous banks of the river change over time. New river channels are constantly being made by the course of the river, and old channels are filled by sediment deposits. When that occurs, the old channel no longer carries river water.

Several irrigation companies divert water from the river, including the Midland-Overland irrigation company. The water ran into the "disputed channel" in *Wheeler* due to the obstruction caused by the Bennet Sand Dam. However, not all the water in the Canal is diverted by the Bennet Sand Dam. The Canal and the remaining water continue to the south and east at the Bennet Sand Dam, while the "disputed channel" runs in a more easterly direction. In the fall, the Bennet Sand Dam is breached by the Midland-Overland irrigation company. Most of the water then flows in the Canal as opposed to flowing into the disputed channel.

The waterway at issue in this case is the portion of the Canal upstream from the Bennet Sand Dam. In short, the water flowing through the waterway disputed in this case is diverted from the river at the Wilkinson Diversion Dam, through the Canal past the Scofields' property, and then to the Bennet Sand Dam, where it either is diverted into the "disputed channel" discussed in the *Wheeler* case, or stays in the Canal and returns to the river.

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[4] *Id.* at 1032.

District Court's Decision

In response to the Scofields' complaint, the DNR filed a motion to dismiss, claiming that the Scofields' complaint failed to state a claim upon which relief could be granted.[5] The district court granted the DNR's motion. The court disagreed with the Scofields' claim that the use of the Canal to establish the boundary for the refuge was contrary to the DNR's statutory authority. The court explained that it had already determined in a consolidated order in two other cases that the DNR had "properly utilized the statutory definitions detailed in Neb. Rev. Stat. §37-706 in determining the boundaries of the Garden County Refuge."

The court then pointed to the language of the consolidated order in which it had held that

> "the Legislature gave the authority to the DNR to create the boundaries through the use of maps and global positioning technology. In accordance with Neb. Rev. Stat. §37-707(2)(a), the DNR promulgated boundaries of the Garden County Refuge 'based' on the definitions of §37-706. The DNR's adoption of [the Garden County Regulations] was based on the plain and ordinary reading of §37-706 and the DNR was acting with constitutional authority granted by the Legislature."

The court concluded that nothing in the DNR's determination was contrary to the statutory definition of the Garden County refuge found in § 37-706 or the authority granted to the DNR in § 37-707(2).

The district court also dismissed the Scofields' claims that the regulations violated their substantive due process rights and constituted an unlawful taking of their property without just compensation. In so doing, the court cited *Bauer v. State Game, Forestation and Parks Commission*[6] and explained that the Scofields have no property right in the wildlife that enters their land. Accordingly, the court determined that because the Scofields do not have a right to the wildlife on their property,

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[5] See Neb. Ct. R. Pldg. § 6-1112(b)(6).

[6] *Bauer v. State Game, Forestation and Parks Commission*, 138 Neb. 436, 293 N.W. 282 (1940).

"the prohibition of hunting on their property does not result in a Due Process Clause violation," nor does it result in an unconstitutional taking. Thus, all of the Scofields' claims for relief were dismissed, and the Scofields appealed.

ASSIGNMENTS OF ERROR

The Scofields assert, summarized, restated, and renumbered, that the district court erred in (1) finding that the regulations were valid under Neb. Rev. Stat. §§ 37-708.01 (Reissue 2004) and 84-911(2) (Reissue 1999), (2) dismissing their substantive due process claims, (3) dismissing their claims that the regulations constituted an unlawful taking, and (4) giving preclusive effect to factual determinations made by the court in two consolidated cases, both previously dismissed on the State's motion for summary judgment.

STANDARD OF REVIEW

[1,2] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.[7] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[8]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[9]

ANALYSIS

Regulations Establishing Boundary Are Valid

The Scofields contend that the DNR exceeded its statutory authority in promulgating the regulations that utilized the Canal to establish the boundary for the refuge, and therefore, the regulations should be declared invalid. The DNR disagrees, arguing that the Legislature expressly gave it the authority to set the boundary and that it has acted within its statutory authority.

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[7] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[8] *Id.*

[9] *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008).

The Legislature has given the DNR the authority to determine the boundaries of the state game refuges, within broad parameters set forth in the statutes.[10] The parameters for the Garden County refuge are "[a]ll that portion of the State of Nebraska on the North Platte River and for one hundred ten yards back of the banks of said stream on the land side in Garden County, Nebraska."[11] But the Legislature's sole guidance to the DNR regarding the "banks" of the North Platte River is that they are "the banks of the river which are the elevation of ground which confines the water at a level not exceeding flood stage."[12] The parties' difference of opinion regarding the DNR's establishment of the Canal as part of the refuge boundary is explained by the fact that the Legislature did not expressly instruct the DNR on whether the "banks of the river" should include man-made waterways.

The legislative history of § 37-706 suggests that this omission was intentional. Between 1965 and 2004, the refuge's boundary had specified that "except for the repair for existing alterations, future alterations in the banks by the damming of [the North Platte River] shall not be recognized as effecting legal changes of such refuge boundary."[13] 2004 Neb. Laws, L.B. 826, was introduced because the refuge boundary was "most in need of clarification since litigation surrounding the refuge has been abundant in the past few years."[14]

As originally proposed, L.B. 826 would have defined the "banks of the river" as "the elevation of ground which confines the water in its natural course."[15] But as the introducer of the bill explained:

> The real issue that we have in western Nebraska, more so than eastern Nebraska, is that whenever you look at the

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[10] See § 37-707(2)(a).

[11] See § 37-706(1).

[12] § 37-706(3).

[13] See § 37-706(1) (Cum. Supp. 2002).

[14] Introducer's Statement of Intent, L.B. 826, Committee on Natural Resources, 98th Leg., 2d Sess. (Feb. 11, 2004). See, e.g., *Wheeler, supra* note 2.

[15] Explanation of L.B. 826, Committee on Natural Resources.

> flow of rivers or streams through western Nebraska . . . like in the North Platte River, that channel, it's more of a braided stream. It's not channelized like you would have in eastern Nebraska.[16]

And as a representative of the Attorney General's office explained, in describing the litigation that prompted the bill, the law provided that man-made changes after 1965 had to be excluded, "but how can you now 30 years later determine what course the river would have taken if you didn't have man-made intervention?"[17]

The Attorney General's representative explained that in order to have effective legal enforcement of the refuge boundaries, it would be helpful to "move the setting of the boundary into a rule-making process in which the [DNR] would set those boundaries."[18] Therefore, the representative recommended that the language referring to "natural course" be removed because it was not enforceable.[19] Instead, the boundary would be determined by the DNR, and "if that encompasses some of the man-made intervention, then so be it."[20] And based on that testimony, the bill was amended to enact § 37-706 (Reissue 2004) in substantially its current form.[21] In short, the purpose of the amendment, and of the amended bill, was to "give the authority to the [DNR] to determine the banks of the river" without specifying whether they included man-made waterways.[22]

[4-7] It is a well-established principle that the Legislature may delegate to an administrative agency the power to make

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[16] Committee on Natural Resources Hearing, L.B. 826, 98th Leg., 2d Sess. 27 (Feb. 11, 2004).

[17] *Id.* at 38.

[18] *Id.* at 40.

[19] *Id.* at 42.

[20] *Id.*

[21] See Amend. 2606, L.B. 826, Committee on Natural Resources, 98th Leg., 2d Sess. (Feb. 12, 2004).

[22] Floor Debate, L.B. 826, Committee on Natural Resources, 98th Leg., 2d Sess. 11348-49 (Mar. 11, 2004).

rules and regulations to implement the policy of a statute.[23] An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.[24] But in considering the validity of regulations, we generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.[25] And in particular, we have said that delegation of legislative power is most commonly indicated where the subject to be regulated is highly technical or where regulation requires a course of continuous decision.[26]

[8] Section 37-706 is silent on whether man-made waterways, as the Canal is alleged to be, should be included in the "banks of the river." But when a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature.[27] Here, when read in context, it is evident that the Legislature did not intend § 37-706 to either include or exclude man-made waterways from the "banks of the river." Instead, the Legislature intended to delegate to the DNR the responsibility for determining whether any particular waterway should be considered part of the banks of the river.

For this reason, we reject the Scofields' claim that the DNR exceeded its statutory authority in using the Canal as part of the refuge boundaries. While the definition of the "banks" of the North Platte River set forth in § 37-706(3) does not necessarily include man-made waterways, it does not exclude them either. Instead, the Legislature has entrusted the DNR with the authority to make those determinations. And there is no allegation

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[23] *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

[24] *Id.*

[25] See *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

[26] See *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006).

[27] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

in the Scofields' complaint that the Legislature's delegation of authority was unlawful.

To be sure, the DNR's authority to establish the boundaries of the state game refuges is not unlimited. The Legislature has provided reasonable limitations and standards to the DNR for carrying out its delegated duties,[28] and the DNR must act within them. And by concluding that the regulations in the present case are valid, we do not foreclose the possibility that under other circumstances, the DNR's determination of a particular boundary may exceed its statutory authority. But the complicated history and geography of the waterway at issue in this case demonstrate precisely why the Legislature found itself ill equipped to establish a one-size-fits-all definition of the boundary of the refuge. This court is at least equally ill suited to make such a determination. Instead, § 37-706 allows the DNR to decide such matters, as the administrative agency best prepared to do so.

And in the present case, the DNR's adoption of the regulations establishing the Canal as the boundary for the refuge was a reasonable exercise of the DNR's authority as granted by the statute. As explained in *Wheeler*,[29] which the Scofields relied upon in their complaint,[30] water from the North Platte River flows through the Canal and back into the main channel of the river. And more importantly, regardless of whether the Canal was man-made or is maintained, the Scofields do not allege any facts that would carry their burden of showing that the DNR acted unreasonably in concluding that the Canal should now be considered part of the banks of the North Platte River for these purposes.

The DNR's official rulemaking record[31] provides some context for the DNR's decision to use the Canal to establish the refuge boundary. The DNR was presented with substantial

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[28] See *Schumacher, supra* note 26.

[29] *Wheeler, supra* note 2.

[30] See *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006) (court may judicially notice matters of public record without converting motion to dismiss into motion for summary judgment).

[31] See, Neb. Rev. Stat. § 84-906.01 (Cum. Supp. 2006); *DLH, Inc., supra* note 23 (Gerrard, J., concurring; Hendry, C.J., and Connolly, J., join).

evidence suggesting that the Canal was not a "natural" part of the river, such that the Canal would run dry if a man-made impediment, the Wilkerson Diversion Dam, was not maintained each irrigation season.[32] But the DNR recognized, correctly, that L.B. 826 "deleted a requirement in prior law that prohibited the consideration of man-made alterations as affecting legal changes or refuge boundaries."[33] The head of the DNR's survey division explained the lengthy and detailed process used by the DNR to establish the refuge boundaries. He described the use of manned surveys and aerial photographs "to make sure that the river geometry had not changed significantly" in a 10-year period.[34] The riverbank locations derived from aerial photographs were reviewed by DNR field office personnel and "were determined to be consistent with near, bank-full river conditions."[35] And those determinations were also compared to National Weather Service information to confirm that they reflected water levels "not exceeding flood stage."[36]

The process described in the official rulemaking record reflects a reasonable implementation of the standard established by § 37-706(3). The refuge was created "[f]or the better protection of birds and the establishment of breeding places therefor . . . ."[37] Wild birds are, presumably, not concerned with whether a waterway is maintained by human intervention. Given the purpose of the refuge, the "natural" course of the river is less important than the *actual* course of the river, regardless of the reason it follows that course. And the DNR's survey personnel gathered data and engaged in a rigorous process of analysis to determine where the actual course of the river was located, over the 10-year period preceding the establishment of the disputed

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[32] See Public Hearing, Department of Natural Resources, "In the Matter of the Proposed New Rules and Regulations Related to the Boundary of the Garden County State Game Refuge to Be Included in Title 459 of the Nebraska Administrative Code" (Feb. 10, 2005).

[33] *Id.*, vol. I at 5.

[34] *Id.* at 6.

[35] *Id.*

[36] *Id.* at 7.

[37] § 37-706(1).

boundary. In short, the official rulemaking record reflects that the DNR exercised the authority delegated to it in a manner consistent with the controlling statutes and the purpose of those statutes.

The Scofields' complaint does not allege facts that, if proved, would be sufficient to carry their burden of showing that the DNR acted unreasonably, or outside the authority delegated to it by the Legislature, when it used the Canal to establish the boundary of the refuge. Accordingly, the district court did not err in dismissing the Scofields' first claim for relief.

Substantive Due Process Claims

The Scofields also contend that the district court erred in dismissing their claim that the DNR's decision violated their substantive due process rights under the federal and Nebraska Constitutions.

The federal and Nebraska Constitutions contain similar due process language, and both provide that no person shall be deprived of life, liberty, or property without due process of law.[38] Because the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution, we apply the same analysis to the Scofields' state and federal constitutional claims.[39]

The Scofields first claim that their substantive due process rights have been violated because the regulations at issue "go too far," thus destroying the value of their property to such an extent that the regulations have the same effect as a taking by eminent domain. In presenting this claim, the Scofields are apparently relying on language found in this court's decision in *Whitehead Oil Co. v. City of Lincoln*.[40] In *Whitehead Oil Co.*, we cited the 11th Circuit case of *Eide v. Sarasota County*,[41] which identified various types of challenges a landowner could bring against the State. The 11th Circuit in *Eide* characterized one

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[38] U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3.

[39] See *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

[40] *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

[41] *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

of these challenges as a "due process takings" claim,[42] which apparently is what the Scofields are asserting here. The court in *Eide* explained that this type of claim can be brought by the plaintiff when "the application of the regulation goes so far and destroys the value of his or her property to such an extent that it has the same effect as a taking by eminent domain."[43]

However, after our decision in *Whitehead Oil Co.*, and approximately 7 years after deciding *Eide*, the 11th Circuit, in *Villas of Lake Jackson, Ltd. v. Leon County*,[44] concluded that two U.S. Supreme Court cases, *First Lutheran Church v. Los Angeles County*[45] and *Lucas v. South Carolina Coastal Council*,[46] refuted the notion of due process as an independent ground for a takings claim. The 11th Circuit concluded that those U.S. Supreme Court cases, when read together, "firmly place all the constitutional constraints on regulatory takings recognized by this Court under the Takings Clause alone."[47] The court definitively stated, "There is no independent 'substantive due process taking' cause of action. The only substantive due process claim is for arbitrary and capricious conduct."[48] Stated differently, the court determined that the only available substantive due process claim in this context is one that alleges that the regulation is arbitrary and capricious.

[9] We agree with the 11th Circuit's analysis and conclusion in this regard. Accordingly, we now conclude that when a party alleges that a regulation "goes too far," as the Scofields have done here, such a claim should be analyzed under the Takings Clause of the Fifth Amendment and not under principles of substantive due process. To the extent *Whitehead Oil Co.* can be

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[42] *Id.* at 720.

[43] *Id.* at 721.

[44] *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997).

[45] *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[46] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[47] *Villas of Lake Jackson, Ltd., supra* note 44, 121 F.3d at 613.

[48] *Id.* at 612.

read as creating a "due process takings" claim, it is disapproved. Accordingly, the district court properly dismissed the Scofields' claim that their substantive due process rights were violated because the regulations "go too far."

[10] The Scofields also allege that their substantive due process rights have been violated because the regulations, insofar as they use the Canal to establish the boundary for the refuge, are arbitrary, capricious, and not based on any legitimate state interest. To establish a substantive due process violation, the government's land-use regulation must be "'"clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."'"[49]

Because the Scofields' substantive due process claim was dismissed for failure to state a claim, the key inquiry in our analysis is simply whether the facts, as pled in the Scofields' complaint, sufficiently allege an arbitrary and capricious act. The Scofields argue that they have met this standard. In particular, the Scofields point to their complaint wherein they allege that the regulations, "to the extent they utilize the shoreline banks of the [Canal] to establish the boundaries of the . . . Refuge, are arbitrary and capricious, are so egregious and irrational as to exceed standards of inadvertence and mere errors of law, and do not substantially advance a legitimate state purpose."

But this assertion by the Scofields is merely a legal conclusion, and we are free to ignore sweeping legal conclusions that are cast in the form of factual allegations.[50] More to the point, as already discussed above, the regulations using the Canal to establish the refuge boundary are consistent with the applicable statutory requirements.

Because we have already determined that the regulations using the Canal to establish the refuge boundary are consistent with the applicable statutes, and because the Scofields do not take issue with the statutes themselves, the Scofields cannot prove

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[49] *Whitehead Oil Co., supra* note 40, 245 Neb. at 688, 515 N.W.2d at 408, quoting *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). See, also, *Villas of Lake Jackson, Ltd., supra* note 44.

[50] See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

a set of facts in support of their substantive due process claims that would entitle them to relief. Therefore, the district court did not err in dismissing their substantive due process claim.

Unlawful Taking Without Just Compensation

The Scofields next argue that the district court erred in dismissing their claim that the regulations effected an unlawful taking of their property without just compensation in violation of the Nebraska and U.S. Constitutions.

The Nebraska Constitution provides that the "property of no person shall be taken or damaged for public use without just compensation."[51] The 5th Amendment to the federal Constitution, made applicable to the states through the 14th Amendment, provides: "[N]or shall private property be taken for public use, without just compensation."[52] Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking.[53] We have noted, however, that notwithstanding the difference between the federal and state Constitutions, we have analyzed the state constitutional issue of whether there has been a regulatory taking or damage for a public use by treating federal constitutional case law and our state constitutional case law as coterminous.[54]

The U.S. Supreme Court in *Lingle v. Chevron U.S.A. Inc.*[55] clarified the law surrounding regulatory takings claims and provided a framework under which such claims are to be addressed. The Court identified two types of regulatory actions that constitute categorical or per se takings: "First, where government requires an owner to suffer a permanent physical invasion of her

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[51] Neb. Const. art. I, § 21.

[52] U.S. Const. amend. V. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[53] *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

[54] *Id.*

[55] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

property—however minor—it must provide just compensation."[56] Compensation is required for physical takings "however minimal the economic costs [they] entail[]," because they "eviscerate[] the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."[57] The "second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property."[58] The complete elimination of a property's value is the determinative factor in this category because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.[59]

[11] The Court in *Lingle* stated that outside these two relatively narrow categories, and the special context of land-use exactions, regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City* (*Penn Central*).[60] Thus, under a *Penn Central* inquiry, relief is possible from a regulatory taking which does not deprive the owner of all economic use of the property. The standards set forth in *Penn Central* are designed to allow careful examination and weighing of all relevant circumstances.[61] The Court in *Lingle* explained that the "[p]rimary" *Penn Central* factors included "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'"[62] Another relevant factor in discerning whether a taking has occurred is the "'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the

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[56] *Id.* at 538. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

[57] *Lingle, supra* note 55, 544 U.S. at 539.

[58] *Id.*, 544 U.S. at 538 (quoting *Lucas, supra* note 46).

[59] *Lingle, supra* note 55.

[60] *Penn Central, supra* note 52.

[61] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[62] *Lingle, supra* note 55, 544 U.S. at 538-39.

benefits and burdens of economic life to promote the common good.'"[63] The *Penn Central* analysis turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[64]

In the present case, the Scofields do not allege that the DNR has effected any permanent physical invasion of their property. Nor do they allege that all economically beneficial use of their property has been taken as a result of the regulations at issue. Thus, in order for their takings claims to survive the DNR's motion to dismiss, they must have sufficiently alleged in their complaint that, despite neither permanent physical invasion of their property nor a complete deprivation of all the economically beneficial use of their property, they are nevertheless entitled to compensation based upon the factors discussed in *Penn Central*. In light of the allegations presented in the Scofields' complaint, and because we must accept as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom,[65] we conclude that the Scofields have, at least, stated a claim under the *Penn Central* factors.

The district court, in granting the DNR's motion to dismiss, found that because the Scofields do not have property rights in wild game on their land, the prohibition on hunting as a result of their land's being designated as a refuge did not constitute an unconstitutional taking. The court was correct in that "there is no property right generally in wild game, for the ownership therein is lodged in the state."[66] However, the court incorrectly construed the allegations raised in the Scofields' complaint. As noted by the Scofields in their brief, "it is not the right in the wild game or the right to hunt"[67] for which they are seeking compensation. Rather, they are seeking compensation for the

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[63] *Id.*, 544 U.S. at 539.

[64] *Lingle, supra* note 55.

[65] See *Kanne v. Visa U.S.A.*, 272 Neb. 489, 723 N.W.2d 293 (2006).

[66] *Bauer, supra* note 6, 138 Neb. at 443, 293 N.W. at 285.

[67] Brief for appellants at 29.

deprivation of their "right to make economically viable use of their property."[68]

[12] In this regard, we have held that "'[t]he right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law.'"[69] And in their complaint, the Scofields alleged, among other things, that the regulations have "significantly denied [them] their enjoyment and beneficial (or economically viable) use of a portion of [their] [p]roperty." Furthermore, the Scofields claimed that the regulations have "deprived [them] of recreational income" and have "resulted in a diminishment of the fair market value of such property."

The question at this point is not whether the Scofields will be able to prove these allegations sufficiently to establish a taking, as we do not test the claim's substantive merits under § 6-1112(b)(6). Assuming that these allegations are true, and construing them in the light most favorable to the Scofields, we find that the Scofields have stated a claim for relief under a *Penn Central* theory of recovery.

District Court's Reliance on Prior Cases

In their final assignment of error, the Scofields argue that the district court, in dismissing their complaint, erred in relying upon factual findings that the court had made in a consolidated opinion of two prior cases. On this note, the Scofields claim that the court's prior decisions "should not have been used to collaterally estop [them] from litigating any of [the] issues or claims raised in this case."[70]

The Scofields' argument is without merit. In granting the DNR's motion to dismiss, the court did not apply principles of collateral estoppel, nor did the court improperly rely upon any factual findings that it had made in a separate case. Rather, as we read the court's opinion, by referencing language from a prior decision, the court was simply iterating *legal* conclusions that

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[68] *Id.* (emphasis omitted).

[69] *State v. Champoux*, 252 Neb. 769, 778, 566 N.W.2d 763, 769 (1997).

[70] Brief for appellants at 33.

it had previously reached. The court's decision explained and quoted its prior reasoning and conclusions. And in the court's view, the legal reasoning used to reach that conclusion was equally applicable to the Scofields' case.

Simply stated, the district court was explaining its legal basis for reaching its decision in the present case by applying the same legal reasoning it had used in a prior decision, and citing that decision. This was, as a practical matter, no different from our citation to previous decisions in this opinion, where those decisions contain reasoning that is helpful to our analysis of this case. In other words, we disagree with the Scofields' interpretation of the district court's decision and do not find that the district court erred in citing one of its own decisions.

And in any event, as is evident from the above discussion, we have analyzed each of the Scofields' claims for relief and have reached our own conclusions independently of any decision made by the district court. Accordingly, this assignment of error is without merit.

CONCLUSION

While the district court correctly concluded that the DNR did not exceed its authority in using the Canal to establish the boundary of the refuge, and correctly dismissed the Scofields' due process claims, the court erred in concluding that the Scofields did not state a claim for relief, insofar as they alleged that the boundary effected a taking without just compensation, pursuant to *Penn Central*.[71] The judgment of the court is reversed, and the cause remanded to the district court for further proceedings regarding the Scofields' *Penn Central* claim for relief.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[71] *Penn Central, supra* note 52.

MICHAEL E. STACY, APPELLANT, V. GREAT LAKES AGRI MARKETING, INC., APPELLEE.

753 N.W.2d 785

Filed July 25, 2008. No. S-07-1000.

1. **Workers' Compensation: Appeal and Error.** Pursuant to 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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Expert Witnesses.** Although medical restrictions or impairment ratings are relevant to a workers' compensation claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant.
4. **Workers' Compensation.** The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.
5. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
6. **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. **Workers' Compensation.** In workers' compensation cases, a distinction must be observed between causation rules affecting the primary injury and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment.
8. **Workers' Compensation: Words and Phrases.** When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results."
9. **Proximate Cause.** A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.

10. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
11. ____. While the inquiry into loss of earning power includes an employee's ability to obtain employment generally, neither the single judge of the Workers' Compensation Court nor the vocational rehabilitation specialist should be expected to disregard a job that an employee actually has.
12. ____. Permanent total disability benefits are not generally available for a single scheduled member injury.
13. **Workers' Compensation: Time.** The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident.
14. ____: ____. A workers' compensation claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing.
15. **Workers' Compensation.** Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.
16. ____. Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience.
17. ____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
18. ____. Vocational rehabilitation training that could lead to employment in another career field is not available, pursuant to Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2006), unless a new job with the same employer is unlikely to result in suitable employment for the injured employee.
19. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Cum. Supp. 2006), an employer need not prevail in the employee's claim—it simply must have an actual basis in law or fact for disputing the claim and refusing compensation.
20. **Workers' Compensation: Claims.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2006) may exist if the properly adduced evidence would support reasonable but opposite conclusions by the Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
21. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2006) is a question of fact.
22. ____: ____. If an employee files an application for a review before the compensation court of an award by a judge of the compensation court when the amount of compensation due is disputed, and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney fee to be taxed as costs against the employer for such review.

23. **Workers' Compensation.** Where the issue of a credit against the award is not decided by the single judge of the Workers' Compensation Court, the defendant is still entitled to receive credit for payments already made.

Appeal from the Workers' Compensation Court. Affirmed.

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

D. Steven Leininger and Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

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

GERRARD, J.

Michael E. Stacy was employed by Great Lakes Agri Marketing, Inc., doing business as Bridgeport Tractor, when he sustained an injury in the course of and arising out of his employment. Specifically, Stacy was removing a part from a tractor when a piece of metal struck him near the right knee, causing a nondisplaced fracture of his medial condyle. Stacy developed deep vein thrombosis in his right leg, and it is not disputed that Stacy requires anticoagulation therapy for the foreseeable future. The primary issue presented in this workers' compensation appeal is whether the diagnosis of a complex pain disorder in Stacy's right leg, or his need to take anticoagulant medications, has resulted in an injury to his body as a whole instead of to a scheduled member. Because the evidence is sufficient to support the Workers' Compensation Court's finding of a scheduled member injury, we affirm its judgment.

BACKGROUND

STACY'S WORK HISTORY

Stacy graduated from high school in 1983 and joined the Marine Corps. He served 4 years as a combat engineer, doing construction work and demolitions. After he was honorably discharged, Stacy and his wife had a flooring business in Chadron, Nebraska, installing carpet, tile, vinyl, and laminate flooring.

Stacy and his wife moved to the area of Bridgeport, Nebraska, in January 2004 and planned to continue in the flooring business. But they needed additional income, so Stacy obtained the job at which he was injured. Stacy's primary duties involved removing tractor parts and cleaning them for resale. Stacy was injured on July 21 while using a sledge hammer to remove a broken axle, when a piece of metal flew off the tractor and hit him in the leg below the right knee.

Medical Evidence

About 3 weeks after the accident, Stacy was still suffering from swelling in his right leg. He was admitted to the hospital, and blood clotting was discovered, which was treated with heparin, Coumadin, and compression hose. In September 2004, Stacy began to suffer from "hypersensitivity" in his leg. Stacy testified that

> [b]efore it was just the swelling and kind of stiffness and that, and it — it started getting so it was like needles. I don't know how to really explain it, what I've tried to say before is, like when you've been out in the cold and your hands get really, really cold out in the wintertime and you come inside and stick your hands under hot water, that instant — feels like a bunch of little needles stickin' in your leg. And that's what my leg started to feel like.

In late September 2004, Stacy's treating orthopedic surgeon, Dr. Bryan Scheer, diagnosed Stacy with reflex sympathetic dystrophy (RSD), which can be briefly described as an excessive or abnormal response of the sympathetic nervous system following an injury.[1] On October 27, Scheer released Stacy to sedentary work, but not to drive, stand on the job, or "other activity."

Stacy was evaluated at the Mayo Clinic Vascular Center in January 2005 by Dr. Mark Costopoulos. Costopoulos found evidence of both chronic and acute deep vein thrombosis in the right leg and, at the least, postphlebitic syndrome in the right leg. Costopoulos prescribed prescription-strength compression hose and continued Coumadin anticoagulation therapy. And

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[1] See, generally, Taber's Cyclopedic Medical Dictionary (18th ed. 1997); The Merck Manual of Diagnosis and Therapy (16th ed. 1992).

Costopoulos concluded that Stacy "will need lifelong Coumadin anticoagulation for this problem for as long as he can take the medication relatively safely and reliably." Costopoulos noted that workers' compensation case evaluations were not performed at the Mayo Clinic, so Stacy's "return to work evaluation" was deferred to Stacy's primary care physician and workers' compensation insurer.

Back in Nebraska, on June 27, 2005, Scheer observed "an atrophic leg that is very dysthetic and painful." Scheer also observed "some skin color changes" and that Stacy's calf was "tender and very small when compared to the opposite side." Scheer reported that Stacy and his wife asked Scheer to consider amputation of Stacy's right leg. Scheer encouraged pain management techniques, but concluded Stacy's prognosis was "poor." Scheer "withheld any issues regarding [maximum medical improvement] at this point." In August 2005, Scheer directed Stacy to remain off work until further notice, based on a representation from either Stacy or Stacy's wife that Stacy was physically unable to work.

Dr. Bruce Lockwood evaluated Stacy in September 2005. Lockwood is board certified in physical medicine and rehabilitation, and in electrodiagnostic medicine. After the September examination, Lockwood did not believe Stacy was at maximum medical improvement, although "ascertaining that time is exceedingly difficult." Lockwood testified that "a reasonable diagnosis at the time would have been a tibial nerve injury causing the innervation in the muscles that it innervated." Lockwood thought there was "probably" also a perineal nerve injury, and Lockwood thought "there was an issue addressing, which wasn't firm in [Lockwood's] mind, whether or not [Stacy] had CRPS type I or RSD." Lockwood explained that CRPS was "chronic regional pain syndrome" and that CRPS type I described, essentially, RSD. But Lockwood did not finalize that diagnosis. Lockwood also noted a deep vein thrombosis in Stacy's right leg, with probable postphlebitic syndrome, and said Stacy would need anticoagulation treatment for the foreseeable future.

At a followup discussion on November 16, 2005, Lockwood discussed with Stacy, "very candidly," that Lockwood had

concerns about noncompliant behavior. Lockwood did not conduct another physical examination. Lockwood's notes indicate that Stacy was resistant to an electromyogram because Stacy's previous electromyogram, at the Mayo Clinic, had been painful. Lockwood was unable to contact Stacy after November 16 and pronounced him at maximum medical improvement. Lockwood concluded Stacy was being noncompliant and stated that "[i]n light of what would appear to be consistent and repeated noncompliant behavior, it would appear as though he is at maximum medical improvement, based on the information made available to [Lockwood]." Lockwood also assigned an impairment rating, based on an RSD diagnosis, of 9-percent impairment to the body as a whole. But Lockwood altered that rating in response to a request from Stacy's case manager. Lockwood noted, in his letter to the case manager, that "[i]t would appear as though [the case manager is] asking [Lockwood] to convert the 9% whole person impairment to an extremity impairment." He converted the rating to a 22- or 23-percent lower extremity impairment.

Lockwood testified that there was no indication Stacy's accident resulted in physical injury other than to his right leg and that "[w]ith reluctance," he had given Stacy an impairment rating. Lockwood later withdrew his impairment rating at his deposition, because although he "was asked to do it" and gave his best effort, he did not "think that's reasonable to stand by." Lockwood testified that there was no physical injury to Stacy's body other than to his right leg and that he was not "comfortable" diagnosing Stacy with a physical injury to his sympathetic nervous system. However, Lockwood opined that if Stacy had a "sympathetic or an RSD situation," such an injury would be classified as an extremity injury.

On December 2, 2005, Scheer wrote Bridgeport Tractor's workers' compensation insurer, stating that Stacy "is requesting he be placed at [maximum medical improvement] which I think is reasonable." In a letter dated December 29, 2005, Scheer opined that Stacy's deep vein thrombosis, "his chronic lower extremity pain, his complex regional pain syndrome, and his medial condyle fracture are, within a reasonable degree of medical certainty, related to his injury." Scheer opined that Stacy

would need future medical care for chronic pain and the poor function of his right leg. Scheer rated Stacy's right leg as 100-percent impaired and opined that although it would be difficult to assess Stacy's permanent work restrictions, Scheer thought Stacy would

> have little use of his right lower extremity, including vigorous labor, heavy lifting, ladders, etc., but he should be able to be retrained in another profession. Also, his anticoagulation therapy and his weakness would limit it, as well as his pain syndrome may limit his employment opportunities.

On December 22, 2005, Bridgeport Tractor's workers' compensation insurer had informed Stacy, through Stacy's counsel, that Stacy had been placed at maximum medical improvement by Lockwood, with a 22- to 23-percent impairment of the right lower extremity. A final lump-sum payment for permanent partial disability was made on that basis.

On July 20, 2006, Scheer opined that

> transient sedentary activity without prolonged standing or prolonged sitting is warranted. Certainly, he has a functional left lower extremity, bilateral upper extremity and I think he is a very bright man who could be vocationally rehabilitated to do many tasks, but labor, heavy lifting, squatting, bending, ladders, repetitive activity, prolonged standing, prolong [sic] sitting and others will likely have to be avoided for the foreseeable future if not permanently.

Scheer had "no doubt" about the diagnosis of RSD.

Dr. Lawrence Lesnak, a Colorado physician, board certified in physical medicine and rehabilitation, examined Stacy on August 23, 2006. Lesnak found medical evidence to suggest deep vein thrombosis and postphlebitic syndrome in Stacy's right leg. Lesnak found "no indication whatsoever" that Stacy had RSD, also known as CRPS type I. Instead, Lesnak diagnosed Stacy with causalgia, also known as CRPS type II. Causalgia is briefly described as intense burning pain accompanied by trophic skin changes, due to injury of nerve fibers.[2] Lesnak opined that

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[2] See, generally, Taber's Cyclopedic Medical Dictionary, *supra* note 1; The Merck Manual of Diagnosis and Therapy, *supra* note 1.

Stacy's symptoms were not "sympathetically mediated" and "in all likelihood are something strictly from this post phlebitic syndrome." Lesnak found that Stacy was at maximum medical improvement and assigned a 20-percent lower extremity impairment. Lesnak found no condition that involved Stacy's body as a whole, or any extremities other than his right leg.

When asked whether he disagreed that Stacy would require lifetime anticoagulation therapy, Lesnak said that it was "not a typical recommendation for someone who has had a single episode of deep venous thrombosis." But Lesnak did not have an opinion on whether lifetime anticoagulation therapy was required. Lesnak's impairment rating for Stacy's leg did not include causalgia or lifetime Coumadin treatment, because Lesnak concluded that "the post phlebitic syndrome was the ratable condition, not the causalgia." Lesnak conceded that revised American Medical Association guidelines might provide a basis for a "rating in and of itself for anticoagulation." But Lesnak believed that "if you rate post phlebitic syndrome, then you're basically double dipping if you rate Coumadin usage." Lesnak conceded that if Stacy continues on Coumadin treatment, he would need to avoid occupations that involved trauma to the body.

Stacy testified at trial that he still felt constant pain in his right leg and a shooting pain when he put weight on his right foot. Stacy explained that he could not squat, lift, or kneel with his right leg. He said that his walking pace had slowed considerably, he was unable to walk over rough surfaces, and he had difficulty even on smooth surfaces. Stacy said he could not get up without using a cane and could climb stairs only with a cane and handrail.

Vocational Evidence

In November 2004, Stacy and David DeFoe, Bridgeport Tractor's store manager, began discussing the possibility of Stacy's returning to work. DeFoe told Stacy that transportation would be arranged for him. Stacy said he was told he would be assigned to use a computer to make "a map of the tractor place. Of where the tractors and parts were, in what area." Stacy said he was told that nothing else was planned and that he "could sit

back on the couch and read a book or whatever." But Stacy testified that he was unable to return to work at that time.

DeFoe described the job as researching part numbers and proofreading a catalog that the company was preparing to print. DeFoe said that at the time, the position did not exist, but there had been previous discussion in the management group about creating a full-time position to do the research. DeFoe said the job was needed by the company and still was needed at the time of trial. And in November 2005, Stacy was offered a job that DeFoe said was essentially the same job, but expanded beyond the catalog to encompass the company's entire inventory of used parts. The job was being held for Stacy and, in the meantime, had been filled with other employees at different stores.

Stacy testified that before his injury, his intent had been to work at Bridgeport Tractor only until he could get his flooring business reestablished. But after his injury, he could no longer perform the physical tasks that would be required in the flooring business, because he could no longer lift or kneel, or work with knives because of his anticoagulant regimen. Stacy said he would like to get back into the work force, but needed professional help because he could no longer do the kind of work he had done before.

Stacy testified that he had no computer training or experience, except that he had a computer at home that he used to "play Solitaire" and read e-mail. In Stacy and his wife's flooring business, Stacy's wife had used a computer for bookkeeping, but Stacy did not use the computer. Stacy also testified that he did not like computers and did not want to work with a computer. He explained, "I like to do things, where I can see something accomplished. I can't — I can't comprehend sittin' there at a computer all day long . . . ." He testified that he had been doing manual labor his whole life and did not "want to go to work and be miserable" every day at a job he hated. Stacy said he wanted a job he thought he could succeed at and did not believe he could succeed at the jobs recommended to him by his vocational counselors.

Laren Roper, an occupational therapist, testified regarding a jobsite evaluation he performed in November 2004. Roper opined, based on his examination of the Bridgeport Tractor

jobsite and his understanding of Stacy's physical restrictions, that Stacy could return to work and perform the duties of the computer job offered by Bridgeport Tractor. But Roper conceded that he was not a vocational specialist and did not determine whether the job was suitable for Stacy based on Stacy's education and aptitude.

Ronald Schmidt, the Workers' Compensation Court-appointed vocational rehabilitation counselor, evaluated Stacy's loss of earning power. Schmidt considered Stacy's work restrictions and surveyed the relevant labor market, but "was unable to identify any employment opportunities in . . . Stacy's geographic area that were consistent with not only the physical limitations but his education and vocational background." Schmidt concluded that Stacy's on-the-job injury "eliminated [his] earning capacity." Schmidt did not evaluate Stacy's candidacy for vocational rehabilitation because he concluded, as he had explained in a previous letter, that due to the job offered by Bridgeport Tractor, "the development of a vocational rehabilitation plan is not indicated at this time."

A rebuttal loss of earning power analysis was completed by Patricia Conway, a rehabilitation specialist, on September 27, 2006. Conway found that Stacy could perform sedentary jobs and had suffered a 50-percent loss of earning power. Conway recommended that Stacy either accept the job offered by Bridgeport Tractor or participate in appropriate vocational rehabilitation services. However, Conway noted that because Stacy "had been offered a physically appropriate job with the employer of injury, . . . it would appear that he is not entitled to vocational rehabilitation services."

Compensation Court Proceedings

Trial was had before a single judge of the Workers' Compensation Court in October 2006. The single judge, relying on Lockwood's opinion, found that Stacy was temporarily totally disabled from the date of the accident until reaching maximum medical improvement on January 20, 2005. The single judge found that Stacy's RSD affected his leg, producing a scheduled member injury, and that "[w]ith respect to the anticoagulation therapy, the Court is not persuaded that it produces

any limitations in [Stacy] not already produced by the permanent impairment to [Stacy's] right leg." The single judge agreed with Scheer that Stacy's right leg was totally impaired.

But the single judge found that because of the available job with Bridgeport Tractor, Stacy was not entitled to vocational rehabilitation benefits. The single judge did find that Stacy was entitled to future medical care as was reasonable and necessary to treat his injury. And finally, the single judge awarded waiting-time fees based on Bridgeport Tractor's failure to pay benefits for approximately 6 weeks after the injury. But the court found a reasonable controversy to have existed with respect to the extent of Stacy's permanent impairment after his date of maximum medical improvement and did not award waiting-time penalties or an attorney fee for that period. The single judge awarded compensation for temporary total disability, and then for 100-percent permanent loss of a scheduled member, the right leg.

Stacy filed an application for review. The review panel found that the single judge's finding that Stacy suffered a scheduled member injury to his right leg was not clearly erroneous. The review panel found little evidence in the record to suggest that Stacy suffered whole-body consequences from deep vein thrombosis or RSD. The review panel affirmed the single judge's finding of the date of maximum medical improvement. And the review panel affirmed the single judge's refusal to award vocational rehabilitation benefits. Finally, the review panel affirmed the single judge's finding of a reasonable controversy regarding the extent of Stacy's permanent impairment. Stacy appeals.

ASSIGNMENTS OF ERROR

Stacy assigns, restated, that the Workers' Compensation Court erred in (1) refusing to award permanent disability benefits based on injury to the body as a whole, (2) failing to find that Stacy is entitled to permanent total disability benefits as a matter of law, (3) finding that Stacy reached maximum medical improvement on January 20, 2005, (4) not awarding vocational rehabilitation benefits, (5) finding a reasonable controversy regarding the extent of Stacy's permanent impairment, and (6) refusing to award an attorney fee on review.

STANDARD OF REVIEW

[1,2] Pursuant to 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.[3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.[4]

ANALYSIS

Injury to Body as a Whole

In support of his first assignment of error, Stacy argues that his diagnosed medical conditions—deep vein thrombosis and RSD—should have been found by the compensation court to result in injury to his body as a whole. Stacy argues that although his initial injury was to a scheduled member, the resulting conditions impair his body as a whole. But the medical evidence in the record does not support Stacy's argument.

[3] Stacy begins by arguing, based on the medical evidence and his own testimony, that his deep vein thrombosis affected his entire circulatory system, not just his right leg. Although medical restrictions or impairment ratings are relevant to a workers' compensation claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant.[5] But here, none of the medical experts whose testimony was presented to the single judge opined that Stacy had suffered a whole body

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[3] *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

[4] *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

[5] See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

impairment. Nor did Stacy's own testimony establish any whole body impairment caused by his deep vein thrombosis.

[4] The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.[6] In the absence of evidence establishing that Stacy's deep vein thrombosis caused impairment to the body as a whole, we cannot say that it was clearly wrong for the single judge to find that Stacy's deep vein thrombosis was compensable as an aspect of his scheduled member injury.[7]

Stacy calls particular attention to his need for anticoagulant therapy and argues that the effect of his anticoagulant regimen is, in effect, a whole body impairment. He argues that "acquired thrombotic disorder," resulting from anticoagulant therapy, is a diagnosable condition.[8] That may be, but there is no evidence establishing that diagnosis here, or any resulting impairment of Stacy's body as a whole.

[5-7] In order to recover under the Nebraska Workers' Compensation Act,[9] a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.[10] 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.[11] In workers' compensation cases, a distinction must be observed between causation rules affecting the primary injury and causation rules that determine how far the range of compensable consequences

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[6] *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999).

[7] See *id.*

[8] Brief for appellant at 20.

[9] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004, Cum. Supp. 2006 & Supp. 2007).

[10] *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

[11] *Id.*

is carried, once the primary injury is causally connected with the employment.[12]

[8,9] When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results."[13] A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.[14]

We recognize that several courts have, in determining the extent of a claimant's impairment and disability, considered the effects of medication necessary to treat a compensable condition.[15] There is no reason, under the causation principles set forth above, why the effects of medical treatment could not be a direct and natural result of a compensable injury. But the record before us in this case does not evidence any such effects, to the extent necessary to establish as a matter of law that Stacy has suffered a whole body impairment. As the single judge noted, the requirement that Stacy avoid a risk of trauma is subsumed in the other work restrictions imposed by his deep vein thrombosis and RSD. And more importantly, neither the medical testimony nor Stacy's own testimony established an impairment to the body as a whole.

Stacy next argues that his RSD is a disease of the entire nervous system, not just his right leg. He contends that "both of [Bridgeport Tractor's] experts agreed that [RSD] is a condition impairing the sympathetic nervous system."[16] But the expert

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] See, e.g., *Anderson v. Harper's Inc.*, 143 Idaho 193, 141 P.3d 1062 (2006); *Averill v. Dreher-Holloway*, 134 N.H. 469, 593 A.2d 1149 (1991); *Flannery v. Nassau County Police Dept.*, 26 A.D.3d 678, 809 N.Y.S.2d 652 (2006); *Hulshouser v. Texas Workers Comp. Ins. Fund*, 139 S.W.3d 789 (Tex. App. 2004).

[16] Brief for appellant at 22.

testimony presented to the single judge does not support that construction. While Lockwood testified that RSD *can* spread, there was no evidence that Stacy's RSD has actually impaired any part of his body other than his right leg. Courts in other jurisdictions have found evidence, in some cases, that RSD has caused impairment to a claimant's body as a whole.[17] But such decisions have been based on evidence showing that those claimants' RSD had spread beyond a particular scheduled member.[18] None of that authority supports Stacy's contention that RSD, as a matter of law, necessarily produces whole body impairment. And the evidence adduced here does not prove, as a matter of law, that Stacy suffers from whole body impairment.

The medical conditions affecting Stacy are complex and may involve "injury" to his circulatory and central nervous systems, but, as previously noted, it is the location of the impairment, not the injury, that determines whether a claimant's impairment is to a scheduled member or to the body as a whole.[19] And while the basic principles of causation on which Stacy relies are sound, the evidence here is sufficient to support the single judge's determination that Stacy's deep vein thrombosis and RSD resulted in impairment only to a scheduled member. Stacy's first assignment of error is without merit.

Permanent Total Disability Benefits

[10] In his second assignment of error, Stacy contends that he was entitled to permanent total disability benefits as a matter of law. A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.[20] Stacy takes issue with Conway's and Schmidt's assessments of Stacy's loss of earning

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[17] See, *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961); *Collins v. Department of Human Services*, 529 N.W.2d 627 (Iowa App. 1995); *So. Farm Bureau Cas. v. Aguirre*, 690 S.W.2d 672 (Tex. App. 1985).

[18] See *id*.

[19] See *Ideen, supra* note 6.

[20] *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

capacity, because those opinions were based, in part, on the availability of a job for Stacy at Bridgeport Tractor.

[11] This argument does not succeed for two reasons. First, it was not incorrect to consider the availability of a job at Bridgeport Tractor in evaluating Stacy's loss of earning power. While the inquiry into loss of earning power includes an employee's ability to obtain employment generally, neither the single judge nor the vocational rehabilitation specialist should be expected to disregard a job that an employee actually has.[21] And there is no suggestion, in the record or Stacy's brief, that Bridgeport Tractor's offer of employment is not genuine.

[12] But more importantly, Stacy's claim for permanent total disability benefits is dependent on the argument, which we rejected above, that Stacy suffered an injury to the body as a whole. Permanent total disability benefits are not generally available for a single scheduled member injury.[22] And as discussed above, the record does not establish that the injury to Stacy's right leg resulted in an unusual or extraordinary condition as to other members or other parts of the body.[23] Therefore, Stacy's second assignment of error is also without merit.

Date of Maximum Medical Improvement

[13-15] Stacy argues that the single judge erred in relying on Lockwood's testimony to set Stacy's date of maximum medical improvement as January 20, 2005. The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. A claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing.[24] And generally, whether a workers'

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[21] See *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

[22] See § 48-121(3).

[23] See *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003).

[24] *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005).

compensation claimant has reached maximum medical improvement is a question of fact.[25]

Stacy notes that after examining him in September 2005, Lockwood was unable to conclude that he was at maximum medical improvement. But in his November medical report, Lockwood clearly articulated the basis for his conclusion that Stacy had reached maximum medical improvement on January 20. Lockwood explained that "[t]o specifically ascertain an appropriate date of maximum medical improvement is very difficult, but it would appear as though over the last approximately 10 months his care has been supportive care, i.e., maintenance care. Thus, a reasonable date in hindsight of maximum medical improvement would be January 20, 2005." Lockwood acknowledged that "this is a difficult calculation to make, but again, based on the information made available to me, this would appear to be appropriate."

Stacy notes that Scheer disagreed with Lockwood's opinion. But Lockwood explained the basis for his opinion, and the single judge is entitled to accept the opinion of one expert over another.[26] Stacy did not present evidence of any meaningful change in his condition that occurred after January 20, 2005. We cannot say the single judge was clearly wrong in finding that Stacy had reached maximum medical healing on that date. Therefore, we find no merit to Stacy's third assigned error.

Vocational Rehabilitation Benefits

[16,17] Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience.[27] Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.[28] Stacy contends that despite the available

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[25] *Id.*

[26] *Lowe, supra* note 3.

[27] *Hagelstein, supra* note 20.

[28] *Willuhn v. Omaha Box Co.*, 240 Neb. 571, 483 N.W.2d 130 (1992). See, also, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

job at Bridgeport Tractor, he should have been awarded vocational rehabilitation benefits.

But both of the vocational rehabilitation specialists whose opinions were presented to the single judge opined that because of the Bridgeport Tractor job, vocational rehabilitation services were not warranted.[29] And more importantly, Stacy's argument is inconsistent with the priorities that the Nebraska Workers' Compensation Act directs the Workers' Compensation Court to use in developing and evaluating a vocational rehabilitation plan. Those priorities are, listed in order from lower to higher priority:

> (a) Return to the previous job with the same employer;
>
> (b) Modification of the previous job with the same employer;
>
> (c) A new job with the same employer;
>
> (d) A job with a new employer; or
>
> (e) A period of formal training which is designed to lead to employment in another career field.[30]

No higher priority may be utilized "unless all lower priorities have been determined by the vocational rehabilitation counselor and a vocational rehabilitation specialist or judge of the compensation court to be unlikely to result in suitable employment for the injured employee that is consistent with the priorities listed."[31]

[18] Stacy is seeking vocational rehabilitation training that could lead him to employment in another career field. The record demonstrates that Stacy is unable to perform his previous job with Bridgeport Tractor, even if it were modified. But the record also demonstrates that a new job at Bridgeport Tractor is available to Stacy. There is nothing in the record to suggest that Bridgeport Tractor's offer of employment is insincere. And the training Stacy seeks is not available, pursuant to § 48-162.01(3), unless "[a] new job with the same employer" is "unlikely

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[29] Cf. *Davis, supra* note 21.

[30] § 48-162.01(3).

[31] *Id.*

to result in suitable employment for the injured employee."[32] Stacy's frustration with his employment opportunities and medical condition is apparent from the record, and completely understandable. But it is clear from the medical evidence that no amount of vocational rehabilitation can enable Stacy to perform the kind of work he enjoyed before his accident. And while the job available at Bridgeport Tractor may not seem ideal, Stacy is physically capable of performing it, and the Nebraska Workers' Compensation Act establishes priorities for postinjury employment that neither this court nor the Workers' Compensation Court are at liberty to ignore.

When the requirements of § 48-162.01(3) are considered, the record supports the single judge's finding that because a new job with Bridgeport Tractor was available to Stacy, further vocational rehabilitation services were not warranted. Stacy's fourth assignment of error is without merit.

Reasonable Controversy

Stacy contends that the single judge erred in finding a reasonable controversy regarding the extent of Stacy's permanent impairment. Stacy complained to the single judge about Bridgeport Tractor's failure to pay indemnity benefits between December 22, 2005, and July 27, 2006. Stacy contends that there was no reasonable controversy regarding his entitlement to benefits, because the medical opinions upon which Bridgeport Tractor relied were flawed. And § 48-125 authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.[33]

[19-21] But to avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim—it simply must have an actual basis in law or fact for disputing the

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[32] *Id.*

[33] See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819.

claim and refusing compensation.[34] A reasonable controversy under § 48-125 may exist, for instance, if the properly adduced evidence would support reasonable but opposite conclusions by the Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.[35] And whether a reasonable controversy exists under § 48-125 is a question of fact.[36]

Here, the existence of a reasonable controversy is evidenced by Lesnak's opinion, assigning Stacy a 20-percent lower extremity impairment. And Bridgeport Tractor's termination of benefits and its final lump-sum payment were based on Lockwood's assignment of a 22- or 23-percent lower extremity impairment. Lockwood later changed his opinion, and at trial, the single judge found Scheer more persuasive than Lockwood or Lesnak with respect to Stacy's impairment rating. Stacy now argues that Lockwood's and Lesnak's opinions were so lacking in foundation that they should not have been considered at all.

But Stacy has not assigned error to the admission of that evidence, so his complaints about foundation go to weight, not admissibility. And although those opinions were ultimately unpersuasive, that does not mean that the single judge was clearly wrong in concluding that they at least established a reasonable controversy regarding Stacy's impairment rating.[37] Given the conflicting medical evidence, the single judge's finding of a reasonable controversy is supported by the evidence. We find no merit to Stacy's fifth assignment of error.

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[34] 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).

[35] See *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004).

[36] *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

[37] Compare, e.g., *Dawes, supra* note 34; *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

Attorney Fee on Review

[22] Finally, Stacy argues that he should have been awarded an attorney fee on review, because he appealed to the review panel and obtained an increase in his award. If an employee files an application for a review before the compensation court of an award by a judge of the compensation court when the amount of compensation due is disputed, and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney fee to be taxed as costs against the employer for such review.[38]

The issue here arose when Bridgeport Tractor presented the single judge with a summary of the benefits it had paid Stacy. That summary reflected an overpayment of $838.07. Stacy objected to the claimed overpayment, arguing that the attached documentation had been interpreted incorrectly and that two payments had been double-counted. Bridgeport Tractor was unable to immediately resolve the matter, so the single judge said, "I'll order payments if appropriate and I won't make a finding on credits. And I'll let you guys take that up with whoever . . . ." Stacy's counsel indicated that the parties "can figure it out." However, in the final award, the single judge mistakenly made a finding of the credit to which Bridgeport Tractor was entitled for payments already made, including the objected-to $838.07.

On review, the review panel found that because the single judge had agreed with the parties not to decide the matter of Bridgeport Tractor's credit, the single judge had erred in crediting Bridgeport Tractor for the objected-to $838.07. The review panel reversed the single judge's decision to that extent. But the review panel declined to award an attorney fee, reasoning that "the disallowance of a credit did not necessarily establish an increase in [Stacy's] Award, but only reserved the issue of the subject credit for future resolution."

[23] Stacy argues that the review panel should have awarded an attorney fee. For purposes of this appeal, we assume, without deciding, that a disagreement over credit for voluntary payments could be a dispute over "the amount of compensation due" that

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[38] See § 48-125(2).

may result in "an increase in the amount" of an award.[39] But we agree with the review panel that the reversal of the credit, in this case, did not result in an increase in the award, because the issue was reserved for future determination, not decided. Where the issue of a credit against the award is not decided by the single judge of the Workers' Compensation Court, the defendant is still entitled to receive credit for payments already made.[40] And here, the parties agreed with the single judge to reserve the issue. The single judge's mistake was deciding the issue at all, and the review panel's disposition simply enforced the consensus that had been reached at trial.

Given that fact, there are two problems with Stacy's argument for an attorney fee. First, because the credit issue has not been finally decided, it is impossible to tell at this point whether or not Stacy's appeal could result in an increase in the award.[41] Second, and perhaps more fundamentally, the record does not establish that in this case, the amount of Bridgeport Tractor's credit was "disputed" within the meaning of § 48-125(2). The issue was not submitted to the single judge, and the record does not show whether Bridgeport Tractor disputed the issue before the review panel.

Absent any suggestion in the record that Bridgeport Tractor actually tried to persuade the court that it was entitled to credit for the purported $838.07 "overpayment," it is difficult to conclude that Bridgeport Tractor actually "disputed" the "amount of compensation due," as is necessary to authorize an attorney fee on review pursuant to § 48-125(2). There is no basis in § 48-125(2) to penalize Bridgeport Tractor for a mistake it neither asked the single judge to make nor asked the review panel to affirm. And the record before us contains no evidence that Bridgeport Tractor did either.

In short, the record does not establish that the purported overpayment has been disputed before the Workers' Compensation Court or that Stacy has, at this point, obtained an increase in the

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[39] See *id.*

[40] See *D'Quaix v. Chadron State College*, 272 Neb. 859, 725 N.W.2d 558 (2007).

[41] See *Dawes, supra* note 34.

award as a result. The review panel did not err in declining to award Stacy an attorney fee. Therefore, Stacy's final assignment of error is without merit.

CONCLUSION

The evidence in this case is sufficient to support the single judge's finding of a scheduled member injury, because the evidence does not prove, as a matter of law, that Stacy's medical condition has resulted in impairment to his body as a whole. Nor did the single judge clearly err in setting Stacy's date of maximum medical improvement and declining to award permanent total disability or vocational rehabilitation benefits. The evidence supports the single judge's finding of a reasonable controversy regarding Stacy's disability. And the review panel did not err in declining to award an attorney fee on review. Therefore, the judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. RYAN L. POE, APPELLANT.

754 N.W.2d 393

Filed August 1, 2008. No. S-06-853.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Criminal Law: Constitutional Law: Due Process.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.

4. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution.
5. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
6. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
7. **Constitutional Law: Trial: Witnesses.** The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.
8. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
9. **Trial: Rules of Evidence.** In considering the admission of relevant evidence, a trial court, when requested to do so, is required to weigh the danger of unfair prejudice against the probative value of the evidence.
10. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
11. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Mona L. Burton, and Robert Marcuzzo for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Following a jury trial, Ryan L. Poe was convicted of first degree felony murder and use of a deadly weapon to commit a felony. He was sentenced to life in prison plus a consecutive term of 10 to 20 years in prison on the weapon conviction. Poe appeals.

SCOPE OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id.*

FACTS

On November 11, 2004, Trever Lee was shot and killed during a robbery of his townhouse in Omaha, Nebraska. Lee and his roommates, Nicholas Ertzner and Jeff Connely, were sleeping in three upstairs bedrooms when the front door of the townhouse was kicked in.

Connely testified he was awakened when he heard someone running up the stairs and shouting, "[P]olice." He opened his bedroom door and saw a person covered from head to toe in black and wearing a black mesh mask. The individual pointed a gun at Connely and told him to "get down." Connely complied. He saw another person with a gun in front of the door to Lee's bedroom.

Connely heard a struggle followed by multiple gunshots coming from the hallway. After the shooting stopped, he heard people running down the stairs. He called the 911 emergency dispatch service, went out into the hallway, and saw Lee on the floor. The autopsy of Lee's body revealed six gunshot wounds, as well as abrasions and contusions. His death was caused by a gunshot wound to the head behind the right ear.

Ertzner stated that one of the intruders came into his room, pointed a gun at him, and asked, "[W]here's the money[?]" Ertzner said he did not know what the man was talking about. The man told Ertzner to get down on the floor. The man took $50 to $70 cash from the pocket of Ertzner's pants that were in a laundry hamper and left the room. A second man came into Ertzner's room and also asked for money.

While on the floor, Ertzner looked into the hallway and saw a scuffle between Lee and at least one other person. He heard shots being fired for 3 to 5 seconds. When it was quiet, he checked on Lee and called to Connely to see if Connely was all right. Ertzner then returned to his room and stayed there until police arrived.

Connely testified he saw the wrist of one of the intruders and his skin was a "darker color." Ertzner described one of the intruders as 5 feet 5 inches to 5 feet 7 inches tall and between 170 and 180 pounds. The second man had a similar build. Poe was 5 feet 4 inches tall and weighed 145 pounds. Kashaun Lockett, who was also arrested in connection with the case, was approximately 5 feet 10 inches tall and weighed 150 to 160 pounds.

Connely had been selling marijuana from the townhouse since February 2004. Two of his customers were Keenan Barnes and Antwine Harper. Harper purchased marijuana from Connely and then sold it to others, including Poe. Harper testified that he supported himself by selling marijuana. Connely was Harper's supplier for several months prior to the shooting.

Police interviewed Harper as part of the investigation into Lee's death. Harper initially denied having any information concerning the shooting. During a second meeting with police, Harper drove with police to Connely's townhouse. Harper told police that Poe had driven him there on one occasion but that

Poe had not entered the townhouse. During a third interview, Harper implicated Poe, Donte Reed, and Lockett in the shooting. Several weeks before the shooting, Poe had asked Harper if he could rob Harper's supplier. Harper told Poe not to rob Connely because Harper paid his bills and fed his family by selling the marijuana he obtained from Connely.

At trial, Harper testified that on the morning of the shooting, he was at the hospital with his wife for the birth of their second child. Shortly before noon, Poe called Harper and said, "I just sent your dude to Texas." Harper understood that statement to be a street term for having killed someone.

When Poe was arrested on another charge, he called Harper and asked him to bail Poe out of jail. Poe said that if he did not get out of jail, "we're all going to go down," or words to that effect.

Two or three days after the murder, Poe told Harper that he went to Connely's house with Lockett and Reed. They kicked in the front door, went upstairs, kicked in another door, and asked one of the residents "where it was." Poe said the man stated, "I don't have it. It's not me." Poe went into another room, put a gun to the resident's head, and asked him, "[W]here's the bud at[?]" The man said, "[I]t's not me, it's not me."

Poe said he left the room and went to another room, where he found a naked man sleeping. Poe and Lockett woke the man, and a scuffle started between the man and Lockett. During the scuffle, Lockett lost a shoe. Each of the three men carried a gun, and all three fired at the naked man. Poe told Harper they disposed of the guns. Poe also said that they wore ski masks and that they disposed of the clothes worn at the time of the shooting.

Barnes testified that a few weeks prior to the incident, Poe brought up the subject of robbing Connely. Poe attempted to recruit Barnes on several occasions to participate in the robbery, including the morning of the shooting. Barnes said he refused to open his door when Poe showed up that morning.

A jury found Poe guilty of first degree murder and use of a weapon to commit a felony. He was sentenced to life imprisonment plus a consecutive term of 10 to 20 years' imprisonment for the use of a deadly weapon. He appeals.

ASSIGNMENTS OF ERROR

Poe assigns the following errors: The trial court (1) denied his right to present a complete defense by refusing to allow Poe to play the videotape of a police interview with Harper; (2) violated his right to confrontation by limiting Poe's cross-examination of Harper and Officers Brian Bogdanoff and Robert Laney concerning the police interview of Harper; (3) erred in allowing the State to present testimony of Poe's alleged membership in a street gang; (4) erred in allowing the State to present evidence of "field observation cards," which purportedly connected Poe and Lockett; and (5) erred in allowing testimony regarding ownership of a mask.

ANALYSIS

Right to Present Complete Defense

Poe claims he was denied his constitutional right to present a complete defense because the jury was not permitted to view Harper's videotaped police interview. The videotape is purportedly a January 21, 2005, interview of Harper by Bogdanoff and Laney. Poe claimed that Harper was involved in the planning and execution of the crime, and Poe wanted the jury to observe the videotape of Harper's interview. Essentially, Poe wanted to attack Harper's credibility by having the jury view the police interview and compare it with Harper's testimony at trial.

The interview had not been transcribed, and Poe attempted to introduce the videotape into evidence and to use portions of the videotape to show instances when Harper's statements were allegedly contrary to his trial testimony. Poe claimed that during the interview, Harper was threatened with criminal charges, and that the threat caused Harper to implicate Poe in the robbery and murder.

The videotape was discussed at several points during the trial. During cross-examination, Poe's counsel asked Harper whether the police had threatened him during the interview, and Harper stated, "I don't believe I said that." Counsel offered the tape to establish that during the interview, the police showed Harper a warrant for his arrest on drug charges. Harper testified that he considered the warrant to be a threat. Counsel then asked Harper if police told him that he was a "center pivot access in

this whole thing." The State's objection of improper impeachment was sustained. At a sidebar conference, Poe's counsel stated he would make an offer of proof of the entire videotape to prove that the police had threatened Harper. The trial court expressed concern about showing the entire videotape, because on direct examination, Harper admitted the police had threatened him.

The videotape was marked as an exhibit, and the trial court was requested to watch the videotape. After viewing the interview, the court again sustained the State's objection to the videotape's admission. The exhibit was made a part of the court record, with the provision that it would not be shown to the jury.

The second offer of the videotape was made during the cross-examination of Laney. Poe's counsel again requested to show the interview to the jury because Laney stated he could not remember certain portions of it. The State objected because showing the interview to the jury was not the proper way to refresh Laney's recollection. The court again refused to allow the jury to view the interview, but permitted Laney to refresh his recollection by viewing it. After Laney reviewed the videotape, cross-examination resumed.

At another point, counsel sought to show the videotape to demonstrate who mentioned certain pieces of evidence first: the police officers or Harper. The trial court again declined to show the videotape because Harper and the officers had testified in court. Finally, after both parties had rested, Poe's counsel again asked that the jury be allowed to view a portion of the videotape to see how Harper's story had changed. Although the interview actually lasted 5½ hours, the videotape showed only about 2 hours. The trial court again denied the offer of proof.

Although the jury observed the demeanor of the police officers and Harper at trial, Poe claims he was denied an opportunity to present a complete defense, because the jury was not allowed to view the witnesses' demeanor, their tone of voice, and the emotions exhibited during the actual interview. He claims the jury should have been permitted to see whether "the threatening nature of the interrogation was the catalyst that resulted" in Harper's inculpating Poe. Brief for appellant at 16.

Counsel wanted the jury to assess Harper's credibility by viewing the videotape.

At trial, Harper testified that he had not been honest with police during the first part of the interview, but that he was honest after the officers told him they were going to arrest him. Harper said the police told him there was an arrest warrant for him on marijuana charges, which Harper considered to be a threat. Poe's counsel asked: "Well, you were getting the feeling that they were putting you, as you put it or they put it, in the mix, right?" Harper testified: "Yeah. That was kind of sort of." Harper testified that after the officers told him about the arrest warrant, he started crying because "[t]hey tried to take me away from my family" by bringing up the charges.

Harper said he told the officers he wanted a guarantee that he would not go to jail, because if he went to jail, there would be no one to care for his family. The police responded that they could not provide any guarantees. Harper stated that he was arrested and booked that day on the charges but was held for only 5 minutes before he was released on a "street release bond." The charges included a felony, but it was Harper's understanding that they would be dismissed if he cooperated.

Bogdanoff was cross-examined concerning any threats made to Harper. He told Harper there was an arrest warrant for him, but he denied that he had threatened Harper. Bogdanoff said a statement can be considered a threat, depending on how it is perceived. He told Harper that Lee's murder could have the death penalty associated with it and that people can get 50 years in prison on drug charges. The detectives had an affidavit for a drug charge on the table during the interview with Harper. Bogdanoff told Harper that it might be arranged for Harper to go home that day if he cooperated. Poe claimed the videotape would show how Harper had changed his story from "I don't know much to eventually saying that [Poe] confessed to him."

[3] The issue is whether the refusal to permit the jury to see the videotaped interview of Harper violated Poe's right to present a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . .

the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (citations omitted).

We have previously held that it was not an abuse of discretion to refuse to allow an entire videotaped interview to be shown to a jury. In *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006), the trial court denied the defendant's request to play a 6½-hour interview between the defendant's wife and a police officer, because the videotape would cause undue delay and be a waste of time. We concluded that the trial court did not abuse its discretion in finding that the relevance of playing the entire interview was substantially outweighed by considerations of undue delay or a waste of time.

Here, the content of Harper's interview was extensively covered on direct and cross-examination. The videotape shows that the officers repeatedly told Harper they could not make any promises to him about what would happen if he told them the truth. Harper expressed concern about going to jail and not being able to provide for his family. At one point during the interview, Harper cried. The officers told Harper a felony warrant might be activated if he did not cooperate by telling them the truth.

During the interview, the officers pointed out inconsistencies in Harper's previous statements. Harper eventually said that he would tell the officers "what [they] want[ed] to hear." Poe claims this statement shows that Harper was offering to skew the facts against Poe. However, Poe is asking this court to consider the statement out of context. After Harper's comment, Laney responded: "What you're saying is, 'I'm going to give you what you want to hear.' What I'm hoping is you're going to tell me who did this." Harper then stated, "I'm going to tell you what you want, but I've got to be able to go home tonight."

Evidence can be excluded from a criminal trial under rules established by the Legislature and Congress. See *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). The Court stated:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate

> purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

547 U.S. at 326. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

The rules of evidence allow the exclusion of evidence if its probative value is outweighed by other factors. Harper, Bogdanoff, and Laney all testified at trial. They were thoroughly and extensively cross-examined regarding the interview. The jury observed their demeanor and was able to evaluate their credibility. Harper was questioned whether he had been threatened and whether he was offered any deal in exchange for his testimony. Each testified concerning whether threats were made to Harper during the interview.

We conclude the refusal to allow the jury to view Harper's interview did not deny Poe a complete defense. Poe was permitted extensive and thorough cross-examination of Harper, Bogdanoff, and Laney. Although the jury did not see the videotape of the interview, Poe's counsel was permitted to question the witnesses concerning all aspects of it. The district court did not abuse its discretion in denying Poe's requests to play the videotape for the jury.

Right to Confrontation

In conjunction with his first argument, Poe claims that the trial court unreasonably limited his cross-examination of Harper, Bogdanoff, and Laney and, therefore, violated Poe's right to confrontation. Poe alleges he was prevented from fully exploring the threats and inducements made by police during the interview in order to get Harper to change his story.

[4-6] The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated

in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *Id*. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *Id*.

Poe attempted to establish that when Harper was threatened with arrest for selling drugs, he changed his story to implicate Poe. During the cross-examinations of Harper, Bogdanoff, and Laney, a number of the State's objections were sustained on the basis of hearsay or improper impeachment. Because there was no transcript of the videotape, Poe argued that his only method to impeach the witnesses was to show the jury the videotape of the interview.

Poe's counsel had viewed the videotape and repeatedly asked the witnesses about its contents. The record establishes that Poe's counsel was permitted extensive cross-examination of all witnesses concerning the police interview of Harper. Harper was asked whether the police officers had threatened him, and he responded that he considered the arrest warrant to be a threat.

During cross-examination, Poe's counsel asked Harper if he felt the officers were putting him "in the mix" and Harper said, "[K]ind of sort of." Poe's counsel continued:

> Q. At some point during the interviews did you become concerned that other people might get arrested and point the finger at you as being involved?
>
> A. I don't remember.
>
> Q. Okay. Was there conversation about that?
>
> A. I can't recall.
>
> Q. Isn't that when you get pretty upset?
>
> A. Like I said, I know I got mad and I yelled a cuss word at them.

On further cross-examination of Harper, counsel asked: "[D]id the police tell you if you f[___] them, they're going to f[___] you back?" The State's objection was sustained on the ground of improper impeachment. Counsel then proceeded:

> Q. Well, why don't you tell us what threats specifically were made to you[?]
>
> A. They just told me about the charges.
>
> Q. No, I want to know what they said.
>
> A. I'm going to go to jail for the charges, for marijuana charges.
>
> Q. They said you were going to go to jail?
>
> A. Uh-huh, or something similar to that, or I had warrants for marijuana charges.
>
> Q. Well, didn't they tell you what you had to do to stay out of jail?
>
> . . . .
>
> [A.] I didn't make no deals.

Poe's counsel then asked: "Did [the police] tell you it depended on what you did as to whether they would activate [an arrest warrant on drug charges] or not?" The State's objection was sustained. Poe's counsel followed with another question:

> Q. [S]o you told them what they wanted to hear so you wouldn't have to go to jail, right?
>
> A. Yes.
>
> Q. Specifically what were you told as to what could be done for you if you cooperated and what would happen if you didn't cooperate?
>
> A. I don't remember, but I know no deal was made or nothing like that.
>
> Q. Do you remember asking them for guarantees?
>
> A. Yes. And they told me no.

On direct examination, Laney testified that he had talked to Harper about the drug charges and that during the interview, they told Harper that he would be charged with conspiracy to distribute marijuana. Laney believed it was at that point that Harper began to tell the officers what he knew about Poe's involvement in the shooting. Laney told Harper the officers would "go to bat" for him, which meant that they would let it be known to the county attorney that Harper had cooperated

with them, but Laney also told Harper he could not make any promises or deals.

Poe was permitted lengthy cross-examination of the witnesses concerning Harper's interview with the police. The jury heard the evidence concerning all aspects of Harper's interview with the officers.

[7] The U.S. Supreme Court has stated that the Confrontation Clause "'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (emphasis in original), quoting *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

As noted earlier, the scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). We conclude that the trial court did not abuse its discretion in its rulings concerning Poe's cross-examination of Harper, Bogdanoff, and Laney. The record does not establish that Poe's constitutional right to confrontation was violated by the trial court.

Alleged Gang Membership

Poe claims error occurred when the State presented irrelevant and unfairly prejudicial testimony of his alleged membership in a street gang. During Harper's testimony, he was asked if he knew whether Poe was a member of a gang. Harper testified that he had met Poe in 2000 or 2001 while they were at the same high school. Harper said that when he used to "hang out" on 29th Street in Omaha, he would see Poe there. Harper said there was a gang associated with that area and that he knew Poe was a member of that gang. Poe's objection on foundation and relevance was overruled. Harper testified without objection that Reed, his cousin, and Lockett, also a relative, were members of the "29th Street gang." Harper denied that he was a member of the 29th Street gang. Harper stated that Poe admitted he had committed the robbery and shooting at Lee's home with Reed and Lockett. Harper also said that he was afraid of Lockett's brother.

[8,9] Poe claims his gang membership was not relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401. In considering the admission of relevant evidence, a trial court, *when requested to do so*, is required to weigh the danger of unfair prejudice against the probative value of the evidence. See *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). The court was not asked to consider whether the evidence was unfairly prejudicial under Neb. Evid. R. 403. Poe's objection was based solely on whether the evidence was relevant.

This court has previously been asked to find that the suggestion of a defendant's gang ties results in prejudicial error. In *State v. Iromuanya*, 272 Neb. 178, 191, 719 N.W.2d 263, 279 (2006), the defendant cited to cases from other jurisdictions which held that "purposefully elicited testimony directly indicating gang membership was highly prejudicial," citing *Ex parte Thomas*, 625 So. 2d 1156 (Ala. 1993). However, we found that the *Iromuanya* case differed significantly because the record contained no explicit reference to street gangs.

It is true that "[g]enerally, the evidence which the State offers against a criminal defendant is prejudicial," but this court must consider whether evidence is unfairly prejudicial. See *State v. Myers*, 258 Neb. 272, 292, 603 N.W.2d 390, 405 (1999). In that case, evidence of gang-related activity was offered, and we concluded that it did not create undue prejudice because the defendant's gang affiliation was related to the drug-dealing activities and conspiracy which were under investigation by police. We found no abuse of discretion in the admission of testimony about the defendant's gang activity.

The U.S. Court of Appeals for the Eighth Circuit has noted that while evidence of gang membership is admissible if it is relevant to an issue in dispute, "gang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters." *U.S. v. McKay*, 431 F.3d 1085, 1093 (8th Cir. 2005). The appellate court found no abuse of discretion in allowing limited gang-related testimony, because it was relevant to the reasons

the government did not attempt a controlled buy. In addition, the court cautioned the jury against using gang affiliation as a ground for conviction.

We determine in the case at bar that evidence of Poe's alleged gang membership was relevant to the issues at trial. It demonstrated a connection or relationship among Poe, Reed, and Lockett, who were all implicated in the robbery and shooting death of Lee. The evidence also was relevant to Harper's credibility. It demonstrated Harper's initial reluctance to cooperate with police because he was afraid of Lockett's brother, who was also a member of the gang. The jury was instructed that in determining the credibility of any witness, it could consider "[a]ny other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness."

[10] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, and a trial court's decision regarding them will not be reversed absent an abuse of discretion. See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007). We find no abuse of discretion in the admission of the evidence related to Poe's gang affiliation.

Field Observation Card

Poe claims the trial court erred when the State was allowed to present, over objection, evidence of information contained in a field observation card that purportedly documented personal connections between Poe and Lockett. Poe argues that the field observation card was used to corroborate Harper's "theory" concerning Poe's involvement in the crime. Brief for appellant at 37.

The police department used field observation cards to maintain a databank linking individuals who associate with each other. During direct examination, Bogdanoff stated that police began to investigate Poe after a search of Barnes' residence revealed a map labeled "Operation Rush," which identified an area of townhomes. Bogdanoff then looked for any field observation cards related to Poe, and a card was located which indicated that Poe and Lockett had a connection. Further investigation found that DNA evidence from a shoe left at the scene of the homicide matched Lockett's DNA.

Poe asserts that the reference to the field observation card was hearsay because the information came from an unknown declarant at an unknown time and place and under unknown circumstances. At trial, Bogdanoff was asked whether Lockett was arrested in connection with this case. He responded, "Yes." No further references were made to any field observation card. Although Bogdanoff did not explain how the field observation card made the connection between Poe and Lockett, we conclude that the allowance of this testimony, if error, was harmless beyond a reasonable doubt. The police had obviously made a connection between Poe and Lockett because Lockett was arrested for the same crime. There was other evidence at trial that connected Poe with Lockett, including Harper's testimony that Poe had implicated Lockett in the robbery and murder.

[11] In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error. *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). We conclude that the jury would have reached the same verdict regardless of whether the information concerning the field observation card was received into evidence.

Ownership of Mask

Poe claims the trial court erred when it allowed, over his hearsay objections, testimony from a police officer about the ownership of a black mask. The evidence showed that about noon on November 11, 2004, Poe flagged down Kevin Spellman near 30th and Spencer Streets in Omaha and requested a ride in Spellman's vehicle. Poe sat in the back behind the passenger's seat.

When the car stopped in the parking lot of a liquor store, a bicycle patrolman for the Omaha Police Department smelled the odor of marijuana coming from the car and obtained Spellman's permission to conduct a search of the car. The officer found a

black mask tucked under the front passenger's seat. The mask was made of stretchy material and would cover the entire head. The officer testified that no one in the car claimed ownership of the mask.

Spellman testified that he was with his brother, David Moss, when Poe flagged him down. Poe was the only occupant of the back seat. While in the liquor store, Spellman saw two police officers next to the car, while Moss and Poe were outside the car. After giving the officers permission to search the car, Spellman saw one of the officers pull a mask from the back seat passenger area where Poe had been seated. Spellman testified that the mask was not in the car before he picked up Poe and that he cleaned out his car the day before.

Spellman said the officer pulled the mask out of the car, held it up, and asked to whom it belonged. Spellman responded, "It's not mine." He heard Poe say that neither the mask nor the car was his. Spellman described the mask as a black nylon "whole head" mask with a "[n]etted face area" and no eye or mouth holes. The mask was then placed back in Spellman's car. After he left the liquor store, Spellman threw the mask out of the car.

Officer Lowell Petersen, one of the police officers who searched the vehicle, was asked: "Did you ask any of the parties if the mask belonged to them?" He responded: "No." He was then asked whether anyone claimed ownership of the mask, and Poe objected to the response as hearsay. The objection was overruled, and Petersen testified, "No." Petersen testified that he asked no questions about the mask, no one claimed ownership of it, and he put the mask back in the car.

Poe argues that the nonverbal conduct of Moss, in failing to comment about ownership of the mask, was clearly intended as an assertion that the mask was not his. Moss did not testify at trial. Poe contends that Moss' conduct constituted an out-of-court statement offered to prove the truth of the matter asserted and that the trial court erred in failing to recognize it as such.

We conclude the trial court did not err in overruling the hearsay objections and in admitting Petersen's testimony that he asked no questions about the mask and that none of the

occupants claimed its ownership. Petersen's testimony was not hearsay because it was not offered to prove the truth of the ownership of the mask. Petersen testified to his observations and not to any statement or nonverbal conduct by any of the parties involved. The trial court did not err in overruling Poe's objections.

CONCLUSION

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). The evidence was sufficient to support the conviction. We find no prejudicial error and no merit to any of Poe's assigned errors. The judgment of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

ROBERT M. BRENNER AND LISA D. BRENNER, APPELLANTS, V. BANNER COUNTY BOARD OF EQUALIZATION, APPELLEE.

753 N.W.2d 802

Filed August 1, 2008. No. S-07-810.

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. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Where a statute has been judicially construed and that construction has not evoked an

amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

5. **Taxation: Due Process: Evidence: Appeal and Error.** The Tax Equalization and Review Commission must be afforded some discretion in determining the probative value and admissibility of evidence in an informal appeal hearing, and a proper exercise of such discretion cannot constitute a denial of procedural due process.
6. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
7. ____: ____. An assessor may reasonably rely on physical measurements made by an appraiser as part of a mass appraisal.
8. ____: ____. Physical depreciation results from deterioration of improvements over time.
9. **Property: Valuation: Witnesses.** A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation.
10. **Taxation: Valuation: Proof.** When a county board of equalization has determined the value of the property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action, a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate.
11. **Taxation: Valuation: Words and Phrases.** Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.
12. **Taxation: Valuation.** The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellants.

James L. Zimmerman, Banner County Attorney, for appellee.

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

STEPHAN, J.

Robert M. Brenner and Lisa D. Brenner appeal from an order of the Tax Equalization and Review Commission (TERC) which affirmed a decision of the Banner County Board of Equalization

(Board) denying the Brenners' protest of the 2004 valuation of their residence. We conclude that the TERC decision and order is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. We therefore affirm.

BACKGROUND

Brenner Property

The Brenners are the owners of the property in question, which is a single-family residence located in rural Banner County, Nebraska. Construction of the home was completed in late 1998, and the Brenners occupied the home at that time. The cost of construction was between $200,000 and $204,000. The one-story, wood frame home has a brick veneer exterior and a wood shake roof. The main floor area is 2,544 square feet, which includes two bedrooms, 1½ bathrooms, and other living space. There is an attached garage with an area of 1,020 square feet and a slab porch. There is 2,023 square feet of finished space in the basement, including two bedrooms and a bathroom. The county assessor determined the 2004 actual value of the structure alone, based upon replacement cost less depreciation, to be $220,374.

Board of Equalization Proceedings

The Brenners filed a protest of the 2004 valuation with the Board. After hearing the testimony of the Brenners, the Board accepted the assessor's 2004 valuation of the Brenner home.

TERC Proceedings

The Brenners filed an appeal to TERC, challenging the valuation of their property for specific reasons. The Board filed an answer in which it alleged that the valuation was in accordance with applicable Nebraska law and TERC regulations, and was neither arbitrary, capricious, nor unreasonable. Robert, an attorney, represented himself and Lisa in the TERC proceedings.

At the commencement of the appeal hearing on June 13, 2007, the TERC chairman advised counsel that TERC would consider certain materials not included in the record, as permitted by law.[1]

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[1] See Neb. Rev. Stat. § 77-5016(3) (Cum. Supp. 2006).

Those materials considered and utilized by TERC in this case are reflected in a supplement to the official record. This supplement was filed in this appeal by TERC at the Brenners' request.

TERC received certain exhibits offered by the parties and rejected others. In particular, TERC sustained objections to two documents offered by the Brenners. The TERC chair determined that a report of an audit of the Banner County assessor's office conducted by the Department of Property Assessment and Taxation, covering the period October 2001 through January 2002, was irrelevant. TERC also excluded an exhibit as hearsay, which exhibit was the affidavit of Betty Holliday and an attached report, dated January 1, 2003, of a countywide property reappraisal for Banner conducted by Holliday on behalf of High Plains Appraisal Service (High Plains).

Five witnesses testified at the hearing, including Sharon Sandberg, the Banner County clerk and ex officio assessor. She testified that she requested the audit conducted by the Department of Property Assessment and Taxation in 2001-02 and that the audit disclosed certain deficiencies in her office, which she corrected. At least partially as a result of the audit, Banner County retained High Plains to conduct a countywide reappraisal for 2003. In determining property valuations for 2004, the assessor utilized data collected by High Plains for the 2003 reappraisal, including data for the Brenner property.

In June 2003, the Nebraska Real Property Appraiser Board (NRPAB) commenced an investigation which concluded that High Plains and appraiser Holliday had committed various errors during the countywide reappraisal for Banner County. NRPAB filed a complaint against Holliday. The complaint does not make specific reference to the Brenner property. NRPAB and Holliday reached a settlement in May 2006, in which settlement Holliday recognized that the allegations in the complaint were valid and that the allegations would be violations of Nebraska statutes and the NRPAB rules and regulations.[2] Holliday agreed in the 2006 settlement that she would no longer perform mass appraisals for any board of equalization in Nebraska.

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[2] Neb. Rev. Stat. §§ 76-2237 and 76-2238 (Reissue 2003); 298 Neb. Admin. Code, ch. 2, § 001 (2005).

The county assessor was aware of the complaint against Holliday and the settlement, but testified that she had no basis for concluding that there was any flaw in the actual data collected by High Plains in the countywide reappraisal for the 2003 tax year.

In determining the 2004 valuations, the assessor also utilized depreciation schedules previously developed by High Plains. She acknowledged that these differed from those provided in the Residential Cost Handbook, published by Marshall & Swift, LP, a reference manual commonly used in the valuation of real property. However, the assessor conducted a "depreciation study" and concluded that the depreciation tables developed by High Plains were appropriate.

The assessor testified that she used a computer program called TerraScan to determine property valuations for the 2004 tax season. She testified that an unspecified number of other Nebraska counties also utilized the TerraScan program. Data from the 2003 mass reappraisal was used by the TerraScan program in determining property valuations for 2004. The record card produced by the TerraScan program showing the 2004 valuation for the Brenner property states, "DATA USED FOR COST CALCULATIONS SUPPLIED BY MARSHALL & SWIFT." The heading above the final calculation of assessment value is titled "Cost Approach From Marshall & Swift." The assessor testified that TerraScan "provided [her] with the costing tables and they called their date as of June of 2001." An entry on the 2004 Brenner record card states "Replacement cost new less depreciation was used in improvement valuation. Marshall Swift tables dated June 2001 were used for costing. Depreciation information is on file." The assessor admitted that she had never compared the base cost found in the Marshall & Swift handbook to the TerraScan results for any property in Banner County. She also testified that TerraScan was used to determine all property values in Banner County in the same manner.

The assessor acknowledged that she did not personally inspect the Brenner property prior to the 2004 valuation, asserting that she was denied access by the Brenners. When she personally inspected the property in December 2006, she confirmed that the data previously entered in the TerraScan program was generally

correct. The inspection revealed nothing which caused the assessor to change her determination of value.

The assessor testified that in arriving at the 2004 valuation of the Brenner residence, she considered its condition to be "average" and its quality to be "average plus." She explained that the home had certain features which would not be expected in a home of "average" quality, so she rated the quality "between average and good." The TerraScan program uses a value of 30 for average quality and 40 for good quality. To indicate the "average plus" quality of the Brenner property, the assessor entered a value of 35.

Three members of the Brenner family testified at the hearing. Co-owner Lisa has a bachelor's degree in accounting and has experience in both private and public accounting. She holds an assessor's certificate and has attended "over 60 hours of appraisal education." She testified regarding various aspects of the construction and features of the home, which in her opinion is "average" in both quality and condition. Utilizing the Marshall & Swift Residential Cost Handbook, she concluded that the value of the home in 2004 was approximately $186,000. The only comparable property she could identify was a 3,175-square foot, one-story home which was built in 1976 and valued at $126,072 in 2004. Robert also testified about the quality and condition of the home and agreed with Lisa's opinion that its actual value in 2004 was $186,000. Maddie Lapaseotes, Lisa's daughter and Robert's stepdaughter, testified that the assessor and the county sheriff came to the home unexpectedly in July 2004, when the Brenners were away, and she did not allow them to enter.

Sheila Newell testified as a witness for the Brenners. Newell is licensed in Nebraska as a real estate broker and is also a certified general real property appraiser. At the time of the TERC hearing, she served as chair of the NRPAB. She personally inspected the Brenner home on several occasions between 1999 and 2006. Using the criteria of the Marshall & Swift Residential Cost Handbook, Newell testified that in her opinion, the quality of the home in 2004 was "average." In making this assessment, she considered the various characteristics of construction, including material, workmanship, design, and utility.

Newell also testified that in her opinion, the condition of the home was "average" in 2004, based upon her observations. In response to questions from members of the TERC panel, Newell acknowledged that the determination of quality and condition of real estate was subjective, at least to some degree, and that qualified appraisers could reach slightly differing conclusions. Newell also acknowledged that the home had certain features indicative of better than average quality which would support the assessor's determination of "average plus" quality. Newell did not express an opinion as to the actual value of the Brenner home in 2004.

In its written decision and order, TERC found that the Board's valuation of the residence as of the assessment date for the tax year 2004 was $220,374. It noted that the value was determined by the TerraScan program which implemented the cost approach, first calculating the replacement cost of the structure using tables developed by Marshall & Swift, and then deducting depreciation as determined on the basis of tables or schedules developed by the county assessor. The data used in the analysis was obtained in 2002 and used for the first time in 2003. TERC noted that while the Brenners argued generally that the data was so poor that any valuation based upon it would be unreasonable and arbitrary, "[n]o evidence was presented . . . concerning variances between data collected as shown on a valuation printout and actual characteristics" of the property. TERC noted that the only specific discrepancy claimed by the Brenners involved the quality of the home, which they claimed to be "average" and the assessor evaluated as "average plus." Exercising its statutory authority to utilize its own experience and technical competence in evaluating the evidence on this issue,[3] TERC concluded that the residence was "not of average quality as proposed by the [Brenners] and their appraiser." TERC also determined that Lisa's calculation of value using a cost approach was flawed and that the evidence was insufficient to allow a deduction for economic depreciation.

With respect to the Brenners' claim that their property was not "equalized" with the value of other parcels, TERC determined

[3] See § 77-5016(5).

that the single property claimed by the Brenners to be comparable to theirs was not in fact comparable and that there was "no evidence before [it] that taxable value of the subject property is not the same proportion of actual value as is the taxable value of comparable property." TERC concluded that the evidence did not support a finding that the decision of the Board was unreasonable or arbitrary and that there was no evidence upon which it could grant relief, because the Brenners' "only evidence of actual value for the subject property is a flawed application of the cost approach and there is no evidence of 'equalized' taxable value."

The Brenners filed a timely notice of appeal from this decision, and we moved the appeal to our docket on our own motion.

ASSIGNMENTS OF ERROR

The Brenners assign, restated, renumbered, and consolidated, that TERC erred in (1) applying an incorrect legal standard as to their burden of persuasion, (2) conducting the hearing in a manner that deprived them of procedural due process, (3) failing to conclude on the basis of the evidence that the 2004 valuation by the Board was arbitrary and capricious, (4) failing to find that the Board did not properly equalize their property, and (5) failing to consider and make findings on all issues presented.

STANDARD OF REVIEW

[1-3] Decisions rendered by TERC shall be reviewed by an appellate court for errors appearing on the record of the commission.[4] 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.[5] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[6]

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[4] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2006); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002).

[5] See *Marshall v. Dawes Cty. Bd. of Equal., supra* note 4.

[6] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003); *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

ANALYSIS

Taxpayer's Burden of Persuasion

The first assignment of error presents an issue of law as to a taxpayer's burden of persuasion before TERC. Citing statutory authority and an opinion of the Nebraska Court of Appeals,[7] the TERC order in this case recited the legal principle that TERC "can grant relief only if there is clear and convincing evidence that the action of the . . . Board was unreasonable or arbitrary." The Brenners argue that because of amendments to the TERC statutes in 2004 and 2007, this principle is no longer correct.

Some background is necessary to resolve this issue. Prior to the 1995 enactment of the Tax Equalization and Review Commission Act (TERCA),[8] appeals from actions taken by a county board of commissioners were taken to the district courts.[9] Section 77-1511, as it was written at that time, provided that the district court

> shall hear appeals and cross appeals [from a county board of equalization] as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low.

Construing this statute, this court held that in such appeals,

> [t]here is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and

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[7] See, § 77-5016(8); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

[8] See 1995 Neb. Laws, L.B. 490, § 153.

[9] Neb. Rev. Stat. §§ 77-1510 and 77-1511 (Reissue 1990). See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

> the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.[10]

This court further held that in order to rebut this presumption,

> the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.[11]

TERCA amended § 77-1511 by substituting TERC for the district court as the intermediate appellate tribunal, but it did not change the remaining provisions of the statute.[12] In early appeals under the amended statute, the Nebraska Court of Appeals applied our pre-TERCA case law construing the taxpayer's burden of persuasion under § 77-1511, noting that "the principles which were articulated from this statutory language when the district court heard these matters maintain viability now that [TERC] has taken over the district court's role."[13] In this court's first opportunity to consider an appeal from TERC, we agreed that these principles defined the taxpayer's burden of persuasion.[14]

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[10] *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989).

[11] *Bumgarner v. County of Valley*, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981).

[12] 1995 Neb. Laws, L.B. 490, § 153.

[13] *J.C. Penney Co. v. Lancaster Cty. Bd. of Equal.*, 6 Neb. App. 838, 850, 578 N.W.2d 465, 473 (1998). See, *Forney v. Box Butte Cty. Bd. of Equal.*, 7 Neb. App. 417, 582 N.W.2d 631 (1998); *Lancaster Cty. Bd. of Equal. v. Condev West, Inc.*, 7 Neb. App. 319, 581 N.W.2d 452 (1998).

[14] *US Ecology v. Boyd Cty. Bd. of Equal., supra* note 9. See *Garvey Elevators v. Adams Cty. Bd. of Equal.*, 261 Neb. 130, 621 N.W.2d 518 (2001).

Section 77-1511 was repealed in 2001; at the same time, § 77-5016(7) (Reissue 2003) was amended to read:

> If the appellant presents no evidence to show that the action taken by the board or the Property Tax Administrator is incorrect, the commission shall affirm such action. If the appellant presents any evidence to show that the action taken by the board or the Property Tax Administrator is incorrect, such action shall still be affirmed unless evidence is adduced establishing that the action of the board or the Property Tax Administrator was unreasonable or arbitrary.[15]

At the time of the 2001 amendment, § 77-5016 already provided that TERC "shall hear appeals and cross appeals . . . as in equity and without a jury and determine de novo all questions raised before the county board of equalization."[16] Thus, as a result of the 2001 amendment, § 77-5016(7) included essentially the same provisions previously codified at § 77-1511.

The Brenners argue that because of a 2004 amendment to § 77-5016, they should not have been required to present clear and convincing evidence to rebut the presumption that the Board faithfully performed its valuation duties. As a result of that amendment, § 77-5016(8) (Cum. Supp. 2004) provided:

> In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.[17]

[4] The 2004 amendment to § 77-5016(8) simply recodifies with minor changes the language previously found in § 77-5016(7). That language, in turn, is traceable to § 77-1511

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[15] 2001 Neb. Laws, L.B. 465, §§ 7, 12.

[16] *Id.* at § 7.

[17] 2004 Neb. Laws, L.B. 973, § 51.

prior to its repeal. The taxpayer's burden of persuasion by "clear and convincing evidence" results from long-established judicial construction of this statutory language. We find no language in the 2004 amendment that would reasonably call into question our construction of the language which originated in the former § 77-1511. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.[18]

For the sake of completeness, we note the Brenners' argument that a 2007 amendment[19] to § 77-5016(7) modified the burden of persuasion. That amendment, which became effective February 10, 2007, eliminated language requiring TERC to hear appeals "as in equity and without a jury and determine de novo all questions raised in the proceedings" and substituted a provision that TERC "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based" and "may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal."[20] We do not read this amendment to have any effect on the taxpayer's burden of persuasion in a TERC appeal. It simply restates the concept of de novo review in a manner more appropriate for a nonjudicial tribunal, and specifically authorizes TERC to consider any issues it deems pertinent to a valuation determination, whether or not the issue was raised before a board of equalization. We conclude that TERC did not err in its articulation and application of the Brenners' burden of persuasion.

Procedural Due Process

The Brenners argue that TERC conducted the appeal hearing in a manner which deprived them of their due process rights to

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[18] *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004); *Chapin v. Neuhoff Broad.-Grand Island, Inc.*, 268 Neb. 520, 684 N.W.2d 588 (2004).

[19] See 2007 Neb. Laws, L.B. 167, § 6.

[20] *Id.*

present evidence and be heard before an impartial board.[21] They contend that formal rules of evidence were applied despite the fact that the hearing was to be informal and that the chairman of the TERC panel frequently interrupted their presentation and excluded certain evidence.

TERCA specifies the procedures applicable to taxpayer appeal hearings.[22] Such hearings are to be informal "unless a formal hearing is granted" upon the request of a party.[23] In this case, the order for hearing specified that it was to be informal. Thus, TERC was required to "give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs excluding incompetent, irrelevant, immaterial, and unduly repetitious evidence" and to honor statutory privilege rules, but was "not otherwise . . . bound by the usual common-law or statutory rules of evidence."[24]

[5] These statutory procedures clearly do not require TERC to receive any and all evidence offered during an informal hearing. Rather, TERC is specifically empowered to assess the probative value of proffered evidence and exclude that which it determines to be "incompetent, irrelevant, immaterial, and unduly repetitious."[25] In a judicial proceeding, a trial court has the discretion to determine the relevancy and admissibility of evidence.[26] Likewise, TERC must be afforded some discretion in determining the probative value and admissibility of evidence in an informal appeal hearing, and it follows that a proper exercise of such discretion cannot constitute a denial of procedural due process.

In their brief, the Brenners list various rulings rejecting evidence they offered without explaining why they contend the

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[21] See *Krusemark v. Thurston Cty. Bd. of Equal.*, 10 Neb. App. 35, 624 N.W.2d 328 (2001).

[22] Neb. Rev. Stat. §§ 77-5015 to 77-5019 (Cum. Supp. 2006 & Supp. 2007).

[23] § 77-5016 (Supp. 2007).

[24] § 77-5016(1).

[25] *Id.*

[26] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

rulings were erroneous. In several of these instances, TERC properly rejected evidence offered by the Brenners, because it duplicated materials which were already included in the case file or which TERC had indicated it would consider without inclusion in the record pursuant to § 77-5016(3). These included regulations and other public records pertaining to assessment and taxation and the Brenners' notice of appeal filed with TERC, which they offered twice. The Brenners also complain that TERC sustained a foundational objection to their initial offer of two unidentified photographs. In rejecting the initial offer, the TERC chairman explained that it would be "material for [TERC] to know what, when and under what conditions and under what circumstances and by whom the photographs . . . were taken." When Lisa subsequently testified about the subject matter of the photographs, they were reoffered and received. Thus there was no error by TERC.

The TERC chairman sustained hearsay objections by the Board to evidence offered by the Brenners but also sustained hearsay objections made by the Brenners with respect to evidence offered by the Board. The TERC chairman properly explained that TERC could not consider hearsay evidence, because the applicable provision of TERCA gives parties the right to cross-examine all witnesses.[27]

The Brenners separately argue that TERC erroneously refused to receive and consider the report of the audit of the Banner County assessor's office by the Department of Property Assessment and Taxation, which pertained to the period of October 2001 to January 2002. TERC sustained a relevance objection to this audit, because there was no apparent connection between the events described in it and the manner in which the 2004 valuation of the Brenners' property was conducted. The Brenners made an offer of proof, stating that the audit report noted various irregularities in data collection and "establishe[d] a pattern to which in the year 2004 would indicate . . . continued arbitrary and capricious, unreasonable actions." We conclude that TERC did not abuse its discretion in excluding this and other evidence which it found lacking in probative value as to

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[27] § 77-5016(4).

the determination of the actual value for the Brenner property for the 2004 tax year.

The Brenners also argue that the TERC chairman interrupted their presentation in a manner which demonstrated bias. While interruptions did occur, we cannot conclude from the record that they were indicative of bias. In one instance, the chairman noted that little could be gained from what he deemed imprecise questions and answers with respect to dates and terminology. The chairman specifically noted that he was not prejudging the case, but, rather, encouraging counsel to focus on presenting substantive information relevant to valuation of the property for the 2004 tax year. From our review of the record as a whole, we find no basis for concluding that the chairman or any member of the TERC panel was biased against the Brenners. The record reflects that TERC afforded the Brenners an opportunity to be heard and present their case before an impartial tribunal. They were not denied procedural due process.

VALUATION

[6] The "actual value" of real property is defined by Nebraska law as

> the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.[28]

In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.[29] As we have noted, the Brenners had the burden of persuading TERC that the Board's valuation of their property was arbitrary or unreasonable. An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable

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[28] Neb. Rev. Stat. § 77-112 (Reissue 2003).

[29] *US Ecology v. Boyd Cty. Bd. of Equal.*, *supra* note 9; *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

person to the same conclusion.[30] Here, both the Board and the Brenners utilized the cost approach, which is an accepted method of determining the actual value of real property. There was no other evidence of value. The Brenners challenge the assessor's application of the cost approach to arrive at the valuation which was accepted by the Board.

[7] The Brenners contend that no meaningful valuation could have occurred, because the assessor did not personally inspect the property before arriving at the 2004 valuation. The record reflects that the assessor's office had basic information about the interior of the home obtained by data collectors during and after construction. Generally, an assessor may reasonably rely on physical measurements made by an appraiser as part of a mass appraisal.[31] There is conflicting evidence as to whether the Brenners thwarted her efforts to personally inspect the property prior to the 2004 valuation. Of greater significance is the assessor's testimony that when she did inspect the property in 2006, she found nothing which would change her opinion regarding the 2004 valuation. Under similar circumstances presented in *Kohl's Dept. Stores v. Douglas Cty. Bd. of Equal.*,[32] the Court of Appeals determined that the presumption of validity was properly applied to the valuation as determined by a board of equalization.

The Brenners also argue that the assessor's use of the TerraScan computer program to perform the actual computations used for the 2004 valuation was arbitrary and unreasonable. They claim that the program used flawed data obtained from the 2003 countywide reappraisal, but they could not identify any specific errors in the data. They also argue that the TerraScan program utilized an allegedly nonexistent "June 2001" Marshall & Swift costing table to perform the computations. The record on this point is somewhat unclear. The assessor testified that she did not verify the costing tables used by TerraScan, and Lisa testified that she utilized a Marshall & Swift costing table dated June

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[30] *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000).

[31] See *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 29.

[32] *Kohl's Dept. Stores v. Douglas Cty. Bd. of Equal.*, 10 Neb. App. 809, 638 N.W.2d 877 (2002).

2000, which was the most recent one she could find dated prior to June 2001. TERC noted that a "[s]pecific cost table for June 2001 may not exist. The practice of Marshall & Swift is to issue quarterly adjustment factors," and "[t]he adjustment factors have to be applied to a base cost to derive a cost as of a given quarterly date." We note that the documents which TERC was authorized by § 77-5016(3) to consider and utilize without including in the record included a list of quarterly multipliers dated June 2001 published in conjunction with the Marshall Valuation Service manual, published by Marshall & Swift, LP, to be used "to trend the costs published on the preceding pages to a current date and to adjust the costs by location." We cannot determine from this record that the TerraScan program utilized incorrect costing information. While we acknowledge that this raises some questions regarding the costing methodology employed by the assessor, we cannot conclude that the valuations derived from the TerraScan program utilizing Marshall & Swift costing information was arbitrary or unreasonable.

The record reflects one significant difference between the data utilized by TerraScan and that used by the Brenners in calculating the actual 2004 value of the residence: the evaluation of the quality of the structure. Lisa and Newell testified that the home was of average quality, based upon the factors listed in the Marshall & Swift Residential Cost Handbook. However, both conceded that the home had some desirable features which would not ordinarily be found in a home of average quality, including ceramic tile, wood shake shingle roofing, and a vaulted ceiling. The assessor testified that based upon these features, she rated the home as being of "average plus" quality, meaning that the quality of the home was "between average and good." Newell conceded that determination of the quality of a home for purposes of appraisal is somewhat subjective and that different qualified appraisers evaluating the same property could reach different conclusions within a reasonable range. Utilizing its own experience and technical expertise, as the law permits,[33] TERC determined that "the residence on the subject property is not of average quality as proposed by the [Brenners] and their

[33] § 77-5016(5).

appraiser." This conclusion is supported by competent evidence, including the aforementioned testimony of Lisa, Newell, and the assessor.

[8] The Brenners also contend that the assessor's valuation process did not include a sufficient adjustment for depreciation. Physical depreciation results from deterioration of improvements over time.[34] The assessor testified that she used a 70-year "average life" in determining the depreciation allowance, which differed from the 55- to 60-year average life used by Marshall & Swift. This resulted in an 8-percent deduction for physical depreciation. In her computations, Lisa utilized a 60-year average life, resulting in a 10-percent deduction for physical depreciation. She also included a 5-percent allowance for "locational depreciation."

The Brenners cite no authority for their argument that the assessor was legally required to use the 55- to 60-year average life utilized in the Marshall & Swift depreciation schedules. Regulations issued by the Nebraska Department of Property Assessment and Taxation require an assessor, as a part of the analysis of valuation based on the cost approach, to use the Marshall Valuation Service "as published and updated by Marshall and Swift Publishing Company . . . for uniform identification of the physical characteristics of real property."[35] The regulations do not specifically mention Marshall & Swift depreciation tables, but require an assessor, in the analysis of the cost approach, to develop and substantiate "various forms of depreciation which can be shown to exist through a study of the local market."[36] The assessor testified that she conducted such a study and determined that a 70-year average life was acceptable. We agree with TERC that the record does not support the "locational depreciation" adjustment claimed by the Brenners.

The Brenners argue that TERC ignored competent evidence presented by them and "failed to address" their assertion of quality, condition, opinion, and calculation of value, made as owners

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[34] *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989); *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 29.

[35] 350 Neb. Admin. Code, ch. 10, § 003.04 (2003).

[36] 350 Neb. Admin. Code, ch. 50, § 002.03B(2) (2001).

of the property. After discussing the evidence presented, TERC concluded that

> even if all of the allegations of the [Brenners] are believed, there is no evidence on which [TERC] could grant relief. The [Brenners'] only evidence of actual value for the subject property is a flawed application of the cost approach and there is no evidence of "equalized" taxable value.

The decision and order clearly reflects that TERC did consider and address these issues, but that TERC simply was not persuaded the Brenners had met their burden of showing that the Board acted arbitrarily or unreasonably in determining the value of their property.

[9,10] Lisa and Robert both gave opinions as to the value of their home and assign error to TERC's rejection of their opinions of value. A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation.[37] This principle rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it.[38] When a county board of equalization has determined the value of the property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action, a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate.[39] Here, the Brenners have not shown more than a difference of opinion between their valuations of the residence and those of the county. The TERC order shows that it considered the Brenners' opinions, including Lisa's calculation using the Marshall & Swift costing tables, and rejected their evidence concerning the value of the residence as "not persuasive." TERC's decision to accept the opinion of the

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[37] See, *US Ecology v. Boyd Cty. Bd. of Equal., supra* note 9; *Livingston v. Jefferson Cty. Bd. of Equal.*, 10 Neb. App. 934, 640 N.W.2d 426 (2002); *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001).

[38] *Schmidt v. Thayer Cty. Bd. of Equal., supra* note 37.

[39] *Livingston v. Jefferson Cty. Bd. of Equal., supra* note 37, citing *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 29.

county assessor over those of the taxpayers was neither arbitrary nor unreasonable.

We have considered the Brenners' other arguments with respect to valuation and conclude they are without merit. As we view the record, there is some ambiguity and lack of clarity in both the Brenners' and the assessor's valuation determinations. However, we agree with TERC that in the end, the record reflects nothing more than a difference of opinion between the Board and the Brenners regarding the actual value of the residence for purposes of 2004 taxation, and does not establish that the Board acted arbitrarily or unreasonably in arriving at its valuation.

EQUALIZATION

In their appeal to TERC, the Brenners claimed that the taxable value of their property as of January 1, 2004, was not equalized with the value of other real property in the county. The Brenners assign error to the determination by TERC that the record did not support this assertion.

[11,12] The Nebraska Constitution requires that real property be taxed "by valuation uniformly and proportionately."[40] Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.[41] The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.[42]

The Brenners attempted to prove their allegation that the Board failed to properly equalize assessments through the county assessor's records pertaining to a single residential property built in 1976, which the Brenners claimed to be comparable to theirs. TERC concluded that the property was not comparable to the Brenners' residence and that there was no other evidence in the record demonstrating that the taxable value of the Brenner

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[40] Neb. Const. art. VIII, § 1.

[41] *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[42] *Id.*; *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 29.

property was "not the same proportion of actual value as is the taxable value of comparable property." We agree and conclude that this assignment of error is without merit.

Consideration of All Issues

The Brenners argue that TERC erred in failing to make specific findings on each of their arguments. They contend that such findings are required by § 77-5016(7) as amended and effective on February 10, 2007, which provides that TERC "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based" and "may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal." The statute enables TERC to address all issues it considers pertinent in a valuation appeal, but it does not require TERC to make specific findings with respect to arguments or issues which it does not deem significant or necessary to its determination.

In their notice of appeal, the Brenners listed eight specific reasons for appealing the determination of the Board. In its decision and order, TERC summarized these reasons as pertaining to valuation and equalization, and addressed those issues. We conclude that TERC addressed and decided all issues which were properly before it.

CONCLUSION

For the reasons discussed, we affirm the decision and order of TERC, based upon our determination that it is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable.

Affirmed.

DARNALL RANCH, INC., APPELLANT, V. BANNER COUNTY BOARD OF EQUALIZATION, APPELLEE.

753 N.W.2d 819

Filed August 1, 2008. No. S-07-811.

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: Due Process: Evidence: Appeal and Error.** The Tax Equalization and Review Commission must be afforded some discretion in determining the probative value and admissibility of evidence in an informal appeal hearing, and a proper exercise of such discretion cannot constitute a denial of procedural due process.
5. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
6. ____: ____. An assessor may reasonably rely on physical measurements made by an appraiser as part of a mass appraisal.
7. **Property: Valuation: Witnesses.** A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation.
8. **Taxation: Valuation: Proof.** When a county board of equalization has determined the value of the property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action, a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate.
9. **Administrative Law: Words and Phrases.** An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

Appeal from the Tax Equalization and Review Commission. Affirmed in part, and in part reversed and remanded with directions.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

James L. Zimmerman, Banner County Attorney, for appellee.

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

STEPHAN, J.

Darnall Ranch, Inc. (DRI), owns several residences located on its ranch property in Banner County, Nebraska. It protested the 2004 valuation of each residence for tax purposes, but the protests were denied by the Banner County Board of Equalization (Board). DRI then appealed to the Tax Equalization and Review Commission (TERC), which upheld the valuations as determined by the Board. This is an appeal from the decision and order of TERC. We affirm in part, and in part reverse and remand with directions to adjust the 2004 valuations of two residences which are located in close proximity to a feedlot.

I. BACKGROUND

The 2004 valuations of the subject properties were based upon "replacement cost new less depreciation." The county assessor relied on data collected during a countywide reappraisal in 2003. She did not independently verify the data in determining the 2004 valuations. In a 2006 disciplinary proceeding before the Nebraska Real Estate Appraiser Board, the appraiser who conducted the 2003 countywide reappraisal admitted that she violated certain standards during the reappraisal and consented to disciplinary measures. The Banner County assessor was aware of the disciplinary proceeding, but was never informed that it involved deficiencies in the 2003 data collection. According to the county assessor, "[n]o one has ever proved that the data collection for 2003 was incorrect."

The 2003 data was entered into a computer program called TerraScan, which was used by the county assessor to compute all 2004 valuations for residential and agricultural property in the county. The data included floor plan dimensions and ratings of the quality and condition of each residence. The quality and condition ratings were based upon criteria found in the Residential Cost Handbook, published by Marshall & Swift, LP, a reference manual commonly used in the valuation of real property. In this context, "quality" refers to the overall quality of the characteristics of materials and workmanship, as well as

design and functional utility. "Condition" measures the extent to which physical deterioration or structural defects are present. Marshall & Swift costing tables and local multipliers are built into the TerraScan program. The assessor testified that the Nebraska Department of Property Assessment and Taxation is aware that Banner County uses the TerraScan program and has never objected to or questioned its reliability.

After the 2004 valuations were established, DRI filed protests for the residential properties which are the subject of this case. In each instance, the assessor recommended no change in the valuations, and the Board accepted this recommendation.

We shall refer to residences by the colloquial nomenclature utilized by the parties during the TERC hearing.

1. "Feedlot House" (Parcel 040001830)

The feedlot house is a two-story, single-family home built in approximately 1900, with a 90-percent stucco and 10-percent masonry veneer exterior and an area of 2,188 square feet. The assessor's data listed its quality as "Average" and its condition as "Badly-Worn." The 2004 assessed valuation was $17,765.

Gary Darnall, president of DRI, testified that this house is "basically in the middle of the feedlot." Trucks used to transport cattle, silage, grain, and manure pass within 40 feet of the house, day and night, causing problems with dust and flies. According to Gary, the house "is in disrepair" with defects in the doors and windows. Using his personal criteria, he described its quality as "very poor" and its condition as "badly-worn." In his opinion, the 2004 value of the feedlot house was $6,700.

Sheila Newell testified at the TERC hearing on behalf of DRI. Newell has held a real estate broker's license since 1989 and has been a certified general real property appraiser since 1996. At the time of her testimony, she served as chair of the Nebraska Real Property Appraiser Board. Newell inspected the feedlot house in November 2003 and again in September 2004, noting no changes between the two inspections. She described the house as being of "low" quality based upon its age, design, floor structure, windows, poor heating, lack of adequate utility outlets, and functional utility. She described the condition of the house as of January 1, 2004, as "[b]adly worn." Newell was

not asked to express an opinion as to the 2004 valuation of the feedlot house.

2. "LANE'S HOUSE" (PARCEL 040001822)

This is a single-family home occupied by Lane Darnall and his family, who have lived there since the home was built in 1992. It has a 100-percent masonry veneer exterior and an area of 1,555 square feet. The assessor's data listed its quality as "Fair +," meaning that it was between fair and average quality. The assessor rated the condition of the home as "Average." The 2004 assessed valuation was $101,492. There was no allowance for locational depreciation, because the assessor did not consider it to be "close enough" to the feedlot.

Gary, who is Lane's father, testified that Lane's house was built at a cost of approximately $64,000, and there had been no major remodeling prior to 2004. Gary testified that the house is located across the road and about one-eighth of a mile from the feedlot which has a capacity of 20,000 head of cattle. He also testified that vibration from the 20 to 25 trucks going by the house each day have caused cracking of its walls and foundation. He stated that cattle are located on all sides of the house. Gary testified that there had been "extensive" electrical problems in the home since a 1999 lightning strike. In his opinion, the value of the home in 2004 was $52,264.

Lane, who is the general manager for production of DRI, agreed that cattle regularly graze on all sides of his home. He testified that heavy truck traffic to the feedlot located one-eighth of a mile from his home causes cracking in the drywall and basement walls. He believes that the home receives "above average wear" due to the presence of his teenage children and foreign exchange students hosted by his family. Lane expressed his "lay opinion" that the quality of the home is "fair" and that the condition is "fair to low." In arriving at the claimed value of $52,264, Lane applied a 50-percent locational depreciation due to the proximity to the feedlot.

Newell personally inspected Lane's house in November 2003. In her opinion, the quality of the home was "fair," due to material and workmanship which were below "market standards." She also rated the condition of the home as "fair," due to evidence

of "deferred maintenance." She also testified that the proximity of the home to the feedlot should be considered in determining its value, but she did not quantify this opinion or express any opinion as to the value of the home in 2004.

3. "GARY'S HOUSE" (PARCEL 040002195 - B)

Gary and his wife reside in this 2,046-square-foot stucco home built in 1920. An addition was built in 1977. The assessor's data listed its quality as "Average" and its condition as "Good." The 2004 assessed valuation was $56,203.

Gary testified that the assessor's data was incorrect, in that there is a bathtub in the main floor bathroom, not a shower as indicated by the assessor, and one of the closets is smaller than indicated. He testified that the roof is damaged and that the windows leak. He rated both the quality and condition of the home as "fair." In his opinion, the value of the home in 2004 was $30,626.

Newell inspected Gary's house in November 2003. She evaluated the quality of the original structure as "fair" and the quality of the addition as "average." She rated the condition of the entire structure as "fair." Newell did not express an opinion as to the value of the home in 2004.

4. "PARENTS' HOUSE" (PARCEL 040002195 - A)

This 1,834-square-foot home was built in 1958. The exterior is 90-percent vinyl siding and 10-percent masonry veneer. It is occupied by Gary's mother. The assessor's data listed its quality as "Average+" and its condition as "Average." The 2004 assessed valuation was $100,998.

Gary testified that the roof of this home had its original shake shingles, which were badly worn, and that the roof leaked, causing interior water damage. In his opinion, the quality and condition of the home were both "fair." In Gary's opinion, the value of the home in 2004 was $63,500, which he characterized as "a layman's valuation from seeing other properties of similar homes that age, similar conditions." There was no evidence of other properties specifically considered by Gary in arriving at his valuation.

Newell testified that on the basis of her November 2003 inspection of this property, she considered its quality to be

"average" and she agreed with the assessor that its condition was also "average." Newell did not express an opinion as to the value of the house in 2004.

5. "Labor House" (Parcel 040004627)

This house, located 3 miles west of the feedlot, was constructed in 1996 at a cost of $76,000. It is a one-story house with an area of 1,160 square feet and a vinyl siding exterior. The assessor's data listed its quality as "Fair+" and its condition as "Average." The 2004 assessed valuation was $71,893.

Gary testified that there was a "continuing problem with mold" in this house and that the problem existed as of January 1, 2004. Taking this into consideration, he expressed an opinion that the quality and condition of the house were both "fair" and that its value in 2004 was $58,307.

Newell testified that while she was "not an expert in . . . mold identification," in 2002, she observed what she considered to be mold on both the main level and the basement of the house. Her inspection in November 2003 revealed the mold was increasing. Newell considered both the quality and the condition of the house to be "[f]air." She did not express any opinion as to the value of the house or the effect of the observed mold on value.

TERC determined that there were two issues raised by the appeal: (1) whether the decision of the Board determining taxable value of the subject properties was unreasonable or arbitrary and (2) the taxable value of the subject properties on January 1, 2004. TERC determined that it would not consider any equalization issues, because DRI had not raised such issues in its protests to the Board. TERC further determined that DRI had not shown the 2004 valuations of the subject properties to be unreasonable or arbitrary and that the evidence of actual value presented by DRI was not persuasive and was an insufficient basis for relief. TERC affirmed the determinations of the Board with respect to the 2004 valuations of the subject properties.

II. ASSIGNMENTS OF ERROR

DRI assigns, restated, renumbered, and consolidated, that TERC erred in (1) applying an incorrect legal standard as to its

burden of persuasion, (2) conducting the hearing in a manner that deprived it of procedural due process, (3) failing to conclude on the basis of the evidence that the 2004 valuations by the Board were arbitrary and capricious, (4) failing to consider equalization as an issue on appeal, and (5) failing to consider and make findings on all issues presented.

III. STANDARD OF REVIEW

[1-3] Decisions rendered by TERC shall be reviewed by an appellate 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] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[3]

IV. ANALYSIS

1. Taxpayer's Burden of Persuasion

Citing statutory authority and an opinion of the Nebraska Court of Appeals,[4] the TERC order recited the legal principle that TERC "can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary." DRI argues that because of amendments to the TERC statutes in 2004 and 2007, this principle is no longer correct. We considered and rejected this same argument in *Brenner v. Banner Cty. Bd. of Equal.*,[5] and we therefore do not address it here.

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[1] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2006); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002).

[2] See *Marshall v. Dawes Cty. Bd. of Equal., supra* note 1.

[3] *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003); *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

[4] Neb. Rev. Stat. § 77-5016(8) (Cum. Supp. 2006); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

[5] *Brenner v. Banner Cty. Bd. of Equal., ante* p. 275, 753 N.W.2d 802 (2008).

2. Procedural Due Process

DRI argues that TERC conducted the appeal hearing in a manner which deprived it of due process rights to present evidence and be heard before an impartial board.[6] It contends that formal rules of evidence were applied, despite the fact that the hearing was to be informal, and that the chairman of the TERC panel frequently interrupted its presentation and "became an advocate."[7]

The Tax Equalization and Review Commission Act (TERCA)[8] specifies the procedures applicable to taxpayer appeal hearings. Such hearings are to be informal "unless a formal hearing is granted" upon the request of a party.[9] In this case, the order for hearing specified that the hearing was to be informal. TERC was required to "give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs excluding incompetent, irrelevant, immaterial, and unduly repetitious evidence" and to honor statutory privilege rules, but was "not otherwise . . . bound by the usual common-law or statutory rules of evidence."[10]

[4] As we held in *Brenner v. Banner Cty. Bd. of Equal.*,[11] TERC must be afforded some discretion in determining the probative value and admissibility of evidence in an informal appeal hearing, and it follows that a proper exercise of such discretion cannot constitute a denial of procedural due process.

DRI states that TERC sustained objections to several exhibits it offered and argues that the cumulative effect of these rulings was prejudicial. DRI makes no attempt to explain why the rulings excluding these exhibits were incorrect. We note that after the initial rulings, at least two of the exhibits were subsequently

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[6] See *Krusemark v. Thurston Cty. Bd. of Equal.*, 10 Neb. App. 35, 624 N.W.2d 328 (2001).

[7] Brief for appellant at 27.

[8] Neb. Rev. Stat. §§ 77-5015 to 77-5019 (Cum. Supp. 2006 & Supp. 2007).

[9] § 77-5016.

[10] See § 77-5016(1).

[11] *Brenner v. Banner Cty. Bd. of Equal.,* *supra* note 5.

reoffered and received. TERC excluded several exhibits offered by the Board, based upon objections by counsel for DRI. Viewing the record as a whole, TERC applied the same standard of admissibility to evidence offered by both parties and DRI therefore suffered no prejudice.

DRI also argues that the TERC chairman interrupted its presentation in a manner which demonstrated bias. While interruptions did occur, we cannot conclude from the record that they were indicative of bias. We regard the interruptions as attempts to clarify or focus a particular question or line of inquiry, or to indicate an area in which additional information was needed. TERC has statutory authority to "utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it."[12] In an informal hearing, TERC must have a certain degree of latitude in seeking clarification and focus of testimony as it is received.[13] There is nothing in the record to suggest that TERC exercised this authority in a manner prejudicial to DRI.

For these reasons, we conclude that DRI was not deprived of procedural due process.

3. Valuation

[5] The "actual value" of real property is defined by Nebraska law as

> the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.[14]

In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete

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[12] § 77-5016(5).

[13] See *Brenner v. Banner Cty. Bd. of Equal., supra* note 5.

[14] Neb. Rev. Stat. § 77-112 (Reissue 2003).

accuracy.[15] As we have noted, DRI had the burden of persuading TERC that the Board's valuation of its property was arbitrary or unreasonable. An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion.[16]

Actual value of real property for purposes of taxation "may be determined using professionally accepted mass appraisal methods, including, but not limited to . . . (1) [the] sales comparison approach . . . (2) [the] income approach, and (3) [the] cost approach."[17] The assessor testified that values were determined on the basis of "[r]eplacement cost new less depreciation when compared to the sales roster." DRI does not criticize the use of this approach, but contends that it was not correctly applied by the assessor and the Board.

(a) Physical Characteristics of Property

[6] DRI contends that neither the assessor nor the Board had personally inspected any of the residences to determine their actual physical characteristics before arriving at the 2004 valuations. The assessor acknowledged this, but testified that she relied on data collected during the 2003 countywide reappraisal. The assessor also acknowledged that the person who conducted the 2003 reappraisal was subsequently disciplined for certain irregularities which occurred during the reappraisal, but the assessor was never informed that there was any problem with the 2003 data collection. Generally, an assessor may reasonably rely on physical measurements made by an appraiser as part of a mass appraisal.[18] Here, the assessor also testified that when she inspected the properties subsequent to the 2004 valuations, she found no errors in the data utilized in 2004. Under similar circumstances, the Court of Appeals concluded that the

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[15] *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999); *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

[16] *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000).

[17] § 77-112.

[18] See *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 15.

presumption of validity was properly applied to the valuation as determined by a board of equalization.[19]

Gary testified generally that the data collected in 2003 was inaccurate, but the record does not reflect any significant errors. The assessor conceded that one property was shown on her records as having a "crawl area" when, in fact, it did not. However, she explained that the TerraScan program uses "crawl area" as the default description of the base of a residential structure and attributes no value to it. If the structure has a basement, which does affect value, that information is manually included in place of the "crawl area" designation.

The record does not reflect any significant errors or discrepancies in the description of the physical characteristics used to determine the 2004 valuations. Lane admitted that he utilized the county assessor's data in arriving at his opinion of the value of the residence where he lived.

(b) Costing Methodology

DRI argues that the Board's 2004 valuations were arbitrary and unreasonable because the assessor did not follow regulations and manuals promulgated by the Property Tax Administrator, and specifically those published by Marshall & Swift, LP, such as the Residential Cost Handbook and Marshall Valuation Service. The assessor testified that the TerraScan program which she utilized in determining the 2004 valuations utilized costing information published by Marshall & Swift, and the record cards generated by TerraScan include a notation that data used for calculations is supplied by Marshall & Swift. The reports make reference to a "Manual Date," and the record cards reference "Marshall Swift tables" dated June 2001. The assessor testified that she did not know if Marshall & Swift published new costing tables in June 2001 and that she did not manually compare the TerraScan information on the DRI properties to the Marshall & Swift tables, but, rather, relied upon the program to use the correct information.

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[19] *Kohl's Dept. Stores v. Douglas Cty. Bd. of Equal.*, 10 Neb. App. 809, 638 N.W.2d 877 (2002). See *Brenner v. Banner Cty. Bd. of Equal., supra* note 5.

Newell testified as to her understanding that Marshall & Swift compiles data and issues updates on a regular basis. She stated that "quarterly multipliers should then be used to trim the costs published on the pages that you already have in your Handbook to a current date to adjust the costs." The following exchange then occurred:

> [DRI's counsel:] Now, specifically were there sheets distributed for — it comes out in a book for June 1st of 2001 for average — low quality, fair quality, average quality, good quality, that would cover the — a change made for June, 2001?
>
> [Newell:] For residential there were not.
>
> Q That's —
>
> A For residential —
>
> [TERC chairman]: Is that for the cost factors . . . or is that —
>
> [Newell]: It —
>
> [TERC chairman]: I'm sorry. I can't tell whether counsel is asking you the definitions of change or did the cost factors change.
>
> [Newell]: I believe the question was, did you receive a new page, printout, data.
>
> [TERC chairman]: Cost factors?
>
> [Newell]: On June of 2001 for the residential section.
>
> [TERC chairman]: All right.
>
> [Newell]: That's why I said, no, not for the residential.
>
> [TERC chairman]: But it's a cost factor. It's not the descriptor. It's not the definitions.
>
> [Newell]: Yes, cost.
>
> [TERC chairman]: And it wasn't a factor that you would apply to a prior value.
>
> [Newell]: Wasn't the multipliers.
>
> [TERC chairman]: Wasn't the multiplier, all right.
>
> [DRI's counsel]: Thank you.

The record lists a Marshall & Swift Valuation Service Manual dated "6/2001" as one of the documents which TERC could consider and utilize without inclusion in the record pursuant to § 77-5016(3), although it does not appear that TERC made specific reference to this manual in this case.

DRI argues, on the basis of this evidence, that the TerraScan program utilized incorrect Marshall & Swift costing information in arriving at the 2004 valuations. We cannot determine from the rather confusing record whether or not this is so. Moreover, DRI offered no evidence as to which Marshall & Swift manual should have been used, or whether the use of a different manual would have resulted in lower valuations. While we acknowledge that this evidence raises some questions regarding the costing methodology employed by the assessor, we cannot conclude on the basis of this evidence alone that the valuations derived from the TerraScan program utilizing Marshall & Swift costing information were arbitrary or unreasonable.

DRI also argues that an audit of the Banner County assessor's office conducted by the Department of Property Assessment and Taxation for the period of October 2001 through January 2002 is probative of deficiencies in the 2004 valuations at issue here. We are not persuaded by this argument and agree with the conclusion of TERC that on this record, it cannot be determined that "discontinued assessment practices for years prior to 2003 affected valuation of the subject property for the tax year 2004."[20]

(c) Taxpayer's Opinions Regarding Quality, Condition, and Value

DRI argues that TERC failed to properly consider the taxpayers' opinions and those of its expert regarding the quality, condition, and value of the subject properties. TERC determined that Gary's testimony regarding the quality and condition of the properties was not related to any specific criteria or standards. The record supports this determination. When asked on cross-examination what he considered "low" quality, he replied, "I don't have the definition of it. It would be just my definition." He conceded that what he might consider to be "low" quality, someone else might consider "average." He could not say if his definition of "fair" was the same as that utilized by Marshall & Swift.

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[20] See *Brenner v. Banner Cty. Bd. of Equal., supra* note 5.

In contrast, Newell's testimony regarding the quality and condition of the subject properties was based on the Marshall & Swift criteria. She agreed with the assessor's determination of the "average" quality and condition of the parents' house, but her ratings of the other properties were somewhat lower than those of the appraiser. For example, Newell testified that she observed mold in the labor house and rated the condition of the structure as "fair," compared to the assessor's rating of "average." Newell acknowledged that the determination of quality and condition was somewhat subjective and that the opinions of qualified appraisers with respect to the same property could vary. As noted, Newell expressed no opinion of the value of any of the subject properties, and the record therefore does not indicate whether or how Newell's opinions regarding quality and condition would affect values as determined by the assessor and the Board. The conflicting testimony regarding condition, quality, and value of the subject properties reflected nothing more than differences of opinion, with no correlation to value even if Newell's opinions were accepted.

[7,8] Although Newell gave no opinions of value, Gary did. A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation.[21] This principle rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it.[22] Similarly, a corporate officer may be competent to offer an opinion of value, provided the officer is familiar with the property and has knowledge of general values in the vicinity.[23] When a county board of equalization has determined the value of the property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action, a taxpayer must show more than

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[21] See, *US Ecology v. Boyd Cty. Bd. of Equal., supra* note 15; *Livingston v. Jefferson Cty. Bd. of Equal.*, 10 Neb. App. 934, 640 N.W.2d 426 (2002); *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001).

[22] *Schmidt v. Thayer Cty. Bd. of Equal., supra* note 21.

[23] See *Kohl's Dept. Stores v. Douglas Cty. Bd. of Equal., supra* note 19.

a difference of opinion concerning the assessed value of the taxpayer's real estate.[24]

Gary resided in one of the subject properties and was the president of the corporation which owned each of them. He did not utilize the Marshall & Swift valuation system in arriving at his opinions of the value of each property. His opinions were based upon his knowledge of unidentified "other properties" and "just a judgment call on my part of those experiences of having bought property and sold property in this area." He offered no details of any valuation or sales of comparable residential property. When asked on cross-examination how he arrived at the value of the residence occupied by his family, he replied: "Well, I don't want to get into it, but I have my own little formula that I use to — on depreciation and so forth. It has nothing to do with the way the State does it or anybody else does and that's what I came up with."

The record supports TERC's finding that the taxpayer's evidence of actual value was not persuasive.

(d) External Depreciation

DRI argues that TERC erred in rejecting its argument that external or "locational" depreciation should have been applied in determining the value of Lane's house and the feedlot house, due to their proximity to a cattle feedlot. This argument has merit.

The Nebraska Court of Appeals addressed this issue in *Livingston v. Jefferson Cty. Bd. of Equal.*,[25] which involved the valuation of a rural home located less than 1 mile from the owner's hog farrowing facility. TERC affirmed the assessed valuation of the home, and on appeal, the property owner argued that TERC erred in rejecting any external depreciation based on the proximity of the house to the hog facility. Noting that "[t]he whole concept of determining value must assume both a willing buyer and [a willing] seller," the court concluded:

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[24] *Livingston v. Jefferson Cty. Bd. of Equal., supra* note 21, citing *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal., supra* note 15.

[25] *Livingston v. Jefferson Cty. Bd. of Equal., supra* note 21.

> It was arbitrary for the Board and TERC to ignore the effect that the nearby hog facility would have on the house's fair market value in the ordinary course of trade. No reasonable fact finder could conclude that in the real estate marketplace, a potential buyer would not notice, and react economically, to having a large hog facility very nearby while living in a remote location. Thus, the Board's valuation, and TERC's decision upholding that valuation, was arbitrary and capricious.[26]

In an unpublished opinion,[27] the Court of Appeals applied *Livingston* to the 2002 valuation of the DRI property which we refer to in this case as Lane's house. As in this case, Gary testified in that case that the home was located next to a 20,000-head cattle feedlot, causing problems with trucks en route to and from the feedlot, as well as dust and flies. He also testified that the truck traffic caused the home to vibrate and that the well for the home is connected to the cattle-watering facility. The Court of Appeals held that because this competent evidence was undisputed, TERC's decision upholding the Board's valuation for the property was unreasonable and arbitrary. The court reversed that portion of the TERC order and remanded the cause with directions to consider the proximity of the home to the feedlot in decreasing its value.

At the TERC hearing in this case, the assessor acknowledged that TERC ordered an adjustment in the 2002 and 2003 valuations of Lane's house due to its proximity to the feedlot. However, she testified that no similar adjustment was made in the 2004 valuation because she did not consider the home to be "close enough to the feedlot that it has the problems that the taxpayer contends." As to the feedlot house, which she acknowledged to be "actually in the feedlot," the assessor testified that she did not apply any "locational depreciation" because the house had "an 85 percent physical depreciation, which means that it's about worn out," and that she was "not sure" an

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[26] *Id.* at 947, 640 N.W.2d at 437.

[27] *Darnall Ranch, Inc. v. Banner Cty. Bd. of Equal.*, No. A-04-199, 2005 WL 780379 (Neb. App. Mar. 22, 2005) (not designated for permanent publication).

additional depreciation allowance based upon location "would make that much difference."

[9] An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.[28] It is undisputed that an external depreciation was applied in determining the valuations of these properties for 2002 and 2003, but not for 2004. Gary's description of the problems associated with the location of Lane's house, situated approximately one-eighth mile from the feedlot and next to its access road, is essentially the same as that summarized in the prior case decided by the Court of Appeals. The Board produced no evidence to refute these facts, other than the assessor's unsubstantiated opinion that the property was not "close enough" to the feedlot and a photograph which depicts the home situated across the road from the feedlot. As to the feedlot house, there is no competent evidence in the record to support the assessor's position that depreciation based on useful life obviates the applicability of external depreciation based on the feedlot. The Board's valuations of Lane's house and the feedlot house and the affirmance by TERC were, for these reasons, arbitrary and unreasonable.

4. Equalization

DRI argues that TERC erred in concluding that equalization was not an issue on appeal because it had not been raised before the Board. Our review of the record shows that equalization was not raised or considered by the Board in setting the 2004 valuations for the subject properties. Equalization with respect to the subject residential properties is not mentioned on the protest forms filed by DRI or the summaries of the Board's disposition of each protest. The record includes a transcript of the hearing conducted by the Board at which Emilie Darnall appeared and spoke with respect to the protests. There is no reference to equalization, although it appears that the transcription is incomplete. Emilie testified at the TERC hearing that she discussed equalization when she appeared before the Board, but could

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[28] See *Phelps Cty. Bd. of Equal. v. Graf, supra* note 16.

not recall the specifics of her remarks in this regard. From this record, it cannot be determined with any certainty that any specific issue pertaining to equalization was presented to the Board, either in the protest forms or the subsequent hearing.

DRI argues that TERC should nevertheless have considered its equalization arguments under § 77-5016(7), which provides that TERC "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based" and further provides that TERC "may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal." We do not read this permissive statutory language as requiring TERC to consider issues not presented to a county board of equalization. Based on our review of the record, we conclude that TERC did not err in ruling that equalization was not an issue on appeal.

V. CONCLUSION

For the reasons discussed, we reverse the TERC order with respect to the valuation of Lane's house, parcel 040001822, and the feedlot house, parcel 040001830. As to those properties, we remand the cause to TERC with directions to adjust the 2004 valuations by applying external, or "locational," depreciation in the same manner as in 2002 and 2003. In all other respects, we affirm the TERC order.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V.
GLENN A. HENSE, APPELLEE.
753 N.W.2d 832

Filed August 1, 2008. No. S-07-875.

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. ____: ____. 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.

3. **Statutes: Legislature: Intent.** For a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
4. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
5. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
6. **Motor Vehicles: Licenses and Permits: Revocation: Sentences: Probation and Parole.** Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2006) requires that a 15-year revocation be part of any sentence for a conviction under the statute, including a sentence of probation.
7. **Appeal and Error.** The purpose of appellate review in error proceedings is to provide an authoritative exposition of the law to serve as precedent in future cases.
8. **Double Jeopardy: Sentences: Appeal and Error.** Even though modifying a sentence on review does not violate constitutional principles of double jeopardy, because of the language of Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2006), a Nebraska appellate court does not have authority to modify a sentence in an error proceeding when the defendant has been "placed legally in jeopardy."
9. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

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

Gary Lacey, Lancaster County Attorney, and Krista Hendrick for appellant.

Dennis R. Keefe, Lancaster County Public Defender, Timothy M. Eppler, and Valerie R. McHargue, Senior Certified Law Student, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Glenn A. Hense pled guilty to the felony charge of operating a motor vehicle in a period during which his license had been revoked. See Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp.

2006). The district court for Lancaster County sentenced Hense to probation for 2 years but did not order a further revocation of his operator's license as part of the sentence. The State asserts that a 15-year revocation is mandatory under § 60-6,197.06. The State brought this error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006). The State takes exception to the district court's failure to impose a 15-year revocation of Hense's license. We sustain the State's exception; however, because of the limitations placed on the court under § 29-2315.01 and Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2006), we conclude that Hense's sentence is not affected by our decision in this error proceeding.

STATEMENT OF FACTS

As a result of a conviction for driving under the influence, third offense, Hense's operator's license was revoked for a period of 15 years, which will end in 2012. On September 3, 2006, Hense was arrested for operating a motor vehicle during such period of revocation. Hense was charged with a Class IV felony, operating a motor vehicle during revocation, in violation of § 60-6,197.06. On February 13, 2007, he pled guilty to the charge.

The matter originally came on for sentencing on April 25, 2007. However, the district court continued sentencing until May 23 in order to allow the court to research and determine whether it was required under § 60-6,197.06 to revoke Hense's operator's license for 15 years as part of any sentence of probation that was to be imposed for the current offense of driving during revocation.

At the sentencing hearing, the court noted that prior to an amendment which became effective July 14, 2006, § 60-6,197.06 did not include language requiring license revocation as part of the sentence for a violation of the statute. The 2006 amendment added the following language:

> [T]he court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing,

> upon final judgment of any appeal or review, or upon the date that any probation is revoked.

See 2006 Neb. Laws, L.B. 925, § 12.

The court concluded that § 60-6,197.06 does not mandate a 15-year revocation as part of an order of probation. In so concluding, the court focused on the last phrase of the statute stating that revocation is to be administered "upon the date that any probation is revoked." The court compared § 60-6,197.06 to another statute that specifically required that revocation be part of an order of probation, and the court concluded that the absence of such language in § 60-6,197.06 indicated that revocation was not required to be part of an order of probation under § 60-6,197.06. Based on such conclusion, the court sentenced Hense to probation for a period of 2 years but did not order a revocation of his operator's license as part of the sentence.

The State requested and the Nebraska Court of Appeals granted leave to file this appeal pursuant to § 29-2315.01. Hense sought to bypass the Court of Appeals, and we granted the petition to bypass.

ASSIGNMENT OF ERROR

The State asserts that the district court erred when it failed to impose a 15-year revocation of Hense's operator's license as part of the sentence for the offense of driving during a period of revocation. The State claims that such 15-year revocation is mandatory under § 60-6,197.06.

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. *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

ANALYSIS

Revocation Is Mandatory in a Conviction Under § 60-6,197.06.

The State asserts that the district court erred when it failed to impose a 15-year revocation of Hense's operator's license as part of his sentence of probation for having committed the

offense of driving during a period of revocation. The State claims that revocation is mandatory under § 60-6,197.06 and that the district court erred when it concluded that § 60-6,197.06 does not require a 15-year revocation when a defendant is sentenced to probation. We agree with the State and conclude that a 15-year revocation is required to be imposed as part of any sentence for a conviction under § 60-6,197.06, including a sentence of probation.

[2-4] 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. *Rodriguez-Torres, supra*. For a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Id*.

[5] As noted above, the language of § 60-6,197.06 at issue in this case was added to the statute in 2006. The first sentence of the 2006 amendment provides that "the court *shall*, as part of the judgment of conviction [for felony operation of a motor vehicle during revocation], revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01." (Emphasis supplied.) As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). Therefore, the plain and ordinary meaning of the first sentence is that it is mandatory that the court revoke the operator's license of a person convicted under the statute for 15 years and that the court does not have discretion as to whether or not it imposes such revocation. We note that the same sentence provides that such revocation is to be imposed "as part of the judgment of conviction." In a criminal case, the judgment is the sentence. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). Probation is a sentence. See, Neb. Rev. Stat. § 29-2246(4) (Cum. Supp.

2006) (defining "[p]robation" as a sentence); Neb. Rev. Stat. § 29-2260(4) (Reissue 1995) (providing that when convicted offender is not sentenced to imprisonment, court may sentence him or her to probation). Therefore, the "judgment of conviction" as used in § 60-6,197.06 encompasses an order imposing probation. The first sentence of the 2006 amendment to § 60-6,197.06 does not contain language limiting its effect to specific types of judgments or excluding judgments that include an order of probation. Examination of the first sentence of § 60-6,197.06, standing alone, indicates that a 15-year period of revocation is required to be imposed as part of the sentence of probation for a violation of § 60-6,197.06.

Although the first sentence of the amendment is clear in itself, the amendment, when read as whole, may reasonably be considered ambiguous, because the second sentence of § 60-6,197.06 provides that the revocation "shall be administered upon sentencing, upon final judgment of any appeal or review, *or upon the date that any probation is revoked*." (Emphasis supplied.) Language that the revocation is to be administered upon, inter alia, "the date that any probation is revoked" could be read to imply that revocation is not required to be a part of an order of probation and that instead, revocation is to be imposed only when probation has been revoked. The statute can reasonably be considered ambiguous, because although the first sentence of the amendment states that a 15-year revocation must be part of a judgment of conviction, the second sentence of the amendment implies that a 15-year revocation would not necessarily be part of a judgment of conviction that orders probation, but, rather, must be administered upon the revocation of probation.

Because the amended portion of § 60-6,197.06 is ambiguous, we look to the legislative history of the amendment. The 2006 amendment was part of L.B. 925, which contained amendments to various laws relating to driving under the influence (DUI). The Introducer's Statement of Intent stated that the bill sought, inter alia, "to strengthen and clarify certain portions of Nebraska's existing DUI and DUI related laws." Judiciary Committee, 99th Leg., 2d Sess. (Jan. 19, 2006). The Statement of Intent specifically noted that the bill "[r]equires the imposition of a fifteen (15) year license revocation as part of any sentence for felony

Operation of a Motor Vehicle During Suspension." *Id.* At the committee hearing on L.B. 925, the senator who introduced the bill commented that the bill "requires the imposition of a 15-year license revocation as part of any sentence for felony operation of a motor vehicle during suspension." Judiciary Committee Hearing, 99th Leg., 2d Sess. 22 (Jan. 19, 2006). The legislative history therefore evinces the intent that a 15-year revocation was to be part of "any sentence" imposed under § 60-6,197.96. We read the broad reference to "any sentence" to include a sentence of probation, and we find nothing in the legislative history indicating that revocation was not intended to be required when the sentence for felony operation of a motor vehicle during revocation is probation.

[6] The first sentence of the amended language of § 60-6,197.06 provides that the court "shall" revoke the defendant's license "for a period of fifteen years" as part of the "judgment of conviction" under the statute. To the extent the second sentence of the amendment makes the statute ambiguous, the legislative history of the amendment indicates that the intent was that a revocation would be part of "any sentence" for a conviction under the statute, including a sentence of probation. We conclude that § 60-6,197.06 requires that a 15-year revocation be part of any sentence for a conviction under the statute, including a sentence of probation. The district court's conclusion to the contrary was error. The court in this case did not have discretion under the statute as to whether or not it could impose such revocation, and therefore the court erred when it failed to impose a 15-year revocation of Hense's operator's license. The State's exception to the district court's sentencing order has merit and is sustained.

Effect of Ruling.

[7] We have found merit in the State's exception to the district court's sentencing order, and we must now proceed to determine the effect of our conclusion on the sentence in the instant case. The State brought the present appeal as an error proceeding pursuant to § 29-2315.01. Section 29-2315.01 permits the State to take exception to trial court decisions. We have noted that the purpose of appellate review in error proceedings

is to provide an authoritative exposition of the law to serve as precedent in future cases. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004). Because the State brought this appeal as an error proceeding, disposition of this case and specifically whether our reading of § 60-6,197.06 will permit imposition of a 15-year revocation on Hense is governed by § 29-2316, which provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

[8,9] We noted in *State v. Vasquez*, 271 Neb. 906, 914, 716 N.W.2d 443, 451 (2006), that the "application of § 29-2316 turns on whether the defendant has been placed in jeopardy by the trial court, not by whether the Double Jeopardy Clause bars further action." We therefore concluded that even though modifying a sentence on review does not violate constitutional principles of double jeopardy, because of the language of § 29-2316, a Nebraska appellate court does not have authority to modify a sentence in an error proceeding when the defendant has been "placed legally in jeopardy." *Vasquez, supra*. Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea. *Id.* In *Vasquez*, we determined that the defendant had been placed in legal jeopardy when the trial court accepted her guilty plea

and that therefore, our decision in the error proceeding could not affect her sentence.

We note that the reasoning in *Vasquez* appears to contradict the reasoning in certain prior cases. In *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000), we were required to apply the language of Neb. Rev. Stat. § 29-2319(1) (Reissue 1995), which is virtually identical to § 29-2316 at issue herein except that § 29-2319(1) relates to error proceedings taken from a county court to a district court pursuant to Neb. Rev. Stat. § 29-2317 (Reissue 1995). In *Neiss*, we ruled that the district court did not err in an error proceeding before it involving a sentence enhancement proceeding, when it reversed the judgment of the county court and remanded the case to the county court to resentence the defendant. In reaching this conclusion, we stated that "the protections afforded by § 29-2319 are no greater than or different from the double jeopardy protections afforded by the U.S. and Nebraska Constitutions." 260 Neb. at 701, 619 N.W.2d at 230. Given our statement, we reasoned that because resentencing was not barred by the Double Jeopardy Clause, it was also not barred by § 29-2319.

We based the reasoning in *Neiss* in part on two earlier cases applying § 29-2316, *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990), and *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989). In both *Wren* and *Schall*, brought to this court by the State as error proceedings pursuant to § 29-2315.01, this court determined that because double jeopardy considerations do not prohibit review of a sentence, the defendants in each case had not been "placed legally in jeopardy" within the meaning of § 29-2316 with respect to the sentence that was at issue imposed and that therefore, § 29-2316 did not prohibit an appellate court from affecting the sentence imposed. In *Wren*, this court remanded the cause to the district court for resentencing because the district court lacked statutory authority to impose the sentence it had imposed. In *Schall*, this court remanded the cause to the district court to reinstate and affirm a sentence that the county court had imposed and that the district court had erroneously reversed.

In *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006), we did not cite to or discuss *Neiss*, *Wren*, *Schall*, or other

similar cases. However, our statement in *Vasquez* that "the application of § 29-2316 turns on whether the defendant has been placed in jeopardy by the trial court, not by whether the Double Jeopardy Clause bars further action," 271 Neb. at 914, 716 N.W.2d at 451, demonstrates that we considered and rejected equating the phrase "placed legally in jeopardy" in § 29-2316 with constitutional double jeopardy, and appears to contradict our earlier statement in *Neiss* that "the protections afforded by § 29-2319 are no greater than or different from the double jeopardy protections afforded by the U.S. and Nebraska Constitutions," 260 Neb. at 701, 619 N.W.2d at 230, as well as similar statements in *Wren* and *Schall* regarding the application of § 29-2316. Although jurisprudence related to double jeopardy may inform determinations as to whether a defendant has been "placed legally in jeopardy" under § 29-2316, see *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004), and *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000), we believe, consistent with *Vasquez*, that the analysis under § 29-2316 is not a double jeopardy analysis, but instead is a question of whether further action is permissible under the terms of § 29-2316. Of course, an appellate ruling must not violate double jeopardy protections, but the fact that double jeopardy is not violated does not necessarily mean that further action is permitted by § 29-2316.

Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *Vasquez, supra*; *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006). Certain exceptions from this general rule are permitted by statute, but because such statutes are penal statutes, they are to be strictly construed against the government. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). In the instant case, the State appealed the district court's decision under § 29-2315.01, which provides one such exception. Another exception is found in Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2006), under which the prosecuting attorney may appeal a sentence imposed in a felony case when he or she reasonably believes the sentence is excessively lenient. Under Neb. Rev. Stat. § 29-2323 (Reissue 1995), the Legislature has specifically granted the court authority to set aside an excessively lenient

sentence and either impose a greater sentence or remand the cause. The State chose not to proceed under the excessively lenient statutes in this felony matter. We must, therefore, analyze the effect of our ruling on Hense's sentence under § 29-2315.01 and the related provision in § 29-2316.

Given the statutory constraints attendant to our analysis, the inquiry is whether the defendant has been "placed legally in jeopardy," as that phrase is used in the error proceeding statute § 29-2316. If the defendant has been placed legally in jeopardy, then § 29-2316 requires that the judgment, of which a sentence is a part, "shall not be reversed nor in any manner affected" by the decision of the appellate court. For completeness, we note that in § 29-2316, the statute does permit further proceedings at the trial level, but this is limited to "[w]hen the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had *not* been placed legally in jeopardy *prior* to the entry of such erroneous order . . . ." (Emphasis supplied.) This language in § 29-2316 anticipates a circumstance which is unlike the instant case. In our case, jeopardy attached prior to an erroneous ruling, and further proceedings affecting the judgment are not proper under § 29-2316.

Given our reasoning that the effect of our ruling in the instant case is controlled by the strictures of the error proceeding statutes, and noting parenthetically that our reading of § 29-2316 while not performed under a double jeopardy analysis does not offend double jeopardy protections, we conclude that our analysis in *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006), was a proper statement of the law. We therefore determine that our decision in *Vasquez* overruled *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000); *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989); and other similar cases to the extent the reasoning in those cases differed from that in *Vasquez*.

Similar to *Vasquez*, in the present case, jeopardy attached when the district court accepted Hense's guilty plea. Because Hense was "placed legally in jeopardy," under § 29-2316, our decision in this error proceeding cannot affect the judgment of the district court, including the sentence imposed. The decision

herein determines the law to govern in any similar case which may be pending at the time this decision is rendered or which may thereafter arise in the state, but it does not affect the sentence imposed on Hense.

CONCLUSION

We conclude that § 60-6,197.06 requires that a 15-year revocation be part of any sentence for a conviction for felony operation of a motor vehicle during revocation under that statute, including a sentence of probation. The court in this case therefore erred when it failed to impose a 15-year revocation; however, given the statutory constraints of § 29-2316, Hense's sentence is not affected by our decision in this error proceeding.

EXCEPTION SUSTAINED.

GERRARD, J., concurring in part, and in part dissenting.

While I recognize the tension between *State v. Vasquez*[1] and the line of cases preceding it,[2] our premise in *Vasquez* (which I now believe to be mistaken) is not sufficient justification for upsetting nearly 20 years of well-settled statutory construction. Therefore, while I agree with the majority's conclusion that the district court's sentencing order was erroneous, I dissent from the majority's conclusion that the defendant cannot be resentenced pursuant to Neb. Rev. Stat. §§ 29-2315.01 and 29-2316 (Cum. Supp. 2006).

Section 29-2316 provides that the judgment of the district court, in an error proceeding brought by the State, "shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy."[3] In *State v. Neiss*,[4] we explained our basis for concluding that the protections afforded by that language "are no greater than or different

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[1] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[2] See, *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000); *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

[3] See, also, Neb. Rev. Stat. § 29-2319 (Cum. Supp. 2006) (containing identical language).

[4] *Neiss, supra* note 2, 260 Neb. at 701, 619 N.W.2d at 230.

from the double jeopardy protections afforded by the U.S. and Nebraska Constitutions." We relied on our construction of that language in *State v. Schall*[5] and *State v. Wren*,[6] and invoked the familiar proposition that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.[7] We found nothing in the legislative history or the actions of the Legislature to undermine our established rule that the phrase "'placed legally in jeopardy'" was intended only "to prevent offenders from being subjected to double jeopardy."[8] And we expressly rejected the argument, now endorsed by the majority, that the statutory language required analysis under something other than double jeopardy principles.[9]

That conclusion sensibly permitted the adjustment of a sentence that had been based on an incorrect legal ruling, such as in this case. As the U.S. Supreme Court has explained, double jeopardy protections are inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an offense.[10] And although the majority suggests that the State could have appealed the defendant's sentence in this case pursuant to Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2006), we have explained that a prosecutor's authority under that section is limited to "cases where the prosecutor reasonably believes that the sentence is excessively lenient" and "does not extend to the appeal of a sentence that is not in conformity with the law."[11] Our decision in *Neiss*, and the cases preceding it, persuasively concluded that the Legislature intended for erroneous

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[5] *Schall, supra* note 2.

[6] *Wren, supra* note 2.

[7] *Neiss, supra* note 2.

[8] *Id.* at 701, 619 N.W.2d at 230, quoting §§ 29-2316 and 29-2319.

[9] *Id.*

[10] *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998).

[11] *Glantz v. Hopkins*, 261 Neb. 495, 500, 624 N.W.2d 9, 13 (2001).

sentences to be correctible through error proceedings, consistent with double jeopardy principles.

Nothing that has happened in the Legislature since *Neiss* undermines its reasoning. In fact, § 29-2316 has been amended three times since our decision in *Schall*, and each time, the statute has been repealed and reenacted without changing the language at issue.[12] Generally, it is presumed that when a statute has been construed by this court, and the same is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by this court.[13] If the Legislature had disagreed with our construction of the statute, it could have changed the language at issue instead of reenacting it.

For example, in 2002, §§ 29-2315.01 and 29-2316 only permitted a "county attorney" to take exception to a decision of the trial court.[14] So, in *State v. Jones*,[15] we held that those statutes only applied to county attorneys, and did not authorize an error proceeding by a city attorney representing the State. In the next legislative session, the Legislature fixed the problem by amending §§ 29-2315.01 and 29-2316 to authorize an error proceeding by any "prosecuting attorney."[16] The Legislature expressly clarified that a "prosecuting attorney" includes a city attorney.[17] And the Legislature reenacted the restriction on affecting a judgment after the defendant has been placed "legally in jeopardy,"[18] while presumably aware of what we had construed that language to mean in *Neiss*, *Wren*, and *Schall*.[19]

If we had somehow misinterpreted § 29-2316 all that time, the Legislature could have changed it. The Legislature still could. Admittedly, the doctrine of legislative acquiescence is not

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[12] See, 2003 Neb. Laws, L.B. 17; 1992 Neb. Laws, L.B. 360; 1991 Neb. Laws, L.B. 732.

[13] *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

[14] See Neb. Rev. Stat. § 29-2315.01 and 29-2316 (Reissue 1995).

[15] See *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002).

[16] 2003 Neb. Laws, L.B. 17.

[17] See, *id.*; Neb. Rev. Stat. § 29-2315 (Cum. Supp. 2006).

[18] 2003 Neb. Laws, L.B. 17, §§ 12 and 14.

[19] See *Neiss, supra* note 2.

without limitations.[20] But it, and the doctrine of stare decisis, are entitled to great weight—particularly in cases involving statutory interpretation. Absent a reason why our decisions in *Griffin*, *Neiss*, *Wren*, and *Schall*[21] were manifestly wrong,[22] I would continue to follow them, as the Legislature has done for the better part of two decades. I would remand this cause for resentencing, and dissent to the extent that the majority opinion holds otherwise.

HEAVICAN, C.J., and STEPHAN, J., join in this concurrence and dissent.

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[20] See, e.g., *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[21] *Griffin, supra* note 2; *Neiss, supra* note 2; *Wren, supra* note 2; *Schall, supra* note 2.

[22] See *Bronsen, supra* note 20.

JOHN J. STURZENEGGER, AN INDIVIDUAL, APPELLANT, V. FATHER FLANAGAN'S BOYS' HOME, A NEBRASKA CORPORATION, ET AL., APPELLEES.

754 N.W.2d 406

Filed August 8, 2008. No. S-06-1364.

1. **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.
2. **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.
3. **Rules of Evidence: Other Acts.** Whether evidence is admissible for any proper purpose under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), rests within the discretion of the trial court.
4. **Rules of Evidence: Witnesses.** A determination pursuant to Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1995), regarding cross-examination of a witness on specific instances of conduct rests within the discretion of the trial court.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.

7. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
8. **Motions for New Trial: Appeal and Error.** Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
9. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
10. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
11. **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.
12. **Trial: Polygraph Tests.** The results of polygraph examinations are not admissible into evidence.
13. **Trial: Witnesses.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
14. **Trial: Evidence.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.
15. **Trial: Evidence: Polygraph Tests.** Evidence relating to a witness' willingness or refusal to take a polygraph examination is generally inadmissible.
16. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.
17. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.
18. **Pretrial Procedure.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party.
19. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
20. **Trial: Evidence: Appeal and Error.** An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.
21. ____: ____: ____. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

22. **Evidence: Appeal and Error.** In order that assignments of error concerning the admission or rejection of evidence may be considered, an appellate court requires that appropriate references be made to the specific evidence against which an objection is urged.
23. **Rules of Evidence: Other Acts.** The reason for Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is that other bad acts evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
24. ____: ____. Evidence of prior bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
25. **Rules of Evidence: Other Acts: Words and Phrases.** Evidence that is offered for a proper purpose under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is often referred to as having "special" or "independent relevance," which means its relevance does not depend on its tendency to show propensity.
26. **Rules of Evidence: Other Acts: Rebuttal Evidence: Damages.** Evidence of a plaintiff's prior bad acts may be admitted, pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), where it rebuts the plaintiff's evidence of damages.
27. **Rules of Evidence: Other Acts.** Whether Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), or Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1995), applies to the admissibility of other-acts evidence depends on the purpose for which the proponent introduced the other-acts evidence. Rule 404(2) applies when extrinsic evidence is offered as relevant to a material issue in the case. Rule 608(2) applies when extrinsic evidence is offered to impeach a witness, to show the character of the witness for untruthfulness—in other words, where the only theory of relevance is impeachment by prior misconduct.
28. ____: ____. Because Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1995), affects only evidence of prior instances of conduct when properly relevant solely for the purpose of attacking or supporting a witness' credibility, it in no way affects the admission of evidence of such prior acts for other purposes under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
29. **Trial: Rebuttal Evidence: Other Acts.** Evidence relevant to a material issue is not rendered inadmissible because it happens to include references to specific bad acts of a witness, and such evidence should be admitted where it is introduced to disprove a specific fact material to the case.
30. ____: ____: ____. Evidence that happens to include prior misconduct may still be admissible when offered to show the witness' possible bias or self-interest in testifying.
31. **Pleadings: Evidence.** While a superseded pleading is no longer a judicial admission, it is admissible as evidence of the facts alleged therein, and may be introduced and considered the same as any other evidence.
32. **Trial: Courts: Expert Witnesses.** Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can

be applied to the facts in issue. In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.

33. **Courts: Expert Witnesses.** It is only when a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, or methods, or their application, that the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.
34. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.
35. **Motions for Mistrial: Time.** An aggrieved party wishing a mistrial because of an opponent's misconduct during argument is required to move for such before the cause is submitted.
36. **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.
37. ____. In addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.
38. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
39. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Theodore R. Boecker and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellant.

James Martin Davis, of Davis Law Offices, for appellees Father Flanagan's Boys' Home and Glenn A. Moore.

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

Gerrard, J.

NATURE OF CASE

John J. Sturzenegger sued Father Flanagan's Boys' Home (Boys Town) and a former Boys Town teacher based on an alleged instance of sexual abuse that occurred while Sturzenegger was a resident of Boys Town. After a rather contentious trial, a jury rejected Sturzenegger's claims and the district court entered

judgment against him. Sturzenegger appeals, claiming that the court erred in several rulings during the course of the trial. The primary issue presented in this appeal is whether the court erred in permitting evidence of Sturzenegger's character and behavior before the alleged incident. But Sturzenegger argued that many of his personal problems were caused by the alleged abuse. So, evidence that he had those problems *before* the alleged abuse was relevant to prove that he did not have injuries resulting from sexual abuse, and that no abuse occurred. We affirm the judgment of the district court.

BACKGROUND

This litigation began when Sturzenegger filed a complaint against several defendants, including Boys Town and Glenn A. Moore, a former teacher at Boys Town. Boys Town and Moore are the only defendants who remain relevant to this appeal. Sturzenegger's operative third amended complaint alleged that Sturzenegger began living at Boys Town in 1997, when he was 13 years old. Sturzenegger alleged that Moore, an assistant family teacher at Boys Town, made sexual advances toward Sturzenegger and fondled his genitals, "thereby traumatizing" him.

At trial, Sturzenegger testified that he had been placed in Boys Town when he was 13 because he was having some "family problems." Sturzenegger said he was not using drugs or alcohol at that time. While he was at Boys Town, he and eight other boys lived in a house with their family teachers and Moore, the assistant family teacher. Moore did not live with them, but had a room in the residence for when he stayed overnight, usually on weekends. For reasons that will be apparent later, it is relevant to note that Moore is African-American. Sturzenegger said that he trusted Moore and went to Moore when he had problems.

Sturzenegger was diabetic and had to regulate his diet. His teachers, including Moore, helped him monitor his blood sugar. Sturzenegger testified that on the evening of August 23, 1997, his blood sugar was low, so he had been in and out of Moore's office checking his blood sugar. Sturzenegger said Moore asked him what he would do for $5. According to Sturzenegger, Moore asked him if he would run around the house naked

for $5, and when Sturzenegger said no, Moore asked again. Sturzenegger said he thought Moore was kidding. Sturzenegger testified that then,

> I went to the bathroom. Came back to the office. Checked my blood sugars. They were low again. Went to get some orange juice, came back to the office, sat down. Remember climbing into the chair that was next to the fridge. [Moore] asked me — started making more advances toward me. He said, would you masturbate in front of me for $5. Can I get you up for $5. Stuff like that. I kind of felt pressured into it. So I pulled down my pants a little bit and kind of started to touch myself and he just rolled his chair . . . over to me and pulled my pants down the rest of the way and started fondling me.

Sturzenegger testified that this went on for 60 to 90 seconds, before Moore asked Sturzenegger if he was nervous. Sturzenegger said he told Moore to stop touching him, and Moore did. Sturzenegger said he pulled up his pants and left the room, but returned and confronted Moore. Moore asked what he could do "to make it right" and offered to give Sturzenegger candy or money, or to be more lenient with discipline. Sturzenegger said that after the incident, Moore was more lenient with his discipline.

Sturzenegger testified about a number of personal problems that he attributed to the alleged sexual abuse. For instance, Sturzenegger testified,

> I still wake up three to four times a week in a hot sweat after — especially since this trial has been coming up. It's been happening more and more. Thinking, dreaming about [Moore] at night and him redoing this over and over to me. It just scares me. I have a racial problem. Racial hatred towards black people because of what happened to me. Just lots of other things. My attitude isn't always what it should be.
>
> . . . .
>
> . . . My attitude is bad most of the time. I have poor attitude because I look down upon myself because I didn't stop this from happening to myself.

Sturzenegger testified that he had been using illegal drugs and had some issues with sexual function because of what he alleged Moore had done to him. And Sturzenegger adduced expert psychological testimony linking his claimed symptoms to the alleged sexual abuse and to support the diagnoses of posttraumatic stress disorder, polysubstance abuse disorder, and sexual dysfunction.

On cross-examination, Sturzenegger was questioned extensively and aggressively regarding instances of misconduct that occurred while he was at Boys Town, and other instances of wrongdoing. He was questioned regarding drug use, before and after the alleged incident. And other witnesses testified regarding Sturzenegger's misconduct, particularly at Boys Town. But not all of the incidents about which Sturzenegger was cross-examined were substantiated by other evidence. Sturzenegger was also cross-examined, over objection, about factual allegations in his superseded pleadings that were inconsistent with his operative complaint and trial testimony. The superseded pleadings were later admitted into evidence.

Sturzenegger also testified on cross-examination regarding a polygraph examination that he said he had taken and passed. References to polygraph examinations had been precluded by a motion in limine. But on cross-examination, Sturzenegger responded to a question from Boys Town's counsel by telling counsel, "[w]ell, you know my word is good. And that's pursuant to the testimony I cannot give here today." Counsel asked the court to admonish Sturzenegger, but the court refused. Later, Sturzenegger again responded to a question about his credibility by saying, "[p]ursuant to the testimony that's not allowed here, you know I'm telling the truth."

Counsel began to ask for an admonishment, but withdrew it, and asked Sturzenegger, "[w]hat is this evidence that you say you have that the jury can't hear?" Sturzenegger testified that he had taken and passed a polygraph test. Another colloquy, and a discussion had outside the presence of the jury on a separate objection, suggests that when Boys Town's counsel asked the question, he had been unaware of the polygraph examination about which Sturzenegger testified.

During the same sidebar discussion, Sturzenegger's counsel said that he was "going to ask [Sturzenegger] on redirect about that polygraph examination and I have every right to because he opened the door and he talked about it." The court ruled on the unrelated objection, but said, "I'm not saying you can't talk about the polygraph test." However, Sturzenegger's counsel did not ask him about the polygraph during his redirect examination, and it does not appear from the record that any other evidence of the polygraph was offered at trial, aside from two more instances in which Sturzenegger volunteered it after Boys Town's counsel questioned his credibility. The court later reinstated its prohibition of and reference to polygraphs.

When Moore testified, he denied Sturzenegger's allegations. According to Moore, he and Sturzenegger did not get along well and Sturzenegger had used profanity and racial slurs against Moore. Moore recalled that Sturzenegger's blood sugar had been off on the night of the alleged incident, but denied making sexual overtures to Sturzenegger, having any sexual contact with Sturzenegger, or offering Sturzenegger money to do anything.

On cross-examination, Moore was not asked whether or not he had refused a polygraph examination. But during the testimony of the Boys Town police officer who investigated the incident, an offer of proof had been made that Moore had refused a polygraph. Moore's counsel did ask the officer whether he had arrested Moore, and the officer testified, without objection, that he had not. Sturzenegger proffered the officer's report of his investigation, but Boys Town's hearsay objection was sustained.

Boys Town also adduced testimony from Dr. Terry Davis, a psychiatrist, about whether Sturzenegger suffered from any mental disorder and whether "he had suffered any psychologic[al] injury or damage as a result of" the alleged sexual assault. Davis diagnosed Sturzenegger with "malingering," "polysubstance dependence," and "antisocial personality disorder." Davis explained that "malingering" is "a diagnosis that is given to reflect an intentional false or grossly exaggerated report of physical or psychiatric symptoms for purposes of what's called an external incentive for purposes of obtaining financial compensation, avoiding work, avoiding military duty, obtaining

drugs." Davis said the diagnosis was based, in part, on a discrepancy between claimed disability and objective evidence, and a lack of cooperation with evaluation and treatment. Sturzenegger made a continuing objection to this testimony. Davis concluded, contrary to Sturzenegger's evidence, that Sturzenegger did not suffer from posttraumatic stress disorder.

Davis' opinions were based, in part, on psychological tests administered by Dr. Rosanna Jones Thurman, a psychologist in Davis' office. Over objection, Davis was permitted to testify regarding his assessment of the test results and how they supported his diagnoses.

Before the case was submitted to the jury, Sturzenegger asked to have the jury instructed on alternative theories of recovery, including breach of warranty. Sturzenegger had alleged and testified that he had been assured by Boys Town that he would be safe there. The proffered instructions were refused.

In closing statement, Boys Town's counsel was extremely critical of Sturzenegger's credibility and of the evidence presented by Sturzenegger's attorneys. Boys Town's counsel referred on several occasions to the volumes of evidence that Sturzenegger's attorneys had produced, essentially arguing that all of that evidence was intended to obscure the fact that Sturzenegger had not proved his case. Boys Town's counsel also argued that 435 children lived at Boys Town and that Sturzenegger was "asking [the jury] to take a million dollars away from those 435 kids and put it in his pocket." Sturzenegger's objection to that remark was sustained.

In sum, Sturzenegger made three objections during Boys Town's closing argument. Two of those objections were sustained, including the objection specifically mentioned above, but Sturzenegger did not ask to have the offending remarks stricken or to have the jury admonished to disregard them. Nor did Sturzenegger move for a mistrial.

The jury returned verdicts for Boys Town and Moore, and the court entered judgment accordingly. Sturzenegger appeals.

ASSIGNMENTS OF ERROR

Sturzenegger assigns, consolidated, restated, and renumbered, that the district court erred in

(1) precluding Sturzenegger from referring to or allowing the jury to consider his successful polygraph examination;

(2) refusing to allow evidence that Sturzenegger volunteered to take a polygraph examination;

(3) refusing to allow evidence of either Moore's refusal to take a polygraph examination or his inconsistent testimony of his willingness to take one;

(4) failing to grant a new trial after Boys Town and Moore referenced that Moore was not arrested;

(5) sustaining a motion to quash filed by Moore which prevented Sturzenegger from obtaining information about whether Boys Town was paying for Moore's defense;

(6) refusing to allow into evidence the result of Boys Town's investigation of Sturzenegger's allegations;

(7) allowing improper character evidence of Sturzenegger;

(8) allowing evidence of specific bad acts of Sturzenegger;

(9) allowing questioning of Sturzenegger based upon inadmissible evidence that was not supported by later witnesses at trial;

(10) allowing cross-examination and evidence based on Sturzenegger's superseded pleadings;

(11) allowing Davis to testify regarding reports which were lacking in foundation and should have been excluded under *Schafersman v. Agland Coop*[1];

(12) allowing Davis to offer his opinion about Sturzenegger's truthfulness;

(13) failing to grant a mistrial based on improper argument during Boys Town's closing statement;

(14) failing to grant a new trial after Boys Town's counsel made comments to the jury regarding the financial ramifications a verdict would have on Boys Town;

(15) refusing to instruct the jury on Sturzenegger's claims for breach of warranty and breach of contract; and

(16) issuing so many erroneous rulings that the aggregate effect denied Sturzenegger due process and a fair trial.

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[1] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

STANDARD OF REVIEW

[1-4] 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.[2] 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.[3] In particular, whether evidence is admissible for any proper purpose under Neb. Evid. R. 404(2)[4] rests within the discretion of the trial court,[5] as does a determination pursuant to Neb. Evid. R. 608(2)[6] regarding cross-examination of a witness on specific instances of conduct.[7]

[5-9] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[8] Decisions regarding discovery, motions for mistrial, and motions for new trial are also directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[9] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.[10]

[10,11] Whether the jury instructions given by a trial court are correct is a question of law. When reviewing questions of

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[2] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[3] *Id.*

[4] Neb. Rev. Stat. § 27-404(2) (Reissue 1995).

[5] See, *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Egger*, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

[6] Neb. Rev. Stat. § 27-608(2) (Reissue 1995).

[7] See, *id.*; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. King*, 197 Neb. 729, 250 N.W.2d 655 (1977).

[8] *Bellino v. McGrath*, 274 Neb. 130, 738 N.W.2d 434 (2007).

[9] See, *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008); *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[10] *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[11]

ANALYSIS

Polygraph Evidence

[12] Sturzenegger's first three assignments of error all generally relate to polygraph examinations. As an underlying principle, it is clear under established Nebraska law that the results of polygraph examinations are not admissible into evidence.[12] And on appeal, Sturzenegger does not take issue with those holdings. Instead, Sturzenegger argues that Boys Town "opened the door" to polygraph examination results during cross-examination. And Sturzenegger argues that his and Moore's willingness to submit to polygraph examination was relevant to their credibility. We address each point in turn.

[13] Initially, we find no merit to Sturzenegger's argument that Boys Town opened the door to Sturzenegger's alleged polygraph results, for several reasons. First, it appears that following Boys Town's cross-examination of Sturzenegger, Sturzenegger made no offer of proof with respect to polygraph results. Pursuant to Neb. Evid. R. 103(1)(b),[13] error may not be predicated upon a ruling which excludes evidence unless the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. So, in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.[14] In this case, Sturzenegger did not offer, at trial, to prove the circumstances and foundation for the claimed polygraph examination.

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[11] See *Karel, supra* note 2.

[12] See, e.g., *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), *disapproved on other grounds, State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Temple*, 192 Neb. 442, 222 N.W.2d 356 (1974).

[13] See Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995).

[14] *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998).

[14] Beyond that, Boys Town did not "open the door" to discussion of a polygraph examination. The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.[15] The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal.[16] "Opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.[17]

But here, Sturzenegger is not arguing that responsive evidence should have been admitted—he is arguing that *more* inadmissible evidence should have been admitted to bolster the same, irrelevant point. And it is questionable whether Boys Town's counsel was responsible for introducing the subject of polygraphs. The colloquy relied upon by Sturzenegger only occurred after Sturzenegger, in response to direct but proper questions about his credibility, repeatedly volunteered references to testimony that he "cannot give." Boys Town's counsel only pursued the issue with Sturzenegger after his request to admonish Sturzenegger had been denied. In other words, the colloquy now relied upon by Sturzenegger as "opening the door" began with Sturzenegger's own repeated references to evidence he knew to be inadmissible, not Boys Town's question in response to Sturzenegger's volunteered statement.

[15] In short, we find no abuse of discretion in the district court's handling of polygraph examination results. But Sturzenegger also argues that his simple *willingness* to submit to a polygraph and Moore's alleged unwillingness were also admissible. This argument is equally without merit. We have, in fact, specifically disapproved any reference to polygraph tests at

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[15] *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[16] *Id.*

[17] *Id.*

trial.[18] And we agree with courts which have held that evidence relating to a witness' willingness or refusal to take a polygraph examination is generally inadmissible.[19]

While an inadvertent reference to a polygraph examination may not be reversible error,[20] polygraph results are excluded because polygraph examinations are not wholly accurate.[21] It would make little sense to find relevance in a party's willingness or refusal to submit to an inaccurate, inadmissible test.[22] And what little relevance could be found is substantially outweighed by the danger of unfair prejudice,[23] as the jurors could be confused about whether a polygraph had actually been given and are likely to speculate about what the result of such a test could have been. In fact, the effect on the jurors of the knowledge of a witness' readiness or refusal to submit to something which the jurors might well assume would effectively determine guilt or innocence could be more devastating than actually disclosing the results of such a test, which would at least require scientific foundation.[24] We conclude that evidence of Sturzenegger's and Moore's willingness to submit to a polygraph was properly excluded.

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[18] See *Temple, supra* note 12.

[19] See, e.g., *United Fire and Cas. v. Historic Preservation*, 265 F.3d 722 (8th Cir. 2001); *U.S. v. Vigliatura*, 878 F.2d 1346 (11th Cir. 1989); *deVries v. St. Paul Fire and Marine Ins. Co.*, 716 F.2d 939 (1st Cir. 1983); *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005); *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996); *Industrial Indem. Co. v. Kallevig*, 114 Wash. 2d 907, 792 P.2d 520 (1990); *State v. Dery*, 545 A.2d 1014 (R.I. 1988); *State v. Britson*, 130 Ariz. 380, 636 P.2d 628 (1981); *Moore v. State*, 267 Ind. 270, 369 N.E.2d 628 (1977); *State v. Mower*, 314 A.2d 840 (Me. 1974); *Penn v. Com.*, 417 S.W.2d 258 (Ky. 1967); *State v. Perry*, 274 Minn. 1, 142 N.W.2d 573 (1966); *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957); *People v. Muniz*, 190 P.3d 774 (Colo. App. 2008). Cf. *Temple, supra* note 12.

[20] See *State v. Houser*, 234 Neb. 310, 450 N.W.2d 697 (1990) (collecting cases).

[21] See *Mathes, supra* note 12.

[22] See, *Carter, supra* note 19; *Muniz, supra* note 19.

[23] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

[24] See *Perry, supra* note 19.

Finally, Sturzenegger argues that he should have been allowed to cross-examine Moore about his willingness to submit to a polygraph because of an alleged inconsistency in Moore's deposition testimony. Sturzenegger contends that during his initial interview with Boys Town police, Moore agreed to take a polygraph, but that in his deposition, Moore denied agreeing to take a polygraph.

We reject Sturzenegger's argument that he should have been permitted to cross-examine Moore on this point. First, we disagree with Sturzenegger's interpretation of Moore's deposition. According to police, when Moore was initially interviewed, he agreed to take a polygraph. But later, he refused. At his deposition, Moore was asked if had agreed to take a polygraph, and he said that he had not. But when he was asked whether that had been his initial response, he said he did not remember and also did not remember how long he had taken before he refused a polygraph. In other words, contrary to Sturzenegger's argument, Moore testified at his deposition that he eventually refused a polygraph, but did not remember whether he had initially agreed.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may be inquired to on cross-examination in the discretion of the court.[25] Here, the probative value of the evidence, as to credibility, was minimal. Moore had testified only that he did not remember initially agreeing to take a polygraph—he did not deny doing so. And the subject of the alleged conduct involved evidence that was inadmissible for other reasons—the reference to a polygraph examination. It was not an abuse of discretion to exclude it on that basis, even to the extent the evidence was relevant to credibility.

For the foregoing reasons, we find Sturzenegger's assignments of error relating to polygraph examinations to be without merit.

Reference to Moore's Not Being Arrested

Sturzenegger argues that the district court should have granted a new trial because evidence was adduced that Moore had not

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[25] See § 27-608(2).

been arrested. The district court, in ruling on the parties' motions in limine, had ordered that no reference be made to the fact that the county attorney had not prosecuted Moore. But those rulings did not expressly preclude evidence that Moore had not been arrested by Boys Town police.

[16] And when the Boys Town police officer who interviewed Moore was asked whether he had arrested Moore, Sturzenegger did not object. In fact, on redirect examination, Sturzenegger's counsel immediately asked the officer *why* he had not arrested Moore, and was told that the officer "wanted the opinion of the county attorney." Sturzenegger did not complain about the question until the next day. In short, Sturzenegger did not make a timely objection to the testimony about which he now complains, and even pursued the subject on redirect examination. It is well established that if, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.[26]

[17] Sturzenegger also argues, in his appellate brief, that Moore testified that the county attorney did not prosecute him. But Moore's brief does not identify where, in the record, this testimony supposedly occurred, nor did we find any such testimony, or objection thereto, in our review of the record. Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.[27] Thus, we find no basis for Sturzenegger's argument.

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[26] *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

[27] See *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

In short, Sturzenegger has waived his argument with respect to this evidence by failing to make a timely objection or direct us to the basis for his argument in the record. We find no merit to his assignments of error.

Payment for Moore's Defense

Sturzenegger argues that the district court abused its discretion in quashing his subpoena for records of payments made to Moore's attorney. Sturzenegger's argument, in essence, is that if Boys Town were paying for Moore's defense, Moore might be biased, and Sturzenegger should have been permitted discovery to explore that bias.

Sturzenegger cites no authority in support of his claim that he was entitled to discovery on this matter, nor are we able to discern in what way such information might be relevant to Moore's credibility. Moore had no motive to admit to sexual abuse, regardless of who might have been paying for his defense.

[18,19] Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party.[28] But the party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[29] Sturzenegger has not demonstrated the relevance of the information sought here and, therefore, has not shown an abuse of discretion.

Boys Town Police Report

Sturzenegger argues that the court erred in sustaining Boys Town's hearsay objection to the Boys Town police report memorializing the Boys Town police investigation of the alleged incident. We agree that the district court erred in excluding the police report, but conclude that Sturzenegger was not prejudiced by the error.

Sturzenegger argues that the police report was admissible for several reasons. We agree with his argument that based on the

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[28] *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996).

[29] *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997).

contents of the report and the foundation presented, the report was admissible pursuant to the business records exception to the hearsay rule,[30] although, strictly speaking, Sturzenegger should have offered a redacted copy of the report that excluded any reference to polygraph examinations.[31]

[20,21] But an erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.[32] And an improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.[33] Here, all of the information in the police report was obtained through the investigation of the police officer who testified at trial. That officer, and other witnesses interviewed during the investigation, testified at trial about the events of the investigation that were described in the report, excepting some statements that were excluded on other grounds. With the exception of polygraph-related evidence, Sturzenegger does not complain on appeal about any other excluded statements.

In short, the substance of the admissible evidence in the police report came into evidence anyway, through other testimony. Therefore, although the district court erred in excluding the police report, we find that the error was not prejudicial to Sturzenegger.

Character Evidence and Cross-Examination of Sturzenegger

Sturzenegger assigns several errors with respect to purported character evidence, prior bad acts, and improper cross-examination. First and foremost, Sturzenegger complains about evidence that, generally summarized, established that

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[30] See, Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Cum. Supp. 2006); *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999).

[31] See, *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

[32] *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001).

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

Sturzenegger had engaged in misconduct before and at the time of his alleged sexual abuse.

[22] We note, initially, that our review on this issue is made more difficult by the "shotgun" approach to argument taken by Sturzenegger's appellate brief. In order that assignments of error concerning the admission or rejection of evidence may be considered, an appellate court requires that appropriate references be made to the specific evidence against which an objection is urged.[34] Sturzenegger's appellate argument provides a broad generalization of a multitude of "examples" of erroneously admitted evidence, instead of specific arguments directed at specific rulings.

But even considered generally, Sturzenegger's appellate argument lacks merit. He claims, in essence, that evidence of his conduct and misconduct was simply a "smear campaign" intended to discredit him.[35] He frames his argument under rules 404 and 608 and Neb. Evid. R. 609,[36] and we do likewise. We agree that under those rules, ordinarily, evidence of the kind at issue in this case would be inadmissible. But here, the evidence was admissible to show that Sturzenegger's psychological damages existed before he was allegedly abused.

[23-25] Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.[37] However, evidence of prior bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[38] Evidence that is offered for a proper purpose is often referred to as having "special" or

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[34] *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

[35] Brief for appellant at 25.

[36] Neb. Rev. Stat. § 27-609 (Reissue 1995).

[37] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[38] See, *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *Sanchez, supra* note 37.

"independent relevance," which means its relevance does not depend on its tendency to show propensity.[39]

[26] The record in this case is clear about the specific, independent purposes for which the evidence at issue was offered.[40] Much of the evidence complained of by Sturzenegger was relevant because Sturzenegger's misconduct at Boys Town was punished by Moore, which was relevant because it may have given Sturzenegger a motive to accuse Moore of abusing him. But more importantly, the theory of Sturzenegger's case was that the alleged sexual abuse had caused psychological damage, symptomized by racism, drug abuse, continued antisocial behavior, and diagnosed mental illness. Sturzenegger himself testified to bad acts that he had committed after the alleged abuse, claiming they had been caused by Moore. Evidence of Sturzenegger's conduct before and around the time of the alleged incident was relevant to rebut Sturzenegger's claim. Evidence of a plaintiff's prior bad acts may be admitted, pursuant to rule 404(2), where it rebuts the plaintiff's evidence of damages.[41] The district court in this case did not abuse its discretion in concluding that, generally, the evidence at issue was independently relevant to the issue of Sturzenegger's damages.

[27,28] Nor does rule 608 bar admission of the evidence. Given the theory on which the evidence at issue was admitted, rule 404, and not rule 608, provides the framework for determining its admissibility. Whether rule 404(2) or rule 608(2) applies to the admissibility of other-acts evidence depends on the purpose for which the proponent introduced the other-acts evidence.[42] Rule 404(2) applies when extrinsic evidence is offered as relevant to a material issue in the case.[43] Rule 608(2)

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[39] See *Sanchez, supra* note 37.

[40] Compare *id.*

[41] See, e.g., *Lounds v. Torres*, 217 Fed. Appx. 755 (10th Cir. 2007); *Burke v. Spartanics, Ltd.*, 252 F.3d 131 (2d Cir. 2001); *Udemba v. Nicoli*, 237 F.3d 8 (1st Cir. 2001); *Lewis v. District of Columbia*, 793 F.2d 361 (D.C. Cir. 1986); *Fletcher v. City of New York*, 54 F. Supp. 2d 328 (S.D.N.Y. 1999). Cf. *Rawlings v. Andersen*, 195 Neb. 686, 240 N.W.2d 568 (1976).

[42] See *U.S. v. Morgan*, 505 F.3d 332 (5th Cir. 2007).

[43] See *id.*

applies when extrinsic evidence is offered to impeach a witness, to show the character of the witness for untruthfulness—in other words, where the only theory of relevance is impeachment by prior misconduct.[44] So, because rule 608(2) affects only evidence of prior instances of conduct when properly relevant solely for the purpose of attacking or supporting a witness' credibility, it in no way affects the admission of evidence of such prior acts for other purposes under rule 404(2).[45]

[29] Thus, the application of rule 608(2) to exclude extrinsic evidence of a witness' conduct is limited to instances where the evidence is introduced to show a witness' general character for truthfulness.[46] Evidence relevant to a material issue is not rendered inadmissible because it happens to include references to specific bad acts of a witness, and such evidence should be admitted where it is introduced to disprove a specific fact material to the case.[47] Rule 608(2) does not bar evidence introduced to contradict—and which the jury might find to disprove—a witness' testimony as to a material issue of the case.[48]

[30] And in this case, as already explained, the evidence at issue was relevant to the issues of Sturzenegger's bias against Moore and Sturzenegger's alleged damages. First, the self-interest of a witness, as opposed to his general character, is not a collateral issue. Evidence that happens to include prior misconduct may still be admissible when offered to show the witness' possible bias or self-interest in testifying.[49] And Sturzenegger's damages were obviously at issue. Thus, although some of the evidence certainly reflected on Sturzenegger's credibility, the

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[44] See, *id.*; *U.S. v. Chu*, 5 F.3d 1244 (9th Cir. 1993), citing 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 608[5] (1993).

[45] See *U.S. v. Farias-Farias*, 925 F.2d 805 (5th Cir. 1991).

[46] *Id.*

[47] See, *U.S. v. Calle*, 822 F.2d 1016 (11th Cir. 1987); *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979).

[48] See *Calle, supra* note 47.

[49] See *id.* Cf. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

evidence was independently relevant for a proper purpose.[50] For the same reasons, Sturzenegger's argument under rule 609 is equally unavailing.[51]

Generally, an appellate court gives wide latitude to the trial judge in determining the admissibility of evidence, because the trial judge is in the best position to assess the impact and effect of evidence based upon what the trial judge perceives from the live proceedings of a trial, while the appellate court can review only a cold record.[52] In this case, given the unique allegations made by Sturzenegger, and with due deference to the district court's exercise of its discretion, we find no abuse of such discretion in the court's admission of evidence relating to Sturzenegger's conduct and misconduct before the alleged abuse.

Sturzenegger also argues that he was improperly cross-examined about incidents which were not corroborated by later evidence—specifically, an instance of animal cruelty and evidence of Sturzenegger's conduct in middle school. But the fact that extrinsic evidence was not presented to prove the basis for a cross-examination question does not make the question improper—quite the opposite. Although not precisely applicable to the unique issues presented by this case, Neb. Evid. R. 405(1)[53] and rule 608(2) expressly contemplate that specific incidents of a witness' conduct may be inquired into on cross-examination without proof by extrinsic evidence. In fact, under those circumstances, extrinsic evidence may be inadmissible, and the cross-examiner may be "stuck" with the answer given by the witness.[54]

In this case, Boys Town directly asked Sturzenegger about certain misconduct and Sturzenegger was able to either explain or deny it. Boys Town was not required to prove the basis for

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[50] See *U.S. v. Blum*, 62 F.3d 63 (2d Cir. 1995). See, also, *U.S. v. Gray*, 24 Fed. Appx. 358 (6th Cir. 2001); *U.S. v. Brassard*, 212 F.3d 54 (1st Cir. 2000).

[51] See *U.S. v. Soria*, 965 F.2d 436 (7th Cir. 1992).

[52] *Stumpf v. Nintendo of America*, 257 Neb. 920, 601 N.W.2d 735 (1999).

[53] Neb. Rev. Stat. § 27-405(1) (Reissue 1995).

[54] See *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

those questions, and the district court did not abuse its discretion in permitting them to be asked.

[31] Finally, Sturzenegger argues that he was improperly cross-examined with respect to inconsistent factual allegations in his superseded pleadings. We disagree. While a superseded pleading is no longer a judicial admission, it is admissible as evidence of the facts alleged therein, and may be introduced and considered the same as any other evidence.[55] The district court did not err in permitting the pleadings to be admitted into evidence and in permitting Sturzenegger to be cross-examined with respect to the inconsistent descriptions of the alleged sexual abuse that they contained.

For those reasons, we find no merit to Sturzenegger's assignments of error with respect to character evidence, prior bad acts, and cross-examination.

Davis' Expert Testimony

[32] Sturzenegger raises two arguments with respect to Davis' expert testimony. First, Sturzenegger argues that Davis' opinion was improperly based upon a personality test conducted by Thurman. In making that argument, Sturzenegger has invoked *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[56] and *Schafersman v. Agland Coop*.[57] Under *Daubert* and *Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[58] This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue.[59] In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.[60]

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[55] See, *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Sleezer v. Lang*, 170 Neb. 239, 102 N.W.2d 435 (1960).

[56] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[57] *Schafersman, supra* note 1.

[58] *Smith, supra* note 27.

[59] *Id.*

[60] *Id.*

[33] But it is only when a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, or methods, or their application, that the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.[61] Here, the only purported "methodology" that Sturzenegger challenges is Davis' use of results from a test that was administered by another medical professional. Such reliance on another's work is clearly permissible under the rules of evidence, so long as the facts or data relied upon are of a type reasonably relied upon by experts in the particular field.[62] And more to the point, Sturzenegger's argument does not identify any methodological defect underlying Davis' opinion. The court did not err in permitting Davis to provide expert testimony based, in part, on tests administered by Thurman.

Sturzenegger also argues that Davis' diagnosis of "malingering" was an improper opinion on Sturzenegger's credibility. We have held that "'"'[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.'"'"[63] But testimony that contradicts that of another witness is not improper. Sturzenegger testified to the psychological symptoms that he claimed were caused by Moore and adduced expert testimony opining he suffered from, among other things, posttraumatic stress disorder. It was not improper for Davis to opine, based on adequate foundation, that Sturzenegger was not suffering from those conditions or to offer a different diagnosis to explain Sturzenegger's evidence.

If this case involved a physical injury, there would be no question that expert testimony refuting the plaintiff's claim of a physical disability would be admissible. The fact that the claimed injury in this case is mental does not change the applicable principles of law. Having reviewed Davis' testimony, we find no error in admitting his opinion regarding Sturzenegger's

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[61] See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

[62] See *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994).

[63] See *State v. Archie*, 273 Neb. 612, 633, 733 N.W.2d 513, 531 (2007).

mental condition. We find no merit to Sturzenegger's assignments of error.

Closing Argument

Sturzenegger argues that several remarks in Boys Town's closing argument were prejudicial. But Sturzenegger objected only three times during Boys Town's closing. Of the objections that were made, two were sustained. Sturzenegger did not move for a mistrial or even ask that the jury be admonished to disregard the remarks. And Sturzenegger did not ask for a mistrial before the cause was submitted to the jury.

[34,35] Sturzenegger now claims that the court should have declared a mistrial. But in order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.[64] And an aggrieved party wishing a mistrial because of an opponent's misconduct during argument is required to move for such before the cause is submitted.[65] On balance, given Sturzenegger's failure to object to nearly all of the remarks about which he complains on appeal and his failure to make a timely motion for mistrial, we conclude that the court did not abuse its discretion in failing to enter a mistrial.[66]

In arguing to the contrary, Sturzenegger specifically assigns error to Boys Town's reference to the potential financial effect of a million-dollar verdict on Boys Town's juvenile residents. This remark was certainly improper. But Sturzenegger's objection to the remark was immediately sustained. He did not ask for the jury to be admonished to disregard any financial effect on Boys Town. And Boys Town's general charitable mission was apparent from the evidence presented at trial, even to the extent that Douglas County jurors could have been expected to not know about it already.

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[64] *Wendeln v. Beatrice Manor*, 271 Neb. 373, 712 N.W.2d 226 (2006); *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

[65] *Wolfe, supra* note 64.

[66] See *Nichols, supra* note 9.

[36,37] 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.[67] And in addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.[68] When considered in context, we cannot conclude that the isolated remark made by Boys Town's counsel was so prejudicial as to prevent a fair trial or could not have been cured by the admonition that Sturzenegger did not request. And when Boys Town's closing argument is read as a whole, it is admittedly forceful, but not beyond the realm of acceptable argument, particularly given Sturzenegger's general refusal to object. Therefore, we find no merit to Sturzenegger's assignments of error regarding Boys Town's closing argument.

Instruction on Breach of Contract and Warranty

Sturzenegger argues that the district court should have instructed the jury on his theories of recovery for breach of contract and breach of warranty. Sturzenegger argues that breach of contract was recognized as a theory of recovery under similar circumstances by this court's decision in *K.M.H. v. Lutheran Gen. Hosp.*[69]

In *K.M.H.*, a patient sued a hospital after she was sexually assaulted by a male nurse. We reversed a summary judgment entered for the hospital, finding that the petition alleged "in general terms an implied contract, imposing upon the hospital the duty and obligation to provide plaintiff a private, secure environment for her care and to protect her privacy, safety, and security."[70]

But unlike *K.M.H.*, this is not an appeal from a summary judgment. The district court's decision to refuse Sturzenegger's breach of warranty instruction was made after a complete trial, and based on the evidence presented, we conclude that Sturzenegger was not prejudiced by the district court's refusal.

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[67] *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

[68] *Id.*

[69] *K.M.H. v. Lutheran Gen. Hosp.*, 230 Neb. 269, 431 N.W.2d 606 (1988).

[70] *Id.* at 272-73, 431 N.W.2d at 608-09.

[38] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[71] Here, even assuming (without deciding) that Sturzenegger's proposed instruction was a correct statement of the law and warranted by the evidence, there was no prejudice. Sturzenegger's evidence did not establish any basis for awarding damages other than those caused by sexual abuse. The theory of Boys Town's defense was that the alleged abuse had not occurred. And Sturzenegger's testimony did not establish any duty on the part of Boys Town, based in warranty or contract, that was greater than its duty in tort to prevent Sturzenegger from being sexually abused.

In short, the evidence did not establish any duty or damages based on breach of warranty that was not coextensive with those encompassed by the tort theory on which the jury was instructed. Therefore, Sturzenegger did not show that he was prejudiced by the court's refusal of his breach of warranty instruction.

[39] Sturzenegger also argues, briefly, that the court should have instructed on other theories, such as intentional infliction of emotional distress. Those theories suffer from the same defect as his breach of warranty argument. Furthermore, Sturzenegger only assigned as error the court's refusal of contract and warranty theories. And errors argued but not assigned will not be considered on appeal.[72]

For those reasons, we find no merit to Sturzenegger's assignment of error relating to jury instructions.

Cumulative Error

Finally, Sturzenegger argues that the cumulative effect of the district court's purported errors denied him a fair trial. For the reasons discussed above with respect to each of Sturzenegger's assignments of error, we also find no merit to his claim of cumulative error.

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[71] *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[72] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

CONCLUSION

For each of the above reasons, we find no error requiring reversal, and we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
WILLOW T. HEAD, APPELLEE.

754 N.W.2d 612

Filed August 8, 2008. No. S-07-464.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Judgments: Collateral Attack.** A party to a proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered.
3. **Double Jeopardy: Juries: Pleas.** A defendant is placed legally in jeopardy when (1) the jury is impaneled and sworn; (2) a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) the trial court accepts the defendant's guilty plea.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, PETER C. BATAILLON, Judge. Judgment of Court of Appeals reversed.

Donald W. Kleine, Douglas County Attorney, and James M. Masteller for appellant.

James E. Schaefer and Jill A. Podraza for appellee.

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

PER CURIAM.

BACKGROUND

Willow T. Head pled guilty to, and was convicted of, driving under the influence of alcohol (DUI) in the district court for Douglas County. At the enhancement hearing, the State introduced evidence that Head had been convicted of DUI offenses

on December 6, 1993; February 17, 1995; April 29, 2002; and August 14, 2003. The district court rejected Head's convictions from December 1993 and April 2002. Regarding the former conviction, the court found that principles of collateral estoppel prevented it from being used for sentence enhancement purposes. The court rejected the latter conviction based on its reading of *State v. Loyd*.[1]

The State appealed to the Court of Appeals pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006). In a memorandum opinion filed January 3, 2008, the Court of Appeals reversed the district court's determination regarding Head's conviction from April 2002 and remanded the cause to the district court for resentencing in light of that offense. Head petitioned this court for further review. We granted Head's petition and, for reasons set forth below, reverse the Court of Appeals' decision.

ASSIGNMENTS OF ERROR

Head assigns, restated, that the Court of Appeals erred in (1) concluding that her April 2002 conviction should be used for sentence enhancement purposes and (2) remanding the cause for resentencing even if her April 2002 conviction is a valid conviction for sentence enhancement purposes.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[2]

ANALYSIS

Applicability of Head's April 2002 DUI Conviction.

As a threshold matter, Head challenges the Court of Appeals' determination that the district court should have considered Head's DUI conviction from April 2002 at the enhancement hearing. This conviction was pursuant to Omaha Mun. Code § 36-115 (2001). Less than a year after Head was convicted of a violation of that ordinance, we struck down the ordinance because its penalty provision conflicted with Neb. Rev. Stat.

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[1] *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003).

[2] *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

§ 60-6,196 (Cum. Supp. 2000).[3] This conflict with state law, we held in *Loyd*, rendered the Omaha ordinance "unenforceable."[4] In light of that determination, the district court found—and Head argues here—that Head's prior conviction under that ordinance is no longer valid for sentence enhancement purposes.

[2] We considered and rejected an identical argument in *State v. Keen*.[5] Like Head, the defendant in *Keen* objected to the use of a prior conviction secured under § 36-115 (1995) on the grounds that the ordinance was no longer valid, a move which we characterized as a "collateral attack" on the validity of the prior conviction.[6] Such an attack was ineffective, however, because "a party to a proceeding will be bound by the judgment in the case when collaterally attacking it, *even though the judgment was irregularly or erroneously entered*."[7]

Head gives us no reason to part ways with *Keen*, and we reaffirm the decision today. Accordingly, like the defendant in *Keen*, Head should have "raised the issue of the ordinance's invalidity when [s]he was prosecuted" under it in April 2002.[8] By failing to do so, Head waived her right to challenge the use of that prior conviction when it was used to enhance her sentence for her latest DUI offense. Accordingly, the Court of Appeals did not err when it concluded that the district court should have considered Head's DUI conviction from April 29, 2002, for sentence enhancement purposes.

Propriety of Remand.

Our conclusion regarding the applicability of Head's DUI conviction from April 2002 does not automatically mean that Head can be resentenced on remand in light of that offense. As a general matter, the State cannot appeal an adverse ruling

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[3] See *Loyd, supra* note 1.

[4] *Id.* at 236, 655 N.W.2d at 706.

[5] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[6] *Id.* at 127, 718 N.W.2d at 498.

[7] *Id.* (emphasis supplied).

[8] See *id.*

in a criminal case without specific statutory authority.[9] In this case, the State's appeal is predicated on § 29-2315.01. However, a neighboring statutory section provides that "[t]he judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy . . . ."[10]

This court has, at times, reached contradictory interpretations of the phrase "placed legally in jeopardy." In *State v. Neiss*,[11] we held that this phrase was no more stringent than the Double Jeopardy Clause in the federal Constitution. Because that clause is not offended if an appellate court remands a cause for resentencing,[12] the Court of Appeals' action would be valid if *Neiss* were the law.

[3] However, in *State v. Vasquez*,[13] decided 6 years later, we held that the "placed legally in jeopardy" language is more exacting than the Double Jeopardy Clause. *Vasquez* concluded that a defendant is placed legally in jeopardy—and thus § 29-2316 precludes a remand—when (1) the jury is impaneled and sworn; (2) a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) the trial court accepts the defendant's guilty plea.[14] While this conclusion contradicted the central holding in *Neiss*, *Vasquez* did not mention or explicitly overrule that case.

We granted Head's petition specifically to resolve these contradictory interpretations of the "placed legally in jeopardy" language. While this case was pending, however, the same issue arose tangentially in another case on our docket, *State v. Hense*.[15] In *Hense*, a majority of this court upheld our decision

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[9] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[10] Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2006).

[11] *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000). See, also, *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

[12] See *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998).

[13] *Vasquez, supra* note 9.

[14] See *id.*

[15] *State v. Hense, ante* p. 313, 753 N.W.2d 832 (2008).

in *Vasquez* based on the statutory language in § 29-2316, and expressly overruled *Neiss*. Thus, the legal principles established in *Vasquez* must guide our decision today.

The trial court accepted Head's guilty plea, thus placing her legally in jeopardy. Under *Vasquez* and *Hense*, this prevented the Court of Appeals from remanding the cause back to the trial court for resentencing, "even though the district court erred" by failing to consider Head's April 2002 DUI conviction for sentence enhancement purposes.[16]

CONCLUSION

We conclude that the Court of Appeals did not err when it held that Head's April 2002 DUI conviction should have been taken into account when enhancing Head's sentence for her latest DUI offense. However, our recent interpretation of § 29-2316 in *Hense* precludes a remand in this case despite the district court's error.

REVERSED.

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[16] *Vasquez, supra* note 9, 271 Neb. at 915, 716 N.W.2d at 451.

GERRARD, J., concurring in part, and in part dissenting.

I agree with the majority's conclusion that pursuant to *State v. Keen*,[1] the Court of Appeals correctly reasoned that Head's 2002 conviction for DUI should have been used as a prior offense for purposes of sentencing enhancement. But I disagree with the conclusion that Head cannot be resentenced. For the reasons set forth more fully in my dissenting opinion in *State v. Hense*,[2] I believe the Court of Appeals was correct in remanding the cause to the district court and instructing the district court to resentence Head for fourth-offense DUI. I dissent from the majority's conclusion to the contrary, and would affirm the judgment of the Court of Appeals.

HEAVICAN, C.J., and STEPHAN, J., join in this concurrence and dissent.

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[1] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[2] *State v. Hense, ante* p. 313, 753 N.W.2d 832 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

SHAUN O. PARKER, D.D.S., APPELLANT, V. STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEE.

753 N.W.2d 843

Filed August 8, 2008. No. S-07-588.

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 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. **Due Process.** Procedural due process limits the ability of the government to deprive people of interests that constitute liberty or property interests within the meaning of the Due Process Clause.
4. **Due Process: Notice.** Procedural due process requires that the government provide parties deprived of liberty or property interests adequate notice and an opportunity for a hearing.
5. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
6. **Records: Appeal and Error.** It is incumbent upon an appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
7. **Rules of the Supreme Court: Constitutional Law: Statutes: Notice.** Neb. Ct. R. App. P. § 2-109(E) requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court Clerk at the time of filing the party's brief; strict compliance with § 2-109(E) is required for the court to address a constitutional claim.
8. **Disciplinary Proceedings: Health Care Providers.** The criteria to be considered in determining an appropriate professional disciplinary sanction include the following: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the profession as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of the profession.
9. **Appeal and Error.** For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error.

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

Jerry W. Katskee, of Katskee, Henatsch & Suing, for appellant.

Jon Bruning, Attorney General, and Lisa K. Anderson for appellee.

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

CONNOLLY, J.

I. SUMMARY

Shaun O. Parker, D.D.S., appeals the State's disciplinary action. In November 2006, the director of the Department of Health and Human Services Regulation and Licensure (the Department) revoked Parker's license to practice dentistry. Parker sought review by the district court. The court affirmed the order revoking his license.

On appeal, Parker argues that the State denied him procedural due process during the disciplinary procedures. He also contends that the revocation of his license was an inappropriate sanction for his alleged offense. Because of Parker's procedural defaults, we do not address his due process claims. We, however, conclude that revocation was an appropriate sanction. We affirm.

II. BACKGROUND

1. PARKER'S PRIOR DISCIPLINARY ACTION

In January 2001, the State petitioned for disciplinary action against Parker's license to practice dentistry. The State's petition alleged in part that from September 1998 through March 2000, Parker obtained prescription drugs for his personal use by fraudulent prescriptions. In a settlement agreement with the State, Parker admitted the allegations in the State's petition. The agreement noted that in November 2000, Parker completed an inpatient chemical dependency treatment program at an outstate recovery facility. The agreement provided that Parker's dental license would be placed on probation for 5 years.

2. PARKER'S CURRENT DISCIPLINARY ACTION

In June 2006, Parker faced another disciplinary action against his dental license. That action is the subject of the current appeal. The action stemmed from two separate factual allegations that

Parker (1) allowed his dental partner to use a rubber stamp bearing Parker's signature to prescribe controlled substances for multiple patients and (2) failed to maintain a controlled substance log for Triazolam kept and used in the office.

(a) The Department's Investigation and the Board of Dentistry's Subsequent Recommendation

In January 2006, a Department investigator, Jeff Newman, received information from a confidential informant. The informant told Newman that Parker's dental partner, Carl Braun, D.D.S.—who was not authorized to prescribe controlled substances—was using a rubber stamp bearing Parker's signature to prescribe drugs for his patients. The Department began an investigation involving Parker. Upon completing the investigation, Newman drafted a written report of the investigation and his findings. He submitted the report to the Board of Dentistry (the Board) for their review and recommendations. The Board recommended that the Department revoke Parker's dental license.

(b) The State's Petition for Disciplinary Action

Following the Board's recommendation, the Attorney General petitioned for disciplinary action against Parker's license. The State alleged that Parker's act of allowing Braun to use the rubber stamp to issue prescriptions justified discipline under Neb. Rev. Stat. § 71-147(8) (Reissue 2003). That section provides that the State may discipline a professional licensee for "[p]ermitting, aiding, or abetting the practice of a profession or the performance of activities requiring a license, certificate, or registration by a person not licensed, certified, or registered to do so." The State also alleged that the conduct was a ground for discipline under § 71-147(2) as dishonorable conduct and § 71-147(10) as unprofessional conduct. The State further alleged that Parker's failure to maintain a controlled substance log for Triazolam was a ground for discipline under § 71-147(10) and (17).

After a hearing before a hearing officer, the director issued findings of fact and conclusions of law. The director concluded that Parker's act of allowing Braun to issue prescriptions without a Drug Enforcement Administration (DEA) permit was a ground

for discipline under § 71-147(8). The director further determined that Parker's conduct in allowing Braun to use the rubber stamp and Parker's failure to maintain a controlled substance log for Triazolam constituted unprofessional conduct and were therefore grounds for discipline. The director revoked Parker's dental license.

(c) The District Court's Review of the Director's Decision

Parker petitioned the district court for review of the director's decision. The district court's subsequent order explained that Parker did not take issue with the director's factual conclusions. Parker instead argued the disciplinary process was unfair and thus it violated his due process rights. The court implicitly concluded that the State had not violated Parker's due process rights. After a de novo review of the record, the court found clear and convincing evidence that Parker engaged in unprofessional conduct. The court concluded that the revocation of Parker's dental license was appropriate under the circumstances. Parker now appeals the district court's decision.

3. Facts Relevant to the Signature Stamp

(a) Braun's Probationary License

The State alleged that between January 2005 and January 2006, Parker allowed Braun to use a rubber stamp bearing Parker's signature to issue prescriptions for controlled substances. During this period, Braun, like Parker, was practicing dentistry under a probationary license. One probationary condition required Braun to practice with another dentist holding a Nebraska license. Another condition provided that until he completed 2 years of probation, Braun was not to prescribe controlled substances. Braun's probation began in 2004.

Parker was Braun's supervisor when Braun began working with Parker in August 2004. At that time, Parker signed a form for the Department stating that he had reviewed the Department's letter offering Braun a probationary license. That letter explained that for the first 2 years of his probation, Braun was not to prescribe controlled substances. Despite the requirement that Braun not prescribe controlled substances, Parker allowed Braun to issue prescriptions by using a rubber stamp with Parker's signature.

(b) Use of the Signature Stamp

After receiving information from the confidential informant about the signature stamp, Newman and a DEA investigator collected prescriptions bearing Parker's name from several pharmacies in Omaha. Several prescriptions had a rubber stamp signature. The stamped prescriptions were for the following controlled substances: (Schedule III) Vicodin, Lorcet 10, and Tylenol #3, and (Schedule IV) Darvocet N100 and Triazolam .25.[1]

After Newman and the DEA investigator collected the prescriptions, they made an unannounced visit to Parker's dental office to talk with Parker and Braun. Newman later testified that Parker was cooperative during the visit.

Parker admitted to Newman that the rubber stamp existed. He told Newman that he and Braun created the stamp to alleviate any inconvenience for Braun's patients who needed controlled substances. Because Braun was not authorized to write prescriptions, Parker had to sign the prescriptions for Braun's patients. Parker explained at the hearing that there were times Braun needed Parker's signature when Parker was in the middle of a procedure. Parker stated that having to "de-glove" in the middle of a procedure and to "re-glove" after signing the prescription could be time consuming. The alternative was to have Braun's patients wait until Parker had finished his procedure. So, according to Parker, they used the rubber stamp with Parker's signature "to facilitate things," "just to move things along so patients wouldn't have to wait." Parker explained that the prescriptions were computer generated with his DEA number and that Braun would then use the rubber stamp to apply Parker's signature to the prescription.

Parker told Newman that he initially provided direct supervision of all prescriptions requested by Braun. But once he became comfortable with Braun's prescribing habits, he no longer made contemporaneous reviews of every prescription Braun issued with the stamped signature. Parker later testified that he reviewed each prescription when it was written or, if not then, within 24 hours of the patient's visit. According to

[1] See Neb. Rev. Stat. § 28-405 (Cum. Supp. 2004).

Newman, Parker acknowledged that Braun used the rubber stamp on occasions when Parker was out of the office.

Parker testified that he regularly used the stamp himself. He also testified he did not know until shortly before his meeting with Newman that using the stamp could be an issue. He stated he was not aware of the problem until a pharmacy notified his office that investigators were pulling the stamped prescriptions. According to Parker, he and Braun immediately stopped using the rubber stamp upon learning of the problem.

4. Facts Relating to Parker's Failure to Maintain a Controlled Substance Log for Triazolam

The events leading to Parker's initial discipline in 2001 would have justified the revocation of his DEA registration as a practitioner authorized to handle Schedule II through V controlled substances.[2] But the DEA agreed not to revoke his DEA registration if he complied with the terms of a "Memorandum of Understanding." Under those terms, Parker agreed that until January 23, 2006, he would maintain a log of all controlled substances he prescribed. The State alleged that Parker had admitted his office did not maintain a controlled substance log for Triazolam (a Schedule IV controlled substance allegedly used in the office). According to the State, Parker's failure to maintain the log was a ground for discipline.

Triazolam is a prescription drug that patients brought to their appointments for possible sedation during their procedures. Newman testified he had information that if any tablets remained after the patient's procedure, the office would use those tablets for other patients. According to Newman, Parker told him this procedure had not been in practice for some time, but Parker admitted that four or five times in the past, he had used the extra Triazolam on his patients. Newman's investigation report explained that Parker stated neither he nor the clinic maintained a controlled substance log for the Triazolam.

At the hearing, Parker disputed Newman's testimony about the Triazolam. Parker testified that to his knowledge, the office did not keep scheduled substances. Parker acknowledged that in

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[2] See *id.*

the past, other providers in the office may have kept Triazolam, but once he became the owner of the practice, he requested that the Triazolam not be retained in the office. Parker denied Newman's allegation that Parker had used the extra Triazolam four or five times.

An employee testifying for Parker stated that Parker did not authorize the retention of medications in the office. The employee testified that if any medication remained after the patient's procedure, the medication was disposed of in the toilet or sink.

III. ASSIGNMENTS OF ERROR

Parker assigns, restated and consolidated, that the district court erred in (1) deciding the disciplinary process did not deny him procedural due process, (2) disregarding the hearing officer's failure to address Parker's constitutional arguments, (3) determining that revoking his license was an appropriate sanction, and (4) finding clear and convincing evidence that Parker engaged in unprofessional conduct.

IV. STANDARD OF REVIEW

[1,2] 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.[3] 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.[4]

V. ANALYSIS

1. We Decline to Reach the Merits of Parker's Due Process Claims

[3-5] Procedural due process limits the ability of the government to deprive people of interests that constitute "liberty" or "property" interests within the meaning of the Due Process

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[3] *Zwygart v. State*, 273 Neb. 406, 730 N.W.2d 103 (2007).

[4] *Id.*

Clause.[5] Procedural due process requires that the government provide parties deprived of such interests adequate notice and an opportunity for a hearing.[6] In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.[7]

Although the State gave Parker notice and an opportunity to be heard before the hearing officer, he contends that the State denied him procedural due process during the disciplinary proceedings. Specifically, Parker sets out three grounds for his due process claim: (1) the Attorney General was allegedly involved in the "closed session investigation"; (2) the Attorney General allegedly appeared before the Department's director following the hearing on the State's petition; and (3) the State used a confidential informant. As discussed below, we decline to reach the merits of Parker's due process arguments.

(a) The Record Fails to Show That the Attorney General Was Present at the Investigation or Appeared Before the Director

When the Department receives a complaint that a licensee has violated the Uniform Licensing Law, the Department may investigate.[8] Following the Department's investigation, the professional board may review the investigational file in making recommendations to the Attorney General regarding the violations the board has identified and any sanctions the board believes would be appropriate.[9] The board's recommendations are part of the completed investigational report that the Department submits to the Attorney General.[10] After the Attorney General receives the Department's report, the Attorney General determines which, if any, statutes, rules, or regulations the licensee

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[5] *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[6] See *id.*

[7] *Id.*

[8] Neb. Rev. Stat. § 71-168.01(1) (Reissue 2003).

[9] § 71-168.01(5).

[10] *Id.*

has violated and the appropriate legal action to take.[11] The Attorney General may elect to file a petition for discipline, which occurred here.[12]

Once the State files a petition, the director sets a time and place for a hearing on the petition and designates a hearing officer to conduct the hearing.[13] Here, both Parker and the State appeared at the hearing and presented witnesses. The hearing officer also received 16 exhibits. Following the hearing, the director entered findings of fact, conclusions of law, and an order revoking Parker's license to practice dentistry.

In his first due process argument, Parker claims that the Attorney General was present at the "closed session investigation" before the State filed its petition and that neither Parker nor his counsel were present. Parker argues that he "was not present at the investigation to hear, much less rebut, the allegations and evidence against him."[14] He claims the Attorney General was present and able to submit evidence against him and to persuade the Board to recommend certain sanctions. Parker further contends that the State denied him due process after the hearing because it would not allow him to appear when the Attorney General allegedly appeared before the director acting as the legal advisor to the Board.

The State contends that Parker has inaccurately described the discipline process. According to the State, the Attorney General did not submit evidence against Parker to the Board or otherwise attempt to persuade the Board to recommend desired sanctions. Moreover, the State disputes Parker's claims that the Attorney General personally appeared before the director as prosecutor and legal advisor to the Board.

Although Parker asserts that the Attorney General was present during the investigation before the hearing and appeared before the director after the hearing, he makes these assertions without any reference to the record. We have not found any evidence that

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[11] Neb. Rev. Stat. § 71-171.01 (Reissue 2003).

[12] *Id.*

[13] Neb. Rev. Stat. §§ 71-153 and 71-155 (Reissue 2003); 184 Neb. Admin. Code, ch. 1, § 008.01 (1994).

[14] Brief for appellant at 12.

the Attorney General was present during the investigation. Nor does the record reflect that the Attorney General appeared before the director concerning Parker's disciplinary action.

[6] Assuming but not deciding that his argument has merit, we decline to address the issue. It was incumbent upon Parker to present a record supporting the errors assigned.[15] Absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[16] Because we cannot determine from the record whether the Attorney General was present during the investigation or appeared before the director, we decline to address the merits of Parker's claims.

(b) The Record Fails to Show That Parker Attempted to Confront or Examine the State's Confidential Informant

Parker also contends that the State denied him procedural due process because it denied him the opportunity to confront and cross-examine the confidential informant. In his brief, Parker frames the issue as "[w]hether [he] was denied procedural due process by the [director] in the crucial initial stages of the proceedings against him, to wit: (a) the investigation of the complaint derived from [a] confidential informant . . . ." Parker argues that he was unable to confront or cross-examine the confidential informant. The State did not call the informant to testify at the hearing. The record, however, fails to show that Parker made any attempts or requests to confront or examine the informant or that the director or hearing officer denied any such attempts or requests. Simply put, the record does not establish that the director or hearing officer denied Parker the opportunity to examine the informant. So, even if we were to agree that denying a licensee the opportunity to examine a confidential informant could be a possible due process violation, here, the record lacks any evidence that Parker was denied such an opportunity. As stated, an appellant must present a record that

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[15] See *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

[16] See *id.*

supports the errors assigned.[17] We decline to address the merits of Parker's argument.

2. Parker Has Failed to Comply With Procedural Rules for Challenging the Constitutionality of Statutes

[7] Parker also asserts in his brief that "the procedures established by the statutory administrative scheme deprived him of due process on this confidential informant based investigation."[18] Parker does not identify the specific statutes to which he is referring. But to the extent he is arguing that specific statutes are unconstitutional, we do not reach this argument. Neb. Ct. R. App. P. § 2-109(E) requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.[19] We have repeatedly held that strict compliance with § 2-109(E) is required for the court to address a constitutional claim.[20] A review of the record shows that Parker failed to file with the clerk a notice of a constitutional question.

Parker also argues that another statute, Neb. Rev. Stat. § 84-917(6)(b) (Cum. Supp. 2006), is unconstitutional. Section 84-917(6)(b) of the Administrative Procedure Act provides that for petitions for review filed in the district court on or after July 1, 1989, "the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." Parker argues that the statute fails to provide a clear standard for the district court regarding the grounds on which it may rely to remand the case. According to Parker, his due process arguments could not be addressed "in any meaningful way" under § 84-917.[21] Parker therefore argues that the statute is "unconstitutional on its face, as it works to deny the ability to raise and have considered violations of constitutional provisions."[22] Again, however, Parker

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[17] See *In re Interest of Kochner, supra* note 15.

[18] Brief for appellant at 17.

[19] See *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

[20] See *id.*

[21] Brief for appellant at 20.

[22] *Id.* at 22.

failed to file with the Supreme Court Clerk a notice of a constitutional question as required under § 2-109(E).

Thus, we do not address Parker's claims that the statutes are unconstitutional.

3. Revocation of Parker's License to Practice Dentistry Was an Appropriate Sanction

Parker also contends that the revocation of his license to practice dentistry was an inappropriate sanction. He argues that he was unaware that the use of a rubber signature stamp was prohibited. He claims that he stopped using it immediately upon learning that it was prohibited, that no patients were directly harmed by his conduct, and that he cooperated with the Department's investigator.

[8] In *Poor v. State*,[23] we identified criteria to consider in assessing the severity of a disciplinary sanction imposed upon a health care professional:

> "(1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the [profession] as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of [the profession]."

The director's revocation of Parker's dental license was not the first disciplinary action taken against Parker. In January 2001, the director placed Parker's license on probation for 5 years after he admitted that he obtained controlled substances for personal use by fraudulent prescriptions and that he violated the Uniform Controlled Substances Act.

While Parker's license was still on probation for this prior misconduct, he agreed to help monitor Braun's compliance with Braun's own probationary terms. Parker knew upon hiring Braun that Braun was prohibited from prescribing controlled substances for the first 2 years of his probation.

Despite this knowledge, Parker allowed Braun to issue prescriptions using Parker's DEA number and a rubber stamp bearing Parker's signature. Parker admitted that although he initially

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[23] *Poor v. State*, 266 Neb. 183, 195, 663 N.W.2d 109, 118-19 (2003).

provided direct supervision of all prescriptions Braun issued with the signature stamp, he eventually ceased making contemporaneous reviews of every prescription Braun issued.

Parker argues that he was unaware that use of the rubber stamp was prohibited. But he misses the point. He knew that Braun was not authorized to prescribe controlled substances and agreed to monitor Braun, yet he allowed Braun to issue prescriptions using the stamp without contemporaneously reviewing the prescriptions. In effect, he enabled and allowed Braun to prescribe controlled substances when Braun was not authorized to do so. Parker's conduct trivialized the terms of Braun's probation.

We find Parker's conduct particularly troublesome given that his own license was on probation at the time. Having been previously disciplined for violations of the Uniform Controlled Substances Act, Parker, an experienced practitioner, should have understood the magnitude of responsibility the Department demands of health care professionals who prescribe controlled substances.

Parker urges us to consider that he cooperated with the investigator and that he and Braun stopped using the signature stamp upon learning that its use was prohibited. The Department's regulations contain a nonexclusive list of factors that the Department may consider to determine an appropriate sanction.[24] We recognize that included as mitigating factors are "[c]ontriteness and willingness to cooperate"[25] and "[c]orrective efforts . . . related to the conduct charged, such as changes in practices . . . ."[26] But included as an aggravating factor is "[p]rior disciplinary action, or misconduct while under discipline . . . ."[27] Because Parker was on probation for prior misconduct involving controlled substances when the current offense occurred, the presence of the two mitigating factors is less than compelling. We conclude that the revocation of Parker's license was an appropriate sanction.

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[24] See 184 Neb. Admin. Code, ch. 1, § 013.03 (1994).

[25] *Id.*, § 013.03B5.

[26] *Id.*, § 013.03B3.

[27] *Id.*, § 013.03A5.

4. We Do Not Reach Parker's Fourth Assignment of Error

[9] Although Parker assigns as error the district court's finding of clear and convincing evidence that he engaged in unprofessional conduct, he makes no argument to support this assignment. For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error.[28] Therefore, we do not consider his fourth assignment of error.

We have considered Parker's remaining arguments and conclude that they are without merit.

VI. CONCLUSION

We decline to reach the merits of Parker's due process claims, his challenges to the constitutionality of statutes, and his claim that the district court erred in finding clear and convincing evidence that he engaged in unprofessional conduct. We conclude that the revocation of Parker's license to practice dentistry was an appropriate sanction under the circumstances. We affirm the district court's order affirming the revocation of Parker's dental license.

Affirmed.

Heavican, C.J., not participating.

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[28] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

Crane Sales & Service Co., Inc., appellant, v.
Seneca Insurance Company, appellee.

754 N.W.2d 607

Filed August 8, 2008. No. S-07-799.

1. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
2. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
3. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.

4. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Neb. Ct. R. Pldg. § 6-1112(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court under § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment.
5. **Pleadings.** Matters outside the pleadings can include written or oral evidence either in support of or in opposition to the pleading which provides some substantiation for and does not merely reiterate what is said in the pleadings.
6. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.

Appeal from the District Court for Douglas County, J. MICHAEL COFFEY, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court reversed, and cause remanded with directions.

Gregory C. Scaglione and R. Scott Johnson, of Koley Jessen, P.C., L.L.O., for appellant.

Matthew V. Rusch, Thomas J. Culhane, and Katrina L. Smeltzer, of Erickson Sederstrom, P.C., for appellee.

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

HEAVICAN, C.J.

FACTUAL BACKGROUND

Crane Sales & Service Co., Inc. (Crane), is in the business of leasing and servicing crane equipment. In the course of this business, Crane, acting as lessor, entered into an equipment rental agreement dated December 10, 2002, with Duncan & Associates Crane Rentals, Inc. (Duncan), named as lessee. Per this agreement, Duncan was required to provide to Crane "an insurance certificate naming Crane . . . as addi[ti]onal insured and loss payee." The certificate was to have a value of $150,000.

On December 11, 2002, Duncan provided Crane with a certificate of liability insurance and certificate of property insurance, which identified Seneca Insurance Company (Seneca) as insurer, Duncan as the insured, and Crane as the certificate holder. The certificate also stated that the "certificate holder is

listed as Loss Payee and Additional Insured." The certificate noted that it was "issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

The record indicates that the equipment in question was in working order on the date the rental agreement was signed. However, in its complaint, Crane alleged that upon the return of the equipment to Crane, damage in the amount of $15,040.25 had been incurred. That damage was repaired, and Duncan was billed. Despite making written and oral demands on Duncan, Duncan never paid for the damage.

Crane brought suit against Duncan and Seneca on March 13, 2006, in Douglas County Court. Thereafter, on April 20, Seneca filed a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6). On May 26, Seneca filed a notice with the county court expressing its intent to introduce the affidavit of Ellen O'Connor in support of its motion to dismiss. O'Connor's affidavit was attached to Seneca's notice.

In that affidavit, O'Connor, a vice president with Seneca, averred that Seneca had issued a contractor's equipment policy to Duncan for the policy period from February 16, 2000, to February 16, 2001, and that the policy was continuously renewed through the policy period ending February 16, 2004. Portions of the applicable insurance policy were also attached as exhibits to O'Connor's affidavit.

A hearing was held on Seneca's motion to dismiss on August 24, 2006. At that hearing, one exhibit—O'Connor's affidavit—was introduced. Crane did not object to the introduction of evidence in general or to O'Connor's affidavit in particular. On August 31, the court granted Seneca's motion, concluding that the policy issued to Duncan did not name Crane as an additional insured. The court also found that there was no contractual relationship between Crane and Seneca, and that without such a relationship, Crane lacked standing and could not maintain a direct action against Seneca. Finally, the court found that Crane lacked standing as a third-party beneficiary to the contract between Duncan and Seneca. As such, the county court dismissed Crane's suit as to Seneca. Default judgment

had already been entered in Crane's favor against Duncan on June 21.

Crane appealed the decision of the county court to the district court on September 18, 2006. The district court affirmed the county court's decision on July 2, 2007. On July 18, Crane appealed to the Court of Appeals. We moved this case to our docket pursuant to our statutory authority to regulate the dockets of this court and the Nebraska Court of Appeals.[1]

ASSIGNMENTS OF ERROR

On appeal, Crane assigns that the district court erred by affirming the county court's decision. In particular, Crane argues, restated, that the court erred by (1) not finding that Crane was a named insured under the insurance policy, (2) finding that Crane's status as a loss payee did not give it standing to file a direct claim under the policy, and (3) finding that Crane was not a third-party beneficiary of the policy.

ANALYSIS

We first consider, and find dispositive, a procedural issue presented in this case—namely, whether the district court ruled on and dismissed Crane's action for the failure to state a claim under § 6-1112(b)(6) or whether Crane's motion had been converted to a motion for summary judgment.

It is clear that Seneca filed a motion to dismiss for failure to state a claim under § 6-1112(b)(6). The county court dismissed Crane's action for this reason. The parties brief this case as if it were decided under § 6-1112(b)(6). And at oral argument, both parties contended this case was dismissed for failure to state a claim under § 6-1112(b)(6).

[1-3] Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[2] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

claim.[3] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[4]

As an initial matter, we agree with Crane that its complaint, considered alongside the certificate of insurance attached to the complaint,[5] when considered in a light most favorable to Crane, was sufficient to state a claim under § 6-1112(b)(6).

[4-6] However, § 6-1112(b) also provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court under § 6-1112(b)(6), the motion "shall be treated" as a motion for summary judgment. Matters outside the pleadings can include written or oral evidence either in support of or in opposition to the pleading which provides some substantiation for and does not merely reiterate what is said in the pleadings.[6] We have noted that when receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.[7]

The controlling procedural issue presented by this appeal, then, is whether this § 6-1112(b)(6) motion was converted to a motion for summary judgment. It is apparent that matters outside the pleadings, specifically O'Connor's affidavit, which included six exhibits, were presented and accepted by the trial court. We therefore conclude that under § 6-1112(b), Seneca's purported motion to dismiss for failure to state a claim under § 6-1112(b)(6) was converted to a motion for summary judgment.

Having concluded that the motion was converted to a motion for summary judgment, we are next presented with the question of whether the county court provided the parties with adequate

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[3] *Id.*

[4] *Id.*

[5] See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[6] See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[7] *Id.*

notice that the motion had been converted and whether the court provided Crane with a reasonable opportunity to present all material made pertinent to such a motion. We conclude that such was not given.

First, there is no evidence in the record that the county court explicitly alerted the parties to the fact that the motion to dismiss had been converted into a motion for summary judgment. In fact, a review of the record suggests that the county court itself might have been unaware that by accepting O'Connor's affidavit, § 6-1112(b) required it to treat the motion as a motion for summary judgment.

In addition, throughout these proceedings, both parties have treated Seneca's motion as a motion to dismiss under § 6-1112(b)(6), rather than as a motion for summary judgment. There is no indication from the record that at the time of the hearing, either party believed the motion had been converted into a motion for summary judgment. Both parties have briefed this case on appeal as if it were a motion to dismiss. At oral argument, both parties continued to maintain that it was a motion to dismiss, despite explicit questioning by this court regarding whether the motion might instead have been for summary judgment.

Finally, a review of the record demonstrates that while Crane did not object to the admission of O'Connor's affidavit, Crane also did not introduce any of its own evidence at the August 24, 2006, hearing, nor was it given the explicit opportunity to do so. And there is no indication from this record that Crane was given the opportunity to conduct discovery in this case. On appeal, Crane contends that if it were allowed to conduct discovery, it would be able to prove its standing as an additional insured.

We conclude that adequate notice of the conversion from a motion to dismiss to a motion for summary judgment was not provided and that Crane was not given a reasonable opportunity to present all material pertinent to a motion for summary judgment. We therefore reverse the decision of the district court affirming the dismissal of Crane's suit and remand the cause to the district court with directions to remand the matter to the county court for further proceedings.

CONCLUSION

Crane's motion to dismiss was converted to a motion for summary judgment under § 6-1112(b). However, the parties were not given sufficient notice of that conversion, nor was Crane provided with a reasonable opportunity to present any material it might find relevant to a motion for summary judgment. As such, we reverse the judgment of the district court and remand the cause to the district court with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

KATHIE STEFFEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY L. STEFFEN, DECEASED, APPELLANT, V. PROGRESSIVE NORTHERN INSURANCE COMPANY, APPELLEE.

754 N.W.2d 730

Filed August 15, 2008. No. S-07-509.

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. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
6. **Insurance: Contracts.** Insurers may not issue policies that carry terms and conditions less favorable to the insured than those provided in the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).
7. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Insurance: Motor Vehicles: Statutes.** Read together, the provisions of the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat.

§§ 44-6401 to 44-6414 (Reissue 2004), mandate that unless one of the exclusions set forth in § 44-6413 applies, an insured is entitled to recover for injuries sustained in any accident, so long as the injuries were caused by an underinsured motor vehicle or an uninsured motor vehicle.

9. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
10. **Insurance: Contracts: Statutes.** Where a statutory omnibus provision is in conflict with the provisions of an insurance policy, the statute and not the policy provision is controlling.
11. **Insurance: Contracts.** While the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004), allows insurers to issue policies with terms and conditions more favorable to their insureds, they may not exclude coverage that is guaranteed by the act.
12. **Limitations of Actions: Insurance: Motor Vehicles.** The purpose underlying Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) is the protection of the insurer when it may have to pay uninsured or underinsured motorist benefits.
13. **Limitations of Actions: Insurance: Motor Vehicles: Tort-feasors.** An insured must file suit against or settle with all uninsured or underinsured motorist tort-feasors involved in an automobile accident within the applicable statute of limitations pursuant to Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004).
14. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
15. **Insurance: Motor Vehicles: Tort-feasors: Words and Phrases.** A "claim against the uninsured or underinsured motorist," within the meaning of Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004), is a claim against a tort-feasor who caused the injury with respect to which the insured is claiming uninsured or underinsured motorist coverage. Thus, uninsured or underinsured motorist coverage is not barred where the person alleged to have been "the uninsured or underinsured motorist" was not, in fact, a tort-feasor.

Appeal from the District Court for Cedar County: WILLIAM BINKARD, Judge. Reversed and remanded for further proceedings.

Mark A. Keenan, of Moyer, Egley, Fullner, Montag & Keenan, for appellant.

Stephan L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

McCormack, J.

NATURE OF CASE

Kathie Steffen brought this breach of contract claim against Progressive Northern Insurance Company (Progressive), the underinsured motorist carrier for her husband, Jeffrey L. Steffen. Jeffrey was killed when his tractor was struck from the rear by an underinsured motorist. The district court granted Progressive's motion for summary judgment on the grounds that the Progressive policy did not provide for underinsured motorist coverage for operation of a farm tractor and that the breach of contract claim was barred by the statute of limitations. We reverse the decision of the district court because the exclusion in the Progressive policy is contrary to Nebraska law and remand the cause for further proceedings regarding the determination of the statute of limitations issue.

BACKGROUND

On November 17, 2003, Jeffrey was operating his tractor on Highway 84 just west of Hartington, Nebraska. Jeffrey was struck from behind by a westbound vehicle driven by an underinsured motorist, Mary A. Arens. The force of the impact ejected Jeffrey from his westbound tractor, and he landed in the eastbound lane. Shortly after the collision, Lyle J. Hochstein approached the scene of the accident, traveling eastbound at approximately 50 miles per hour in his 1980 Chevrolet pickup, pulling a loaded flatbed car hauler. As he crested a hill, Hochstein saw two vehicles stopped on the north side of the highway. As he passed the two vehicles, his vehicle drove over Jeffrey. Hochstein stated in his affidavit that he had no knowledge that a collision had occurred between Arens' vehicle and Jeffrey's tractor and that he did not observe Jeffrey's body in the road until after he stopped his vehicle. Jeffrey died at the scene of the accident. The parties stipulated that Jeffrey "died as a result of the injuries he sustained as a result of the collision between Arens' vehicle and his tractor."

At the time of the accident, Jeffrey was insured by a liability policy issued by Progressive. The policy also provided underinsured motorist (UIM) coverage of $100,000. The UIM coverage section of the policy included the following provisions:

> Subject to the Limits of Liability, if **you** pay a premium for Underinsured Motorist Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is entitled to recover from the **owner** or operator of an **underinsured motor vehicle** because of **bodily injury**:
>
> 1. sustained by an **insured person**;
> 2. caused by an **accident**; and
> 3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

(Emphasis in original.)

The Progressive UIM coverage had certain exclusions. The pertinent exclusion in this case provided:

> 1. Coverage under this Part III is not provided for **bodily injury** sustained by any person while using or **occupying**:
>
> . . . .
>
> d. a motorized vehicle or device of any type designed to be operated on the public roads that is **owned** by **you** or a **relative**, other than a **covered vehicle.**

(Emphasis in original.) The Progressive policy defined "vehicle" as follows:

> "Vehicle" and "vehicles" mean a land motor vehicle:
>
> a. of the private passenger, pickup body, or cargo van type;
>
> b. designed for operation principally upon public roads;
>
> c. with at least four wheels; and
>
> d. with a gross vehicle weight rating of 12,000 pounds or less, according to the manufacturer's specifications.
>
> However, "vehicle" and "vehicles" do not include stepvans, parcel delivery vans, or cargo cutaway vans or other vans with cabs separate from the cargo area.

(Emphasis omitted.) And a "covered vehicle" was defined as any "vehicle" listed in the declarations page and any additional "vehicle" or any replacement "vehicle" acquired during the policy period.

Jeffrey's tractor was not listed on the declarations page of the Progressive policy, and Kathie admits that the tractor was purchased prior to the policy period. Kathie also concedes

that a farm tractor is not included within the policy definition of "vehicle."

Arens' motor vehicle insurer offered to pay its policy limits of $100,000 to Kathie to settle her claim for wrongful death. Before accepting Arens' insurer's offer, Kathie notified Progressive of the tentative settlement offer in a certified letter. In that letter, Kathie also informed Progressive of her intent to make a UIM claim under the automobile liability policy. Progressive declined to exercise its right of substitution pursuant to Neb. Rev. Stat. § 44-6412(2) (Reissue 2004). In a letter to Kathie, Progressive explained that it was "unable to provide underinsured motorist coverage for this claim and accident" because the farm tractor Jeffrey was driving at the time of his death was not a "covered vehicle" under his policy with Progressive.

On August 1, 2005, Kathie accepted $100,000 in full settlement and satisfaction of all claims against Arens and Arens' insurer. She did not bring any action against Hochstein. On March 31, 2006, Kathie filed this complaint against Progressive for breach of contract. Both parties filed motions for summary judgment. The district court entered summary judgment for Progressive, concluding that the Progressive policy did not provide UIM coverage for operation of a farm tractor and that the claim was barred by the statute of limitations. The court denied Kathie's cross-motion for summary judgment. Kathie appeals.

ASSIGNMENTS OF ERROR

Kathie assigns, consolidated and restated, that the district court erred in (1) failing to find that the Progressive policy provided UIM coverage, (2) failing to find the exclusionary clause of the Progressive policy ambiguous, (3) failing to find the exclusionary clause of the Progressive policy contrary to public policy, (4) finding that the statute of limitations had expired, and (5) failing to grant her cross-motion for summary judgment.

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.[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.[2]

[3-5] The meaning of a contract and whether a contract is ambiguous are questions of law.[3] Statutory interpretation presents a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

ANALYSIS

UIM Policy Exclusions

Kathie argues on appeal that she is entitled to UIM coverage for two reasons: (1) She had a reasonable expectation of UIM coverage under the provisions of the policy, and (2) insofar as the policy may be interpreted as excluding coverage, it is contrary to the Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA).[6]

[6,7] The UUMICA defines the required uninsured motorist (UM) and UIM coverage, the minimum amount of liability, and some exclusions to coverage.[7] Insurers may not issue policies that carry terms and conditions less favorable to the insured than those provided in the UUMICA.[8] In construing a statute, a court must determine and give effect to the purpose and intent of the

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[1] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

[2] *Id.*

[3] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

[4] *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

[5] See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

[6] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[7] *American States Ins. v. Farm Bureau Ins.*, 7 Neb. App. 507, 583 N.W.2d 358 (1998).

[8] *Id.*

Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[9]

Section 44-6408 of the UUMICA states that all automobile liability insurance policies issued with respect to any motor vehicle principally garaged in this state shall provide for protection "of persons insured who are legally entitled to recover compensatory damages for bodily injury, sickness, disease, or death from . . . the owner or operator of an underinsured motor vehicle." An "[u]nderinsured motor vehicle" is defined broadly as "a motor vehicle with respect to the ownership, operation, maintenance, or use of which there is bodily injury liability insurance . . . and the amount of the insurance . . . is less than . . . the damages for bodily injury, sickness, disease, or death sustained by the insured."[10] Certain exclusions to "underinsured motor vehicle" are set forth in § 44-6407, which are not applicable here.

We have explained that the purpose of the UIM provisions is to give the same protection to the insured as he or she would have had if injured in an accident caused by a vehicle covered by an adequate liability policy.[11] The language of § 44-6408 is broad, specifying only that it be for "persons insured" who are injured by an uninsured or underinsured motorist.

In § 44-6413, the UUMICA sets forth specific exclusions to this broad coverage. Section 44-6413 states that the UIM/UM coverage shall not apply when the bodily injury occurs (1) while the "insured" is occupying a motor vehicle owned by, but not insured by, the "named insured"; (2) while the insured is occupying an owned motor vehicle that is used as a public conveyance; (3) where the insured is struck by a vehicle owned by the named insured or a spouse or a relative residing with the

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[9] *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999).

[10] § 44-6406.

[11] See, *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000); *Allied Mut. Ins. Co. v. Action Elec. Co., supra* note 9; *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

named insured; or (4) where the statute of limitations has run on the claim.

[8,9] Read together, the provisions of the UUMICA mandate that unless one of the exclusions set forth in § 44-6413 applies, an insured is entitled to recover for injuries sustained in any accident, so long as the injuries were caused by an "[u]nderinsured motor vehicle"[12] or an "[u]ninsured motor vehicle."[13] It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.[14] Other courts and authorities reading similar language have likewise concluded that unless any statutory exclusion applies, the UIM/UM coverage is to be liberally construed.[15]

The general coverage provision of Progressive's policy with Jeffrey is similar in nature to the general coverage provisions set forth by § 44-6408. The policy provides that unless the policy exclusions apply, Progressive

> will pay for damages . . . which an **insured person** is entitled to recover from the **owner** or operator of an **underinsured motor vehicle** because of **bodily injury**:
>
> 1. sustained by an **insured person**;
> 2. caused by an **accident**; and
> 3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

(Emphasis in original.) We agree with Kathie that the undisputed facts clearly satisfy the general coverage provisions of the policy with Progressive. Jeffrey was an "insured person" under the policy, and he sustained "bodily injury" in an "accident" which arose out of the use of an underinsured motor vehicle.

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[12] § 44-6406. See, also, § 44-6407.

[13] § 44-6405. See, also, § 44-6407.

[14] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[15] See, 16 Samuel Williston, A Treatise on the Law of Contracts § 49:35 (Richard A. Lord ed., 4th ed. 2000); 2 Irvin E. Schermer & William J. Schermer, Automobile Liability Insurance § 25:3 (4th ed. 2004); 1 Alan I. Widiss et al., Uninsured and Underinsured Motorist Insurance § 2.3 (3d rev. ed. 2005). See, e.g., *Ball v. Midwestern Ins. Co.*, 250 Kan. 738, 829 P.2d 897 (1992).

But Progressive asserts that the exclusion provision bars Jeffrey's recovery. Progressive argues that Jeffrey's tractor was either a "motor vehicle" or a "device of any type designed to be operated on the public roads." If this is the case, then, since the tractor was owned by Jeffrey, but was not a "covered vehicle" under the policy, the exclusion would apply. Kathie argues, however, that both under the policy definitions section of the contract with Progressive and under the UUMICA, a tractor is not considered a "motor vehicle." To the extent that a tractor is a "device of any type designed to be operated on the public roads," Kathie argues that this deviation from the exclusions specified in § 44-6413 is an impermissible reduction in the coverage mandated by the UUMICA. We agree.

[10,11] Where a statutory omnibus provision is in conflict with the provisions of the insurance policy, the statute and not the policy provision is controlling.[16] As the Nebraska Court of Appeals explained in *American States Ins. v. Farm Bureau Ins.*,[17] where the exclusions provision of a policy was broader than the exclusions set forth by the UUMICA, then the policy exclusion was void:

> It is obvious that an insurance company could reduce its exposure or risk by excluding coverage of certain events or conditions and that if enough exclusions are allowed, the public could receive markedly less than what the Legislature has decreed it is entitled to. With each exclusion, the insured would receive less coverage than what the Legislature has directed . . . . What possible basis could the courts have for deciding that some exclusions unauthorized by statute are valid and some not?

While the UUMICA allows insurers to issue policies with terms and conditions more favorable to their insureds, they may not exclude coverage that is guaranteed by the act.[18] In other words, the exclusions provided by § 44-6413 are the only exceptions permitted to the coverage mandated by § 44-6408.

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[16] *Allied Mut. Ins. Co. v. Action Elec. Co., supra* note 9.

[17] *American States Ins. v. Farm Bureau Ins., supra* note 7, 7 Neb. App. at 517-18, 583 N.W.2d at 365.

[18] See, *American States Ins. v. Farm Bureau Ins., supra* note 7; § 44-6413(4).

Progressive's policy exclusion states: "Coverage . . . is not provided for bodily injury sustained by any person while using or occupying . . . a motorized vehicle or device of any type designed to be operated on the public roads that is owned by you or a relative, other than a covered vehicle" (emphasis omitted). Section 44-6413(b) of the UUMICA states that coverage shall not apply to "[b]odily injury, sickness, disease, or death of an insured while occupying a motor vehicle owned by, but not insured by, the named insured or a spouse or relative residing with the named insured." Both provisions state that if the insured is injured in a vehicle that the insured or a family member could have insured, but did not, then there will be no coverage when that insured is injured by an uninsured or underinsured motorist.

But the language of the policy and the UUMICA diverges with respect to whether a farm tractor is a device included within this exemption. Under the UUMICA, the exemption is triggered by a "motor vehicle" which is owned by, but not insured by, the named insured or relative residing with the named insured. Section 44-6404 incorporates the definition of "motor vehicle" provided by Neb. Rev. Stat. § 60-501(4) (Reissue 2004): "any self-propelled vehicle which is designed for use upon a highway, including trailers designed for use with such vehicles, except . . . (d) farm tractors." Progressive's policy does not specifically exclude a tractor as a "motor vehicle." But the policy states in relevant part that the term "motor vehicle" means a land motor vehicle "of the private passenger, pickup body, or cargo van type . . . designed for operation principally upon public roads."

Progressive argues that this definition of "motor vehicle" includes tractors and that in any event, a tractor is a "device of any type designed to be operated on the public roads." Therefore, Progressive contends, a tractor is a "vehicle" or "device" that must be specifically covered if owned by the insured or a resident family member. Section 60-501, by specifically excluding farm tractors from the definition of "motor vehicle," trumps any definition in Progressive's policy to the contrary. Progressive's policy definition of a farm tractor as a motor vehicle is, therefore, an attempt to make the policy exclusion broader than the

statutory definition in § 44-6413(b) and is void.[19] Accordingly, the district court erred in granting summary judgment on the ground that Jeffrey's tractor fell under the exclusions provision of the Progressive policy. We turn now to whether the court was correct in granting summary judgment on the alternative ground that Kathie had violated the statute of limitations provisions of the UUMICA and the policy.

Statute of Limitations

As an alternative basis for its ruling in favor of Progressive, the district court determined that the breach of contract action was barred by the statute of limitations. The court found that Kathie's failure to file suit against Arens and Hochstein within the 2-year statute of limitations for wrongful death claims barred the breach of contract claim against Progressive. Kathie asserts that the court erred in granting summary judgment in favor of Progressive on this basis and that her cross-motion for summary judgment should have been granted instead. As to Arens, we conclude that the statute of limitations is not a bar to the breach of contract action because Kathie settled with Arens before the wrongful death statute of limitations expired. As to Kathie's failure to sue or settle with Hochstein, we conclude that there are material issues of fact as to whether Hochstein was, in fact, a second tort-feasor against whom she would have had a "claim" that she allowed to expire.

We first address the court's conclusion that Kathie's failure to file suit against Arens before settling her claim barred her subsequent breach of contract action against Progressive. Under the UUMICA, UIM/UM coverage will not apply to "[b]odily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist."[20] Progressive's policy with Jeffrey incorporated this provision by reference to the limitations periods set forth by applicable state law.

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[19] See *American States Ins. v. Farm Bureau Ins., supra* note 7.

[20] § 44-6413(1)(e).

[12] We have explained that § 44-6413(1)(e) bars as untimely an insured's claim for UIM/UM benefits when the statute of limitations on the underlying claim against the uninsured or underinsured motorist has "expired."[21] The purpose underlying § 44-6413(1)(e) is the protection of the insurer when it may have to pay UIM/UM benefits.[22] The statute makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's subrogation rights against the tort-feasor.[23]

But, the insured can prevent the statute of limitations from "expiring" either by filing a timely complaint[24] or by settling a claim[25] against the tort-feasor. The district court did not have the benefit of our decision in *Reimers-Hild v. State*[26] at the time of its ruling. In *Reimers-Hild*, we clarified that where the insured settles with the tort-feasor within the applicable statute of limitations, a suit against the UIM/UM insurer is not barred, regardless of whether any suit was ever filed against that tort-feasor. We conclude that the district court erred in finding that Kathie's claim for UIM/UM coverage was barred by her failure to sue Arens before the statute of limitations on Kathie's claim against her expired.

[13] However, it does not appear from the record that Kathie either filed suit against or settled with Hochstein. We have never specifically been presented with a situation where an insured's injuries were caused by more than one uninsured or underinsured tort-feasor. There is, however, no reason why the insured's obligations would change simply because multiple motorists are involved. As mentioned above, § 44-6413(1)(e) makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's rights

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[21] *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007); *Schrader v. Farmers Mut. Ins. Co*., 259 Neb. 87, 608 N.W.2d 194 (2000).

[22] *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[23] See, *Reimers-Hild v. State, supra* note 21; *Dworak v. Farmers Ins. Exch., supra* note 22.

[24] See *Schrader v. Farmers Mut. Ins. Co., supra* note 21.

[25] See *Reimers-Hild v. State, supra* note 21.

[26] *Id*.

against the tort-feasor.[27] Two statutory limitations periods are relevant to the insurer's claim because of the derivative nature of UIM coverage.[28] Allowing a claim to "expire" against one of several tort-feasors would prejudice the insurer in the same way that expiration of a claim against a single tort-feasor would. We determine that an insured must, utilizing the procedures set forth in § 44-6412, file suit against or settle with all UIM/UM tort-feasors involved in an automobile accident within the applicable statute of limitations pursuant to § 44-6413(1)(e).

Nevertheless, we do not read § 44-6413(1)(e) as requiring that the insured file an action against or settle with all motorists tangentially involved in an accident. To begin with, § 44-6413(1)(e)'s reference to the insured's "claim" against the uninsured or underinsured motorist presupposes the existence of such a claim. A "claim" for these purposes is the equivalent of a cause of action and consists of the fact or facts which give one a right to judicial relief against another.[29] By definition, an insured cannot have a "claim" against a person who did not injure the insured. It is axiomatic that the statute of limitations cannot "expire" on a claim that never existed.[30] In other words, § 44-6413(1)(e) is only applicable to tort-feasors who injured the insured.

This is consistent with the general scheme of the UUMICA. The UIM/UM coverage required by the act extends only to persons "who are legally entitled to recover compensatory damages" from the owner or operator of an uninsured or underinsured motor vehicle.[31] Settlement with "any person who may be legally liable for [the insured's] injuries" can bar recovery under UIM/UM coverage if the insurer was not properly notified and "such settlement adversely affects the rights of the insurer."[32]

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[27] *Id.*; *Dworak v. Farmers Ins. Exch., supra* note 22.

[28] See *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

[29] See *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

[30] See *Reimers-Hild v. State, supra* note 21.

[31] See § 44-6408(1).

[32] See § 44-6413(1)(a).

It is obvious that the intent of § 44-6413(1)(e), to protect the insurer's rights against a purported tort-feasor, is only implicated if the insurer *has* rights against the tort-feasor arising from an underlying tort. "Uninsured motor vehicle"[33] and "[u]nderinsured motor vehicle"[34] are defined in terms of the relationship between the available insurance and the insured's damages. It is simply nonsensical to refer to a vehicle as being "uninsured" or "underinsured" unless the owner or operator of that vehicle is liable for contributing to the insured's injury.

[14,15] The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.[35] When the UUMICA is read as a whole, it is evident that a "claim against the uninsured or underinsured motorist," within the meaning of § 44-6413(1)(e), is a claim against a tort-feasor who caused the injury with respect to which the insured is claiming UIM/UM coverage. Thus, UIM/UM coverage is not barred where the person alleged to have been "the uninsured or underinsured motorist"[36] was not, in fact, a tort-feasor.

In this case, Kathie argues that the district court's finding that Hochstein was a "second potential tort-feasor" is without basis in law or fact. Specifically, Kathie contends that there are genuine issues of material fact as to whether Hochstein negligently operated his vehicle and, if so, whether that negligence was a proximate cause of any injury to Jeffrey. These questions of fact, Kathie argues, should have precluded summary judgment in favor of Progressive. We agree.

The record demonstrates that there is a genuine issue of material fact regarding Hochstein's negligence and whether that negligence was a proximate cause of Jeffrey's injuries. As part of the record, Hochstein submitted a sworn affidavit regarding the

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[33] See § 44-6405.

[34] See § 44-6406.

[35] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[36] § 44-6413.

accident. Hochstein stated that he had no opportunity to observe Jeffrey on the highway and had no knowledge that a collision had occurred between Arens' vehicle and Jeffrey's tractor until after Hochstein stopped his vehicle. Hochstein stated that "[u]nder the circumstances, [he felt he] operated [his] vehicle appropriately." And Progressive admits in its brief that "there were sufficient facts to tender to a jury the question of . . . Hochstein's role in contributing to [Jeffrey's] death."[37]

As the party moving for summary judgment seeking to be relieved of its UIM coverage obligations to Kathie, Progressive had the burden of showing that Hochstein was negligent and that his negligence was a proximate cause of Jeffrey's death. Progressive failed to introduce evidence showing that Hochstein was negligent and that his negligence was the proximate cause of Jeffrey's damages. Progressive, therefore, failed to carry its burden of showing that Hochstein was an underinsured tort-feasor with whom Kathie was required to settle or whom she must sue, in accordance with § 44-6413(1)(e), before the statute of limitations expired on any potential claim against Hochstein.

Therefore, a genuine issue of material fact exists as to whether Hochstein was negligent and whether his negligence proximately caused Jeffrey's damages. We conclude that the district court erred in sustaining Progressive's motion for summary judgment. However, because there was a genuine issue of material fact, the court did not err in denying Kathie's cross-motion for summary judgment.

CONCLUSION

For the foregoing reasons, we reverse the district court's entry of summary judgment in favor of Progressive and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[37] Brief for appellee at 11.

STATE OF NEBRASKA, APPELLEE, V. PAUL F. SCHREINER, APPELLANT.

754 N.W.2d 742

Filed August 15, 2008. Nos. S-07-828, S-07-829.

1. **Probation and Parole.** The revocation of probation is a matter entrusted to the discretion of the trial court.
2. **Trial.** The general conduct of the trial rests within the discretion of the trial court.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Criminal Law: Probation and Parole.** A motion to revoke probation is not a criminal proceeding.
5. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
6. **Trial: Expert Witnesses.** Under the *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), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
7. ____: ____. If a witness is not offering opinion testimony, that witness' testimony is not subject to inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
8. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
9. **Rules of Evidence: Witnesses.** Determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1995), are specifically entrusted to the discretion of the trial court.
10. **Trial: Witnesses: Proof.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
11. **Trial: Evidence: Juries.** A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such motion to obtain a final ruling upon the ultimate admissibility of the evidence.
12. **Trial: Evidence: Proof: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review, a question concerning the admissibility of evidence

which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection or offer of proof during trial.

13. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity of cross-examination.
14. **Trial: Testimony: Intent.** The exposure of a witness' motivation in testifying is a proper and important function of the right of cross-examination.
15. **Constitutional Law: Trial: Witnesses.** The Confrontation Clause does not prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness.
16. ____: ____: ____. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on the cross-examination of a prosecution witness for potential bias based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
17. ____: ____: ____. The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.
18. **Constitutional Law: Impeachment: Evidence.** The Confrontation Clause does not require that courts permit the use of juvenile adjudications for general impeachment of credibility.
19. **Constitutional Law: Criminal Law: Witnesses: Juries.** A criminal defendant states a violation of the Confrontation Clause by showing that he or she was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, thereby exposing to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.
20. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
21. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
22. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
23. **Trial: Judges: Appeal and Error.** One cannot know of purportedly improper judicial conduct, gamble on a favorable result as to that conduct, and then complain that he or she guessed wrong and does not like the outcome.
24. **Courts: Pretrial Procedure: Time.** Trial courts have wide discretion to ensure that the goal of timely disposition of cases is reached.
25. **Courts: Pretrial Procedure: Time: Due Process.** Trial courts must have a great deal of latitude in striking the balance between the court's calendar and a party's right to a fair chance to be heard.
26. **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.

27. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
28. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
29. **Trial: Witnesses.** A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.

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

Bernard J. Glaser, Jr., for appellant.

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

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

GERRARD, J.

I. NATURE OF CASE

Paul F. Schreiner was convicted of first degree sexual assault on a child, based on a sexual encounter that had occurred with K.G., a 14-year-old girl, after he gave her a ride home from the Nebraska State Fair.[1] Schreiner was also found to have violated an order of probation imposed for two previous convictions of sexual assault of a child.[2] In case No. S-07-828, Schreiner appeals from his conviction and sentence for first degree sexual assault. In case No. S-07-829, Schreiner appeals from the revocation of his probation.

II. BACKGROUND

Schreiner was 22 years old at the time of the alleged assault, and K.G. was 14 years old. K.G. testified that she and her twin sister, D.G., met Schreiner at a gas station in August 2005, while the girls were walking home from a shopping mall. D.G.

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[1] See Neb. Rev. Stat. § 28-319 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2000).

said that they were walking up to the gas station and "said hi to him and started talking to him" and that K.G. had initiated the conversation. Schreiner offered them a ride home, and they accepted. According to Schreiner, K.G. asked for his telephone number when he dropped the girls off at home. A few hours later, he got a call from one of the girls, who identified herself as K.G. She asked for a ride back to the mall, which he provided. Schreiner said that both girls called him several times in the following days. Schreiner testified that he decided "they wanted somebody to talk to that they felt comfortable with. And I felt that maybe I should be friends with them just because of the situation that they said that they were in."

On Monday, September 5, 2005, K.G. went to the state fair and ended up meeting Schreiner there. Although the various witnesses' accounts differ in the details, it is not disputed that K.G. left the fair with Schreiner. And when K.G. called home later, she became aware that the police had been told that she was missing. She was upset about that and did not want to go home, so she went to Schreiner's residence instead.

K.G. said that when they got there, she went downstairs while he got them some sodas. K.G. testified that she went to the bathroom and that when she came out, a hide-a-bed had been pulled out of the couch. K.G. said there were sheets and a blanket on the bed. Schreiner, on the other hand, said that there was no bedding on the hide-a-bed, just a sleeping bag. He said the bed was already pulled out when they returned to the residence.

K.G. testified that after she came out of the bathroom, Schreiner was by the bed, and she and Schreiner started kissing. They got on the bed, and K.G. undressed. Schreiner undressed as well, and they had sexual intercourse on the bed. K.G. described the sex as "normal" vaginal intercourse. K.G. said she did not see Schreiner wearing a condom and did not know if he ejaculated. Then, Schreiner told K.G. he was going to bed, and he went to sleep.

Schreiner, on the other hand, testified that when K.G. went to the bathroom, he set his alarm, turned off the lights, and played some music. K.G. came out of the bathroom and went to the hide-a-bed, while he went to sleep on the couch. Schreiner

specifically denied kissing K.G. or having sex with her. Schreiner testified that when the alarm went off in the morning, he saw that K.G. was not wearing her jeans. She got dressed, and he took her directly home.

Schreiner said that he had previously had sex with someone else on the sleeping bag that he said was on the hide-a-bed, and had recently masturbated while on the sleeping bag. Schreiner testified that he ejaculated on top of his sleeping bag without cleaning it up.

K.G. said that after she was dropped off at home, she went into the house and changed her underwear and pants. She put the clothes she took off in the laundry and washed them. Then she went to her sister's room to go to sleep. K.G. testified that the next thing she remembered after going to sleep was that her mother came to get her, because a police officer was there to see her. K.G. told the officer what had happened between her and Schreiner. The officer testified that K.G. was reluctant to talk to him, but that based on what he was told, he and K.G.'s mother searched the residence for some articles of K.G.'s clothing. K.G.'s mother testified that she helped the officer make sure that K.G. did not change clothes, although she could not say that K.G. had not changed clothes already. She also looked for clothing in the washing machine, but it was empty.

K.G. testified that she did not want to tell police about what happened with Schreiner, because she knew it would get him in trouble and she did not want that. The police officer told K.G. that K.G. was going to the Child Advocacy Center, which she did, with her family, later that morning. K.G. was interviewed at the Child Advocacy Center and then taken to the hospital. K.G. testified that before she went to the hospital, she had not had an opportunity to shower or bathe. K.G. was examined at the hospital, and the nurse took all her clothing. K.G. testified that because she had changed clothes, the jeans and underwear that were taken from her and tested were not the jeans and underwear she had been wearing at the state fair and at Schreiner's residence. K.G. admitted lying to her father and to the police about changing clothes, because she did not want to get Schreiner in trouble and did not want to give up the clothes that she had been wearing.

Diana Severson-Tomek, a sexual assault nurse examiner (SANE) at BryanLGH Medical Center, performed the examination of K.G. Severson-Tomek testified that during the examination, K.G. said she had not showered, bathed, or douched before the examination. K.G. also told Severson-Tomek that she had not had anything to drink and that she had not changed clothes. Severson-Tomek gathered physical evidence from K.G.: most pertinently, vaginal and rectal swabs. The procedure used for Severson-Tomek's examination will be explained in more detail below. Those samples, along with reference samples taken from Schreiner, were delivered to the University of Nebraska Medical Center's human DNA identification laboratory for testing.

A DNA analyst testified regarding the testing. The analyst tested four items: the vaginal and rectal swabs from K.G., K.G.'s underwear, and the reference sample from Schreiner. The analyst performed two different tests for semen on the swabs and underwear. On each swab, one test returned positive results, while the other returned negative results. But the underwear tested positive for semen in both tests. The only DNA profile obtained from the vaginal swab was from a single female contributor, presumably K.G. But the rectal swab and underwear yielded a mixture of DNA from two contributors.

When the mixtures were compared to reference samples, the contributors were determined to be K.G. and Schreiner. Schreiner was the major contributor to the sample from the underwear, and the testing indicated "primarily sperm cells contributing to that DNA fraction."

Schreiner was charged by information with first degree sexual assault. The State also moved to revoke Schreiner's probation for some previous convictions. The jury found Schreiner guilty of first degree sexual assault. At a later hearing, the court found that Schreiner had violated his order of probation.

On the sexual assault conviction, Schreiner was sentenced to a period of 6 to 9 years' imprisonment. For the probation violations, Schreiner was sentenced to two terms of 2 to 3 years' imprisonment, to be served consecutively to one another and to the sentence from the sexual assault proceeding. Schreiner was also given a "Notice of Lifetime Parole Supervision," informing

him that he was subject to lifetime community supervision by the Office of Parole Administration.

Other details regarding the proceedings will be set forth below, with respect to Schreiner's specific assignments of error. Although Schreiner has appealed separately from his conviction for first degree sexual assault and the revocation of his probation, we have consolidated his appeals for disposition.

III. ANALYSIS

1. Consolidated Trial on Probation Violation

(a) Assignment of Error

In case No. S-07-828, and as his sole assignment of error in case No. S-07-829, Schreiner assigns that the court erred in trying the sexual assault charge at the same time as the probation violation charge, in violation of Neb. Rev. Stat. § 29-2002 (Reissue 1995) and the due process and assistance of counsel clauses of the state and federal Constitutions.

(b) Standard of Review

[1-3] The revocation of probation is a matter entrusted to the discretion of the trial court.[3] And the general conduct of the trial rests within the discretion of the trial court.[4] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[5]

(c) Background

Schreiner had been convicted in 2004 of two counts of sexual assault of a child, based on allegations of two separate instances of sexual intercourse with, respectively, a 13-year-old and 14-year-old girl. Schreiner had been sentenced to a 3-year term of probation pursuant to a plea agreement. After the incident with K.G., the State filed a motion to revoke Schreiner's probation.

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[3] *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007).

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

[5] *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

The motion alleged that Schreiner had violated the conditions of his probation by failing to (1) refrain from unlawful or disorderly conduct or acts injurious to others and (2) meet with his probation officer.

Before trial, at a hearing scheduled on the alleged probation violation, Schreiner's counsel informed the court that there was no reason to go forward on the probation violation until the trial on the sexual assault was finished. Counsel noted that the allegations in the sexual assault case were "at least half of the allegation for the revocation." Counsel informed the court that if Schreiner was found guilty in the sexual assault case, there would be no reason to contest the probation violation, and counsel "just thought it would be [a] more efficient use of the Court's time not to have the two trials over the same evidence."

But when the State suggested that the court use the testimony at the sexual assault trial to determine the factual basis for the probation revocation hearing, Schreiner objected, arguing that he would be put in the position of "trying to persuade two different fact finders here" and that it might affect his examination of witnesses. The court agreed that there could be facts relevant to the probation proceeding that were not relevant to the sexual assault and that it did not "want those brought up during this trial before this jury."

But the court was concerned that the trial could be lengthy, and the court did not want to go through a second trial hearing the same evidence. The court suggested that differences in the proceedings could be addressed with a further evidentiary hearing on the motion for revocation of probation, at which the record of the trial in the sexual assault case could be offered.

After Schreiner was convicted in the sexual assault proceeding, a separate hearing was had on the probation violation. Schreiner admitted he had not met with his probation officer as directed. Based on that and "on the evidence that [the court] heard in the trial in this matter that was tried" in the sexual assault proceeding, the court found that Schreiner had violated his order of probation. The court took judicial notice of the trial record from the sexual assault proceeding. Schreiner preserved his objection to the conjoined trial.

(d) Analysis

[4] In support of his argument that the court erred in trying the probation violation at the same time as the first degree sexual assault charge, Schreiner cites § 29-2002, which explains when "two or more indictments, informations, or complaints" may be tried together. But we are not dealing here with a joinder of two separate criminal charges. Instead, we have one information, containing one criminal charge, and a separate motion to revoke probation, which is not a criminal proceeding.[6] Section 29-2002 is not applicable here.

More pertinent is the Nebraska Probation Administration Act,[7] which provides:

> Whenever a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court. The court shall not revoke probation or increase the requirements imposed thereby on the probationer, except after a hearing upon proper notice where the violation of probation is established by clear and convincing evidence. The probationer shall have the right to receive, prior to the hearing, a copy of the information or written notice of the grounds on which the information is based. The probationer shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.[8]

Those requirements were met in this case. On our review of the record, it is not clear how Schreiner was prejudiced by the court's consolidation of the hearing on his probation violation with the trial on his sexual assault charge. If anything, the consolidation of those matters benefited Schreiner, by providing him the "prompt consideration" of the charge to which he was entitled by law.[9]

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[6] See *State v. Burow*, 223 Neb. 867, 394 N.W.2d 665 (1986).

[7] Neb. Rev. Stat. §§ 29-2246 to 29-2269 (Reissue 1995 & Supp. 2005).

[8] § 29-2267.

[9] See *id.*

Schreiner argues that he was denied "a focused competent defense strategy on either the criminal trial or the revocation of probation matter."[10] It is difficult to see how. Schreiner argues that trying to address different issues, and different burdens of proof, hampered his adduction of evidence. But he does not provide any example of when that occurred. At trial, he did not make any offer of proof with respect to evidence he would have adduced had the hearing not been consolidated. Nor did he object, at trial, to any instance in which he was supposedly compelled to adduce evidence that he otherwise would not have adduced.

And at the subsequent hearing dedicated solely to the probation violation, Schreiner admitted failing to meet with his probation officer. He did not present any of the evidence, call any of the witnesses, or ask any of the questions that had purportedly been denied him at the sexual assault trial.

Simply put, we can find nothing in this record to suggest that Schreiner was prejudiced by the consolidation of these proceedings. Consolidation facilitated the prompt consideration of the probation revocation charge. And it is obvious that avoiding the need for another week-long trial made far more efficient use of the court's and State's resources. Absent evidence of prejudice to Schreiner, and given the evident advantages of consolidation, we find no abuse of discretion.

2. *Daubert*/*Schafersman* Objection to Severson-Tomek Testimony

(a) Assignment of Error

Schreiner assigns that the court erred in admitting the testimony of Severson-Tomek, as her testimony lacked foundation under *Daubert*/*Schafersman*[11] standards.

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[10] Brief for appellant in case No. S-07-828 at 22.

[11] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

(b) Standard of Review

[5] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[12]

(c) Background

(i) Motion in Limine

Schreiner filed a motion in limine raising, among other things, a *Daubert*/*Schafersman* objection to Severson-Tomek's testimony. Specifically, Schreiner moved that Severson-Tomek not be permitted to testify "concerning any opinion that the substance obtained in such witness's SANE examination of [K.G.] was consistent with sperm and that her examination of [K.G.] showed evidence consistent with 'rough sex', words to that effect, or any other opinion concerning her examination of [K.G.]"

At the hearing on the motion, Schreiner objected to any testimony about Severson-Tomek's discovery of a stain consistent with sperm, or about "rough sex." But the court determined that the substance of the motion went to foundation, not a *Daubert*/*Schafersman* issue. The court specifically determined that the physical observations that Severson-Tomek made in the course of the examination were relevant and admissible, assuming proper foundation. The motion was sustained as to any comment regarding "rough sex," but otherwise overruled.

(ii) Severson-Tomek's Testimony

When she testified, Severson-Tomek explained the training and education necessary to become a certified SANE, and her qualifications and experience are not disputed. She had been performing examinations as a SANE for about 2½ years and had performed approximately 83 such examinations. For each examination of a suspected sexual assault victim, Severson-Tomek employed the same methods and procedures, and she specifically testified that the methods and procedures that she used were generally accepted.

Severson-Tomek also explained those procedures in more detail. A sexual assault kit is used to specifically assist in the

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[12] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

collection of physical evidence. There are 14 steps in the use of a sexual assault kit: consent and collection of patient history, collection of underwear, collection of debris from clothing, fingernail scrapings, three collections of hair samples, a saliva sample, an oral swab, a vaginal swab and smear, a rectal swab, and a blood sample. All of the steps are performed, unless the patient refuses. A colposcope is used to conduct a detailed examination of the patient's genitalia. The colposcope provides magnification and illumination and takes photographs. Ultraviolet light is used to look for additional evidence. Laboratory tests are performed on bodily fluid samples, and the patient's clothing is collected. The SANE's findings are reviewed by the emergency room doctor, and another SANE reviews the photographs and makes her own observations.

According to Severson-Tomek, K.G. was cooperative and did not refuse any part of the procedure. Severson-Tomek testified, over objection, to several abnormal abrasions that she observed during her examination of K.G. Severson-Tomek specifically testified that she did not have an opinion as to the cause of an abrasion she observed on K.G.'s cervical os, or opening, and she did not offer any other opinion as to what could have caused the other abnormalities she observed.

(d) Analysis

[6] Under our *Daubert*/*Schafersman*[13] jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[14] Schreiner argues that given its gatekeeping responsibility, the district court abused its discretion in admitting Severson-Tomek's testimony.

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[13] *Daubert, supra* note 11; *Schafersman, supra* note 11.

[14] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *cert. denied sub nom. Sommer v. Nebraska*, 552 U.S. 876, 128 S. Ct. 186, 169 L. Ed. 2d 126.

[7] But *Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony. Not every attack on expert testimony amounts to a *Daubert* claim. If a witness is not offering opinion testimony, that witness' testimony is not subject to inquiry pursuant to *Daubert*.[15] And here, Severson-Tomek's testimony at trial was not opinion testimony. Severson-Tomek made observations of K.G.'s physical condition and testified about her observations. Although Severson-Tomek was qualified to offer expert testimony, she was testifying to matters within her personal knowledge.[16] As the district court correctly determined, this is simply not the sort of expert testimony that demands a *Daubert* inquiry.

If Severson-Tomek offered any opinions, they were implicit in her testimony that her examination of K.G. revealed abnormalities. To the extent that this involved a scientific methodology, it was simply empirical: Severson-Tomek examined K.G. and described her observations. It is hard to imagine any method of scientific inquiry that is more well established. Severson-Tomek was well qualified to testify that the abrasions revealed in her examination of K.G. were not normal, and Severson-Tomek testified at length about the procedures she used to make her observations. And she specifically testified that her method of examination was generally accepted.

The district court did not abuse its discretion in concluding that the foundation offered for Severson-Tomek's testimony was sufficient. Therefore, Schreiner's assignment of error is without merit.

3. Cross-Examination of K.G. on Contacts With Police and Juvenile System

(a) Assignment of Error

Schreiner assigns that the court erred in refusing to permit cross-examination of K.G. with respect to (1) prior contacts with the juvenile court system and (2) whether she had lied to a police officer.

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[15] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[16] Compare, *Robinson, supra* note 15; *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

(b) Standard of Review

[8,9] When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.[17] And determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2),[18] are specifically entrusted to the discretion of the trial court.[19]

(c) Background

The State filed a motion in limine to preclude any evidence that K.G. or D.G. had contact with law enforcement except as related to this case, any violations of law, or any cases pending in juvenile court. At the hearing, Schreiner contended that K.G. had stayed at Schreiner's house because she was afraid to go home, since she would get in trouble for having run away. Schreiner argued that K.G.'s prior contact with law enforcement showed she had been in trouble for running away before, supporting Schreiner's contention that K.G. was staying with Schreiner voluntarily. The State replied that it was uncontested that K.G. had stayed at Schreiner's, because she was a runaway and afraid to go home, and that K.G. was at Schreiner's voluntarily. The court sustained the State's motion.

Schreiner further argued that K.G. had been adjudicated for lying to a police officer and that he should be allowed to question her about that because it was a crime of dishonesty. The State replied that juvenile adjudications are not admissible for such purposes,[20] and the court sustained the State's motion in that respect as well.

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[17] *Kuehn, supra* note 12; *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[18] See Neb. Rev. Stat. § 27-608(2) (Reissue 1995).

[19] See, *id.*; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. King*, 197 Neb. 729, 250 N.W.2d 655 (1977).

[20] See Neb. Evid. R. 609(1)(b), Neb. Rev. Stat. § 27-609(1)(b) (Reissue 1995).

At trial, Schreiner made an offer of proof, claiming that if asked, K.G. would admit to lying to a police officer. Schreiner offered that testimony "under rule 27-608 instead of 27-609."[21] But Schreiner also asserted that K.G. had been "adjudicated as such in Juvenile Court of Lancaster County and it's been within the last year." The offer of proof was overruled.

(d) Analysis

[10] We begin by determining which of the issues discussed in the trial court have been presented to this court for review. Pursuant to Neb. Evid. R. 103(1)(b),[22] error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. So, in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.[23]

[11,12] And that offer of proof must be made at trial. A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such motion to obtain a final ruling upon the ultimate admissibility of the evidence.[24] Because overruling a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection or offer of proof during trial.[25]

Therefore, although many issues were discussed in conjunction with the State's motions in limine, we consider only

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[21] See, *id.*; rule 608, § 27-608.

[22] See Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995).

[23] *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998).

[24] See *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[25] See *id.*

the issues preserved by Schreiner's offer of proof.[26] At trial, Schreiner offered to prove two facts: that K.G. had given false information to a police officer and that K.G. had been adjudicated for doing so in juvenile court. Our appellate review is limited to whether Schreiner should have been permitted to cross-examine K.G. about either of those facts.

(i) Juvenile Adjudication

Schreiner first argues that he should have been allowed to cross-examine K.G. about her adjudication in juvenile court. Specific instances of the conduct of a witness, for the purpose of attacking or supporting her credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.[27] Rule 609(1)(b) provides that for the purpose of attacking the credibility of a witness, evidence that she has been convicted of a crime shall be admitted if elicited from her or established by public record during cross-examination, if the crime involved dishonesty or false statement. But rule 609(4) expressly provides that "[e]vidence of juvenile adjudications is not admissible under this rule."

Schreiner argues that the evidence should have been admitted anyway, relying on *Davis v. Alaska*,[28] in which the U.S. Supreme Court held that the trial court's refusal to allow the defendant to cross-examine a key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied the defendant his constitutional right to confront witnesses, notwithstanding a state policy protecting the anonymity of juvenile offenders. But *Davis* is distinguishable, and Schreiner's argument is unpersuasive.

[13-17] The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him,"[29] and the main and essential purpose of confrontation is to secure the opportunity

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[26] See, § 27-103(1)(b); *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993).

[27] See § 27-608(2).

[28] *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

[29] U.S. Const. amend. VI.

of cross-examination.[30] The exposure of a witness' motivation in testifying is a proper and important function of the right of cross-examination.[31] But it does not follow that the Confrontation Clause prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness.[32]

> On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[33]

In *Davis*, a key prosecution witness was on probation, having been adjudicated for burglary. The defendant argued that although juvenile records were confidential, he should have been allowed to cross-examine the witness about his probation, because the witness might have been subjected to undue pressure from police, fearing possible probation revocation. The Court carefully distinguished between the "introduction of evidence of a prior crime [as] a general attack on the credibility of the witness" and "[a] more particular attack on the witness' credibility . . . by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."[34] The Court found the circumstances in *Davis* to be an example of the latter and reasoned that the state's policy interest in protecting the confidentiality of a juvenile offender's

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[30] See *Davis, supra* note 28.

[31] See *id.*

[32] *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

[33] *Id.*, 475 U.S. at 679, quoting *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (emphasis in original).

[34] See *Davis, supra* note 28, 415 U.S. at 316.

record could not require the defendant to yield his right to cross-examine a witness for a particular bias.[35]

[18] Based on the distinction between general credibility and specific bias, courts to have addressed the issue

> "have been reluctant to extend [*Davis*] to justify admitting juvenile adjudications offered to impeach under Rule 609. It makes some sense to draw such a distinction between juvenile-adjudication evidence offered to impeach for bias and such evidence offered to impeach under Rule 609. Evidence offered under Rule 609 undermines credibility only indirectly by showing a criminal character and, thus, a propensity which is only generally linked to truthfulness. On the other hand, bias evidence shows the witness has a motive to lie in the specific case."[36]

In other words, the Confrontation Clause does not require that courts permit the use of juvenile adjudications for general impeachment of credibility.[37] *Davis* neither "holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his [or her] past delinquency adjudications or criminal convictions."[38]

Schreiner's offer of proof in this case did not establish a basis for cross-examination equivalent to the bias suggested in *Davis*. The evidence Schreiner offered to prove was directed at K.G.'s credibility, but did not provide a basis to establish a particular bias. Although K.G.'s deposition indicated, at the hearing on the motions in limine, that K.G. was on probation at the time of her deposition, there was no offer at trial to prove that she was on

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[35] See *id.*

[36] *Reid v. State*, No. 247,2005, 2005 WL 3272134 at *4 (Del. Nov. 30, 2005) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 888 A.2d 232 (Del. 2005)). Accord 28 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6138 (2001).

[37] See, e.g., *State v. Spann*, 574 N.W.2d 47 (Minn. 1998); *State v. Pirman*, 94 Ohio App. 3d 203, 640 N.E.2d 575 (1994). Compare, e.g., *State v. Balisbisana*, 83 Haw. 109, 924 P.2d 1215 (1996).

[38] *Davis, supra* note 28, 415 U.S. at 321 (Stewart, J., concurring).

probation when she testified.[39] And there was no offer to prove, nor evidence in the record to suggest, that K.G.'s adjudication provided a specific motive to testify untruthfully.[40]

Schreiner argues in his brief that K.G. lied to her mother and to the police about the alleged sexual encounter with Schreiner because she was afraid of getting in trouble for having been gone all night. Schreiner suggests that K.G. then reasserted her lie at trial, because she was afraid of prosecution if she contradicted her earlier statement to the police. But Schreiner was able to effectively cross-examine K.G. and present that theory at trial. The fact of a prior adjudication would not substantially change K.G.'s alleged motive to conform her trial testimony to her earlier statements. The limitation of Schreiner's cross-examination did not "prohibit[] *all* inquiry into the possibility that [the witness] would be biased"[41] by fear of contradicting her earlier statements. In other words, Schreiner's theory about K.G.'s specific motive to lie did not rest upon, and was not particularly supported by, the fact of her adjudication. And to say that K.G.'s credibility was still vigorously challenged on cross-examination is, given our review of the record, something of an understatement.

Even if K.G.'s deposition testimony had been referenced as the basis for Schreiner's offer of proof at trial, K.G.'s deposition is far from clear about the basis for her probation. It was apparent that after the alleged incident with Schreiner, but before K.G. was deposed, she had been placed on probation and in a group home by the juvenile court. However, the decision to put K.G. on probation appears to have been primarily based on drug use, truancy, and running away from home-not giving false information to an officer. In other words, Schreiner's offer at trial to prove that K.G. had been adjudicated for lying to an officer did

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[39] Compare, e.g., *U.S. v. Williams*, 963 F.2d 1337 (10th Cir. 1992); *United States v. Ciro*, 753 F.2d 248 (2d Cir. 1985); *United States v. Decker*, 543 F.2d 1102 (5th Cir. 1976).

[40] See, e.g., *Mills v. Estelle*, 552 F.2d 119 (5th Cir. 1977); *State v. Butler*, 626 S.W.2d 6 (Tenn. 1981); *Smith v. United States*, 392 A.2d 990 (D.C. 1978); *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000).

[41] *Van Arsdall, supra* note 32, 475 U.S. at 679.

not offer to prove, or even clearly implicate, K.G.'s status as a probationer.

And asking K.G. why she was on probation would have implicated a number of related subjects, such as truancy and drug use, that would have been irrelevant and unfairly prejudicial. That also distinguishes this case from *Davis*, because "[t]he competing policy at stake here is markedly different from that which the *Davis* Court found subordinate to the right of cross-examination."[42]

In *Davis*, "the trial court had limited cross-examination of the government witness in order to protect him from the embarrassment of having his prior juvenile record exposed. The sole interest served by that ruling was that of the witness."[43] On the other hand, such things as "[h]earsay, evidence of bad character or propensity to commit crimes, and evidence that may unduly prejudice the jury are generally excluded because of their adverse effect on the reliability of the fact-finding process."[44]

The Court's decision in *Davis* rested on the balance between the defendant's right to cross-examine a witness about a motive to lie in the specific case and the government's generalized interest in protecting the confidentiality of a juvenile record. In this case, Schreiner's offer of proof was directed only at general impeachment of a witness' credibility, but implicated the government's interest in the fairness and reliability of the trial process.[45]

[19] A criminal defendant states a violation of the Confrontation Clause by showing that he or she was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, thereby exposing to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.[46] But the only fact Schreiner offered to prove here was that K.G.

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[42] *Cheek v. Bates*, 615 F.2d 559, 563 (1st Cir. 1980).

[43] *Id.*

[44] *Id.*

[45] See *id.*

[46] *Van Arsdall, supra* note 32.

had been adjudicated for lying to a police officer. This offer of proof did not suggest a motive for bias comparable to that in *Davis*,[47] and it implicated other subjects that were clearly inadmissible. On balance, we cannot say that the district court abused its discretion in overruling Schreiner's narrow offer of proof with respect to K.G.'s juvenile adjudication.

(ii) False Statement to Officer

Schreiner also argues that he should have been allowed to ask K.G. about the underlying conduct of lying to a police officer. While specific instances of the conduct of a witness, for the purpose of attacking or supporting her credibility, may generally not be proved by extrinsic evidence, rule 608(2) provides that specific instances of the conduct of a witness "may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . (b) concerning [her] character for truthfulness or untruthfulness."[48]

We are not persuaded that the court abused its discretion by overruling Schreiner's offer of proof here. The offer of proof was simply that K.G. would, if asked, testify that she had given false information to a police officer. This was, evidently, a reference to an incident referred to in K.G.'s deposition, in which K.G. had run away from home for "about a week," and then apparently told the police that she had been with her sister. Schreiner contends that this testimony "would have shown that [K.G.] had no compunction about lying to those in authority."[49]

But the district court had already sustained the State's motion to preclude any evidence about K.G.'s having run away from home and other kinds of misconduct. Other than the issue under discussion, Schreiner does not challenge that ruling on appeal. And without reference to the incident Schreiner offered to prove, K.G. still admitted on cross-examination that she had lied to her parents, the police, and even at her deposition, about the clothing she had been wearing on the night of the alleged sexual

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[47] *Davis, supra* note 28.

[48] § 27-608(2).

[49] Brief for appellant in case No. S-07-828 at 27.

encounter. It is difficult to see what additional value Schreiner could have obtained from the incident he offered to prove, unless he was able to inquire about the specific circumstances of the falsehood. And that would have been beyond the scope of the inquiry permitted by rule 608(2)(b).

In short, the incident Schreiner offered to prove was inextricably linked to other, inadmissible evidence, and Schreiner was able to make the same point through other questions. We do not find an abuse of the district court's discretion in its overruling of Schreiner's offer of proof. And even had the evidence been improperly excluded, the evidence was cumulative and there was other competent evidence to support the conviction, so the improper exclusion was harmless beyond a reasonable doubt.[50]

In summary, we find no abuse of discretion, or prejudicial error, in the district court's overruling of Schreiner's offer of proof regarding K.G.'s adjudication. Schreiner's assignment of error is without merit.

4. DNA Evidence

(a) Assignment of Error

Schreiner assigns that the court erred in admitting K.G.'s underwear into evidence and in allowing testimony regarding DNA testing of K.G.'s underwear, because it was not relevant.

(b) Standard of Review

[20] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.[51]

(c) Background

As described above, DNA testing found Schreiner's sperm on K.G.'s underwear. Schreiner objected to the test results relating to the underwear, because K.G. testified that she had changed clothes after the alleged assault, and Schreiner "object[ed] to

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[50] See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006), *cert. denied* 549 U.S. 1283, 127 S. Ct. 1815, 167 L. Ed. 2d 326 (2007).

[51] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

any further testimony until the State . . . proves that those were actually the underpants that she was wearing at the time that this allegation occurred."

But the DNA analyst testified that semen can leak from the vagina on to underwear after the underwear has been put back on. The district court overruled Schreiner's objection, so the underwear was admitted into evidence and testimony regarding DNA testing of the underwear was allowed. On cross-examination, the analyst admitted that it was possible for DNA to be transferred to clothing and then transferred again to a third person.

(d) Analysis

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[52] Evidence which is not relevant is not admissible.[53] Schreiner argues that the DNA evidence discussed above was not relevant. His argument, essentially, is that the evidence was irrelevant because K.G. testified at trial that she changed clothes when she got home, so the DNA samples were taken from underwear that K.G. testified she put on the day after the alleged sexual encounter.

[21] The court did not abuse its discretion in admitting the DNA testing of K.G.'s underwear. K.G.'s trial testimony that she changed clothes simply does not make the DNA evidence irrelevant. The jury could have concluded, from the evidence, that K.G. had not actually changed clothes. And the DNA analyst's testimony would support the conclusion that even had K.G. changed clothes, residual semen from a sexual encounter could have leaked on to her clean underwear. In any event, evidence is relevant if it tends in any degree to alter the probability of a material fact.[54] The presence of Schreiner's sperm on K.G.'s underwear made it more likely that K.G. and Schreiner had a sexual encounter. Therefore, the court did not abuse its

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[52] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995).

[53] Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995).

[54] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

discretion in admitting the evidence, and Schreiner's assignment of error is without merit.

5. Length of Trial Days

(a) Assignment of Error

Schreiner assigns that the court erred in "permitting the trial to continue until after 8:00 p.m. on at least two days."

(b) Standard of Review

[22] The general conduct of the trial rests within the discretion of the trial court.[55] And a trial court's order denying a motion for new trial is reviewed for an abuse of discretion.[56]

(c) Background

The court held a housekeeping hearing after voir dire was completed on Thursday, April 19, 2007. In the course of discussing the length of opening statements, the court informed counsel that "we're going to have to start telling the jury we're going until 6:00 o'clock." The court explained that the case had to be completed by Wednesday of the following week, because the following Thursday was "completely booked up" and Friday was a court holiday. So, the court stated that "whatever the case, if it takes working on Saturday," it was necessary to have the case submitted to the jury by the end of the day on the following Wednesday. Schreiner's counsel replied that he had "no problem with going to 6:00 o'clock."

During the morning recess the next day, the court again met with counsel regarding scheduling. Based on the representations of counsel regarding the length of their respective cases, the court informed them that it planned to "go until 5:00 today. And next week what we're going to do is, we'll start at 8:30 each day and we'll start at 1:30 each day. And we'll plan on - plan on going until at least 5:00." The court acknowledged that it "sounds like we're going to be pushing" to get the case submitted to the jury by the end of the day on the following Wednesday. The court

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[55] *Gales, supra* note 4.

[56] *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

informed the jury of the proposed schedule after the recess. At no point did Schreiner object.

The State was still presenting its case in chief on Monday afternoon, and the court asked the State about the schedule during the afternoon recess. The State said it was behind. The court concluded that it would "tell the jury that we'll go until 6:00 o'clock tomorrow evening and probably go until 6:00 o'clock on Wednesday." The court added, "Wednesday we'll just go until we're finished. That's what I'm going to tell the jury, they should just be prepared to go until we finish. Because we do need to have it finished by Wednesday." Schreiner did not object. At about 5 p.m., the court informed the jury that it had been

> informed by the attorneys that we are considerably behind from where we expected to be at this point in time in the trial and it is necessary for us to . . . extend the time that you're going to be required to be here in order to get this trial completed. So I'm going to . . . change our schedule a bit.
>
> We are going to start at 8:00 o'clock tomorrow morning. We're going to go until noon. And then we're going to resume at 1:00 o'clock. And tomorrow we're going to go until 7:00. Now, we will take a half hour break between 4:30 and 5:00 so you can get some meals and that sort of thing.
>
> And I'll try to give you plenty of breaks so that you don't get too overly tired. I know it's going to be a grueling day tomorrow. On Wednesday I'm anticipating that we will go until we are finished. Now that may be even longer than we're going tomorrow. And if it looks like it's going to take considerably longer than that, we'll probably take an hour break in the evening so that you do have a bit more of an extended break here.
>
> I apologize for this. We try not to let this happen. But it's going to be necessary in this case so that we can get it completed.

The jury was excused, and a conference was had on several matters, at the conclusion of which the court informed counsel that "the way we're going right now, I'm going to anticipate

that we're just going to go straight through. So we'll instruct the jury whenever we're ready, and we'll do closing arguments just whenever the evidence is completed." Schreiner did not object at any point.

The jury was provided with a dinner break on Tuesday, from 4:35 to 5:10 p.m. Another recess was taken from 6:06 to 6:21 p.m., and the jury was released on Tuesday at 6:59 p.m. On Wednesday, after the defense rested, the jury was released from 3:09 to 5:06 p.m., while the court held the jury instruction conference. Closing arguments were made, the jury was instructed, and the case was submitted to the jury at 6:24 p.m.

The record does not reflect how late the jury deliberated that evening. But the jurors were told that they did not have to deliberate that evening; that if they did deliberate, they could stop for the evening at any time they chose; and that in any event, they should not deliberate later than 8:30 p.m. Schreiner did not object at any point. At 9:52 a.m. the next day, a teleconference was held with respect to a question from the jury. A followup question was discussed in a teleconference at 10:29 a.m. The jury returned its verdict at 10:44 a.m. on the following day, Friday, April 27, 2007.

Schreiner based his motion for new trial, in part, on the complaint that the trial days had been too long. Schreiner's counsel admitted he did not object, but said he "did not realize the impact of the procedure we followed here until the jury had already begun its deliberations." The motion was overruled.

(d) Analysis

[23] Schreiner argues that the court should have sustained his motion for new trial, based on the length of the trial days. But despite several obvious opportunities, Schreiner never objected to the court's stated intent to work late in order to complete the trial during the available time. The failure to make a timely objection waives the right to assert prejudicial error on appeal.[57] One cannot know of purportedly improper judicial conduct, gamble on a favorable result as to that conduct, and then complain that he or she guessed wrong and does not like the

[57] *Gutierrez, supra* note 14.

outcome.[58] The court certainly did not abuse its discretion in overruling a motion for new trial that was predicated on grounds that had been waived during the trial.

[24,25] Nor does any plain error appear on the record. The record, as summarized above, simply does not support Schreiner's assertion that the court "permit[ed] the trial to extend to well after 8:00 p.m."[59] on Tuesday and Wednesday. And generally, trial courts have wide discretion to ensure that the goal of timely disposition of cases is reached.[60] Trial courts must have a great deal of latitude in striking the balance between the court's calendar and a party's right to a fair chance to be heard.[61] Of course, this discretion is not unbounded. Attorneys, witnesses, and jurors should not be asked, absent extremely unusual circumstances, to perform their important duties while battling mental and physical exhaustion.[62] But that did not happen here. Instead, the record demonstrates that the court kept the jury informed, took appropriate breaks, and in general, carefully exercised its discretion to complete the trial in this case during the time available.

In short, Schreiner did not object to the length of the trial days until after he was convicted, and the record does not support his argument in any event. We find no merit to his assignment of error.

6. Inquiry Into K.G.'s Mental Health and Medication

(a) Assignment of Error

Schreiner assigns that the court erred in not permitting him to inquire into K.G.'s mental health status and her use of psychotropic drugs and their adverse effect on her memory.

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

[59] Brief for appellant in case No. S-07-828 at 29.

[60] See *Talkington v. Womens Servs*, 256 Neb. 2, 588 N.W.2d 790 (1999).

[61] See, *Loinaz v. EG & G, Inc.*, 910 F.2d 1 (1st Cir. 1990); *Beary v. City of Rye*, 601 F.2d 62 (2d Cir. 1979).

[62] See *Parker v. State*, 454 So. 2d 910 (Miss. 1984).

(b) Standard of Review

The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.[63]

(c) Background

The State filed a motion in limine asking, among other things, for an order precluding any evidence of mental health issues of K.G. or D.G. At the hearing on the State's motion, Schreiner asserted that during her deposition, K.G. had said that she was being treated for a mental illness and that her medication affected her memory. The State disagreed with that interpretation of K.G.'s deposition testimony. K.G.'s deposition was received as evidence at the hearing. In her deposition, K.G. explained that she had been diagnosed with a mental illness and had been prescribed medication to treat it. But K.G. did not mention any effect of the medication, or her condition, on her memory. And no offer of proof to that effect was made at trial.

After Schreiner was convicted, at the hearing on his motion for new trial, Schreiner's counsel represented to the court that he had recently "received information that [K.G.] suffers from a mental impairment that causes memory loss and was taking medications to treat that impairment." But he represented that he was not basing his motion for new trial on that information, did not have the information from a firsthand source, and just intended "to make a record at this point that I have looked into that" and would file another motion if he ever found evidence to substantiate the information he had been given.

(d) Analysis

Schreiner argues that his Confrontation Clause rights were violated because he "was precluded from cross-examining [K.G.] on the question of her mental health."[64] There is nothing in the record to support this claim. As previously noted, in order to predicate error upon a ruling of the court's refusing to permit

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[63] *Kuehn, supra* note 12.

[64] Brief for appellant in case No. S-07-828 at 29.

a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.[65] No offer of proof was made in this case. The closest Schreiner came was in support of his motion for new trial, and even then, Schreiner's counsel admitted that there was no firsthand basis to believe that K.G.'s memory was impaired.

On appeal, Schreiner relies on *State v. Trammel*,[66] in which this court discussed the Confrontation Clause as it related to a witness' mental condition. But the issue in *Trammel* was discovery, not cross-examination. In *Trammel*, on the facts of the case, this court concluded that the Confrontation Clause required that the defendant be allowed to discover information about a witness' current mental health treatment, despite the physician-patient privilege.

There is nothing in the record to suggest that Schreiner sought such discovery here, nor does *Trammel* authorize a "fishing expedition" on cross-examination of a witness. And, as already noted, there was no offer to prove facts relating to K.G.'s mental condition, on cross-examination or otherwise, that were relevant or admissible. Absent such an offer of proof, we find no merit to Schreiner's assignment of error.

7. Lifetime Community Supervision

(a) Assignment of Error

Schreiner assigns that the court erred in finding he was subject to lifetime community supervision under Neb. Rev. Stat. §§ 29-4005 and 83-174.03 (Cum. Supp. 2006), as those statutes (1) constitute an ex post facto law, (2) violate his right to be free from cruel and unusual punishment, and (3) violate his right to due process of law.

(b) Standard of Review

[26] This issue presents a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[67]

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[65] *Talle, supra* note 23.

[66] *State v. Trammel*, 231 Neb. 137, 435 N.W.2d 197 (1989).

[67] See *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

(c) Analysis

Section 83-174.03(1) provides that

> [a]ny individual who, on or after July 14, 2006, (a) is convicted of or completes a term of incarceration for an offense requiring registration under section 29-4003 and has a previous conviction for a registerable offense, (b) is convicted of sexual assault of a child in the first degree pursuant to section 28-319.01, or (c) is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005, shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life.

Schreiner was notified at sentencing that because he had previously been convicted of a registrable offense, he is subject to lifetime community supervision.[68] He argues, on several bases, that the application of this statute to him is unconstitutional. But the initial question is whether these issues are properly before us in this appeal. The State argues that the provisions of § 83-174.03 are not part of the sentence and, therefore, not ripe for adjudication. In the alternative, the State argues that Schreiner waived his constitutional challenge by not raising it in the trial court.

We addressed a similar issue in *State v. Torres*.[69] In *Torres*, the defendant challenged the registration requirements of the Sex Offender Registration Act (SORA)[70] in a direct appeal from his conviction and sentence. But we explained that SORA's registration requirements were separate and collateral to any sexual offense which the act affects, because "SORA's registration requirements arose solely and independently by the terms of the act itself only *after* [the defendant's] conviction."[71] Thus,

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[68] See Neb. Rev. Stat. § 29-4019 (Cum. Supp. 2006).

[69] *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

[70] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Cum. Supp. 2006).

[71] *Torres, supra* note 69, 254 Neb. at 95, 574 N.W.2d at 155.

we refused to consider the defendant's challenge to his 10-year registration requirement.

But we distinguished *Torres* in *State v. Worm*.[72] In *Worm*, the defendant was subjected, not to a 10-year registration requirement, but to the lifetime registration requirement associated with an aggravated offense.[73] Therefore, his lifetime SORA registration requirement had not arisen solely and independently from the defendant's conviction. Instead, the court had been required, as part of the sentence, to determine whether the offense was aggravated and "make that fact part of the sentencing order."[74] As such, the court's finding that the defendant committed an aggravated offense was part of the court's judgment.[75] So, we determined that the registration requirement for an offender convicted of an aggravated offense was part of the judgment for purposes of filing an appeal and rejected his constitutional challenge to SORA on the merits.[76]

The lifetime community supervision provisions of § 83-174.03 incorporate and mirror the lifetime registration provisions of SORA. But like the defendant in *Torres*, and unlike the defendant in *Worm*, Schreiner was not found to have committed an aggravated offense. Instead, because he had previously been convicted of an offense requiring registration under § 29-4003,[77] he was subject to § 83-174.03 automatically, by virtue of his conviction.[78] The operation of § 83-174.03 is entirely independent from the sentence imposed upon Schreiner for first degree sexual assault. As such, any claim Schreiner may have concerning the constitutional implications of § 83-174.03 should be raised if and when he becomes subject to its provisions, but not on a direct appeal from his underlying sexual assault

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[72] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[73] See § 29-4005(2).

[74] See *id*.

[75] *Worm, supra* note 72.

[76] See *id*. See, also, *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

[77] See § 29-4003(1)(a).

[78] See Neb. Rev. Stat. § 83-174.02(1) (Cum. Supp. 2006).

conviction.[79] Any individual who is subject to lifetime community supervision may, whenever a determination or revision of the conditions of community supervision is made, appeal to the district court.[80]

There are also prudential reasons for concluding that Schreiner's challenge is unripe. Unlike SORA, the provisions of which are mandatory, the effects of the lifetime community supervision provision are uncertain until the defendant is released from incarceration. The statute provides that "[n]otice shall be provided to the Office of Parole Administration by an agency or political subdivision which has custody of an individual required to be supervised in the community . . . at least sixty days prior to the release of such individual from custody."[81] Then, "[i]ndividuals required to be supervised in the community . . . shall undergo a risk assessment and evaluation by the Office of Parole Administration to determine the conditions of community supervision to be imposed to best protect the public from the risk that the individual will reoffend."[82] Those conditions can, based on the risk assessment, be rather onerous, up to and including electronic monitoring.[83] But there is no *requirement* that the Office of Parole Supervision monitor the defendant at all. And that uncertainty, of whether the defendant will be affected at all by these provisions, counsels against weighing their constitutionality before their effects are known.

For those reasons, we agree with the State that Schreiner's constitutional challenges to § 83-174.03 are not ripe for consideration in this appeal. We note that because the issues are unripe, Schreiner was under no obligation to object on that basis in the district court, and has not waived his constitutional claims if and when they become ripe. But in this appeal, they are not before us, and we do not consider them.

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[79] See *Torres, supra* note 69 (Connolly, J., concurring; Gerrard and Stephan, JJ., join).

[80] See Neb. Rev. Stat. § 83-1,103.04 (Cum. Supp. 2006).

[81] See § 83-174.03(2).

[82] See § 83-174.03(3).

[83] See § 83-174.03(4).

8. Sufficiency of Evidence

(a) Assignment of Error

Finally, Schreiner assigns that the district court erred in finding the evidence sufficient to sustain his conviction for sexual assault.

(b) Standard of Review

[27] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.[84]

(c) Analysis

Schreiner's argument, simply stated, is that K.G.'s testimony was unreliable and unsupported by the physical evidence. He points to inconsistencies between K.G.'s testimony and testimony from the other witnesses. He contends that the physical evidence did not support his conviction, because his DNA was not found on all of the swabs taken from K.G., and he claims the evidence did not clearly establish that his sperm was on K.G.'s underwear because of sexual contact.

[28,29] But witness credibility is not to be reassessed on appellate review.[85] Instead, a witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.[86] The jury in this case was made aware of inconsistencies in the evidence, and it resolved those inconsistencies in favor of the State. The evidence is sufficient to support that conclusion.

Nor are we persuaded by Schreiner's questions about the physical evidence. It is fair to say that the defendant's sperm, found in the victim's underwear, is persuasive circumstantial

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[84] *Archie, supra* note 51.

[85] *Robinson, supra* note 50.

[86] *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007).

evidence of sexual contact. While Schreiner raised questions about the DNA evidence, there is sufficient evidence to support the jury's apparent conclusion that Schreiner's explanation for how his sperm got on K.G.'s underwear was less convincing than the State's.

In short, the evidence is more than sufficient to support Schreiner's sexual assault conviction. We find no merit to Schreiner's final assignment of error.

IV. CONCLUSION

We find no merit to Schreiner's evidentiary arguments and no abuse of discretion in the court's conduct of the trial proceedings. The evidence is certainly sufficient to support Schreiner's sexual assault conviction and the revocation of his probation. And finally, we do not address Schreiner's challenges to lifetime community supervision, because they are not ripe for adjudication. The judgments of the district court are affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.
HEAVICAN, C.J., not participating.

MIKE BORRENPOHL, DOING BUSINESS AS BORRENPOHL EXCAVATING, APPELLANT, AND STEVE BARTELS, DOING BUSINESS AS STEVE BARTELS CONSTRUCTION, APPELLEE AND CROSS-APPELLANT, V. DABEERS PROPERTIES, L.L.C., A LIMITED LIABILITY COMPANY, AND THE CARSON NATIONAL BANK OF AUBURN, APPELLEES, AND BANK OF BENNINGTON, APPELLEE AND CROSS-APPELLEE.

755 N.W.2d 39

Filed August 15, 2008. No. S-07-980.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Contracts: Mechanics' Liens: Notice: Time.** The prime purpose of the notice of commencement is to eliminate as a controvertible question of fact the time of visible commencement of operations by providing a method to determine this time with certainty.
5. **Mechanics' Liens: Intent.** Where real-property-related documents are delivered simultaneously without instructions, the relative priority of lien interests represented by the documents is resolved by considering the intentions of the parties.
6. **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.
7. ____: ____. 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.

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

Thomas L. Morrissey, of Morrissey, Morrissey & Dalluge, for appellant Mike Borrenpohl and appellee Steve Bartels.

Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Bank of Bennington.

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

MILLER-LERMAN, J.

NATURE OF CASE

This appeal involves a dispute over lien priorities. Mike Borrenpohl, doing business as Borrenpohl Excavating (Borrenpohl), and Steve Bartels, doing business as Bartels Construction (Bartels), filed suit in the district court for Pawnee County against DaBeers Properties, L.L.C. (DaBeers); The Carson National Bank of Auburn (Carson); and the Bank of Bennington (the Bank) to foreclose construction liens Borrenpohl and Bartels had against property owned by DaBeers (the property) and to establish the priority of those liens. Carson and the Bank each have deeds of trust on the property.

We conclude the district court did not err when it determined that the Bank's deed of trust should have priority over

the construction liens of Borrenpohl and Bartels and when it granted partial summary judgment in favor of the Bank. We find no merit to the appeal and cross-appeal, and we therefore affirm the order of the district court.

FACTS

On October 19, 2005, DaBeers and the Bank executed a loan agreement, pursuant to which the Bank loaned DaBeers $66,198 to make certain improvements on the property. At the time the parties entered into this loan agreement, DaBeers executed a deed of trust in favor of the Bank on the property. There is no dispute in the instant appeal that Carson already had a deed of trust in place on the property and that Carson's lien has priority over both the Bank's lien and the construction liens.

Also on October 19, 2005, DaBeers executed a notice of commencement in accordance with the Nebraska Construction Lien Act (NCLA), Neb. Rev. Stat. § 52-125 et seq. (Reissue 2004). The Bank's representative mailed both the deed of trust and the notice of commencement in a single envelope to the Pawnee County register of deeds' office. He did not provide filing instructions. On October 21, the register of deeds' office received and recorded the documents. The notice of commencement was stamped as recorded at 2:15 p.m., and the Bank's deed of trust was stamped as recorded at 2:20 p.m.

Borrenpohl and Bartels both made certain improvements to the property, and they subsequently filed construction liens against the property relative to those improvements. Bartels' lien was recorded on June 23, 2006, and Borrenpohl's lien was recorded on June 30. However, because § 52-137(2) provides that "[i]f a lien is recorded while a notice of commencement is effective . . . the lien attaches as of the time the notice is recorded . . . ," their construction liens attached on October 21, 2005. On October 6, Borrenpohl and Bartels initiated the instant action against DaBeers, Carson, and the Bank, seeking to foreclose their construction liens and establish the lien priorities.

On February 23, 2007, the Bank filed a motion for partial summary judgment, seeking a determination that its deed of trust was superior to the construction liens of Borrenpohl and Bartels. On March 26, the Bank's motion came on for hearing, and a

total of three affidavits were offered and received into evidence. Exhibit 1 was the affidavit of the Bank's vice president, in which he stated that "DaBeers . . . represented to the Bank that [the Bank's] Deed of Trust would be a second lien, subject only to the lien of Carson . . . . The Bank thus expected to receive a second lien on [DaBeers'] [p]roperty . . . ." Exhibit 2 was the affidavit of DaBeers' manager, who stated that when DaBeers granted the Bank a deed of trust, "DaBeers . . . intended that the Bank would take a lien position second only to the lien of Carson . . . and that the interest of any mechanics' lien claimants would be inferior to that of the Bank." DaBeers' affidavit further stated that "DaBeers . . . at all times intended that the Bank's Deed of Trust would be recorded before the notice of commencement and have priority over any mechanics' liens." Exhibit 3 was the affidavit of Candice Tuxhorn, the deputy county clerk ex officio deputy register of deeds for Pawnee County. In her affidavit, Tuxhorn described the procedures followed by the register of deeds' office when it receives documents for filing by mail and there is no transmittal letter giving filing instructions. Tuxhorn stated that "the office records said documents in the order that they are found in the transmittal correspondence, recording the top document first and all subsequent documents in sequence thereafter." Tuxhorn further stated that when the register of deeds' office received the envelope from the Bank containing the notice of commencement and the Bank's deed of trust, "pursuant to the procedures set forth [above], the Notice of Commencement was recorded . . . on October 21, 2005 at 2:15 p.m. and [the deed of trust] was recorded on October 21, 2005 at 2:20 p.m."

In an order filed March 30, 2007, the district court sustained the Bank's motion and declared that the Bank's deed of trust had priority over the construction liens of Borrenpohl and Bartels. The case proceeded to trial on issues as to other parties, and on September 12, the district court entered amended foreclosure decrees, in which it foreclosed the construction liens of Borrenpohl and Bartels. As part of these decrees and relevant to this appeal, the district court stated that in accordance with a stipulation between the parties, by virtue of its deed of trust, Carson had a first lien against the property. The district court also stated that in accordance with its earlier order sustaining

the Bank's motion for partial summary judgment, the Bank had a lien on the property that was superior to the construction liens of Borrenpohl and Bartels. Finally, the district court stated that Borrenpohl's and Bartels' liens had equal priority.

Due to the timing of filing the notices of appeal, see Neb. Ct. R. App. P. § 2-101(C), Borrenpohl appeals and Bartels cross-appeals. Borrenpohl and Bartels raise the same issue. Both Borrenpohl and Bartels challenge the district court's order that sustained the Bank's motion for partial summary judgment and declared that the Bank's deed of trust had priority over their construction liens. No issues are raised on appeal as to the court's determination that Carson had the first lien on the property or other rulings relative to the interests of DaBeers and Carson.

ASSIGNMENT OF ERROR

Both Borrenpohl on appeal and Bartels on cross-appeal claim, restated, that the district court erred in sustaining the Bank's motion for partial summary judgment and declaring the Bank's deed of trust superior to their construction liens.

STANDARDS 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. See *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (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.*

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

ANALYSIS

At issue in this appeal is the priority under the relevant statutes, our case law, and the facts to be accorded a deed of

trust and a notice of commencement received by the register of deeds in the same envelope and without instructions. We are asked to review the district court's determination that, on the record before it, the parties' intentions rather than the recording times determine priority of the liens. Upon review, we find no error.

As noted above, Bartels' and Borrenpohl's actual construction liens were recorded on June 23, 2006, and June 30, 2006, respectively. However, under § 52-137(2), which is found in the NCLA and derived from the Uniform Simplification of Land Transfers Act (USLTA), their liens attached when the notice of commencement was effectively recorded. Therefore, the filing of the notice of commencement controls the priority accorded these construction liens.

Borrenpohl and Bartels argue that the stamp showing the time of recording of the notice of commencement controls its priority relative to the Bank's deed of trust. Noting that the notice of commencement was recorded 5 minutes prior to the recording of the Bank's deed of trust, Borrenpohl and Bartels claim that their construction liens attached at the time the notice of commencement was recorded and that therefore, their liens were superior to that of the Bank.

In response, the Bank argues that under Nebraska law, in the circumstance when the notice of commencement and the deed of trust are delivered to the register of deeds in the same envelope without instructions, the liens are effectively filed simultaneously. The Bank further argues that under Nebraska law, priorities are resolved in a case of simultaneous filing by reference to the parties' intentions. The Bank refers to the record and notes that the representatives of DaBeers and the Bank each testified that DaBeers intended the Bank's deed of trust to have priority over the notice of commencement and that there was no evidence to the contrary. The Bank argues, therefore, that because intention controls, the Bank's deed of trust was superior to the construction liens, as the district court determined. We agree with the Bank.

As noted above, Borrenpohl's and Bartels' liens were filed pursuant to the NCLA. We have not previously considered the priority of liens as between a deed of trust and a construction

lien filed pursuant to the NCLA, and we therefore consider whether the provisions of the NCLA or other relevant statutes resolve the priority dispute raised in this appeal.

The NCLA became effective January 1, 1982, and was modeled after article 5 of the USLTA. Michael Cox & Michael McCue, Comment, *The Nebraska Construction Lien Act: Which Way to Lien?* 62 Neb. L. Rev. 86 (1983). Portions of article 5 of the USLTA and in particular the "notice of commencement" documents were in turn derived from Florida lien law. Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 Stetson L. Rev. 1 (1980). Although the NCLA contains provisions generally addressing lien priority, e.g., §§ 52-137 and 52-139, none of these priority-related provisions directly support Borrenpohl and Bartels' argument that the date and time stamp on the notice of commencement controls lien priority.

[4] The notice of commencement document at issue in this case was adopted and authorized by statute not to advance the priority of construction liens, but, rather, to avoid the problems associated with "hidden liens." See Cox & McCue, *supra* at 118. Under prior Nebraska law, construction lien priority was determined by the date the work on the property visibly commenced, and the lien attached to the property when the work commenced even though the actual lien was not recorded until a later date. Persons searching the public records for liens would therefore have no notice of a construction lien that had attached but was not yet recorded. See *id.* The notice of commencement provision was adopted to provide notice to persons searching the public records of a potential construction lien, "and, therefore, [it] alleviates the problem of hidden liens." *Id*. In addition, "[b]ecause the visible commencement of construction is often an ambiguous event," the recordation of a notice of commencement makes later-filing parties aware that construction liens may be claimed against the property as of a date certain and will take priority. Bruce, *supra* at 17-18. Thus, it has been said the "prime purpose" of the notice of commencement as part of updated construction lien laws "was to eliminate as a controvertible question of fact the time of visible commencement of operations by providing a method to

determine this time with certainty." Robert M. Ervin, *Revised Mechanics' Lien Law; The Whys and Wherefores*, 37 Fla. Bar J. 1094, 1097 (1963).

In their arguments on appeal, Borrenpohl and Bartels refer this court to a comment following the USLTA § 5-301, 14 U.L.A. 440 (2005), codified by Nebraska at § 52-145. This provision generally governs the recording of a notice of commencement, including such details as who can file a notice of commencement and the contents thereof. The comment states:

> In cases in which a construction lender . . . is taking an interest in real estate on which the owner is about to commence construction, the third party, if he is well advised, will insist that the transaction be structured so that the third party's interest is recorded and then a notice of commencement recorded.

USLTA § 5-301, comment, 14 U.L.A. at 441-42. The broad suggestion in this comment does not resolve the issue in this case of legally simultaneous filings and does not affirmatively establish that the date and time stamp controls the priority of liens. We do not find support within the text of the NCLA provisions for Borrenpohl and Bartels' argument that their construction liens are entitled to priority over the Bank's deed of trust on the basis that the notice of commencement bears a date and time stamp that is 5 minutes earlier than the time on the Bank's deed of trust.

Having reviewed the NCLA without finding definitive authority for resolution of the issue in this appeal, we next turn to the relevant Nebraska real estate statutes and our case law thereunder. As explained more fully below, we conclude that under Nebraska jurisprudence, the fact that the deed of trust and the notice of commencement arrived in the same envelope and were delivered to the register of deeds at the same time without instructions effectively resulted in the simultaneous recording of those documents, and the resolution of priority between simultaneously recorded documents is determined by reference to the intention of the parties. See, generally, *Judkins-Davies v. Skochdopole*, 122 Neb. 374, 240 N.W. 510 (1932). For completeness, we note that the parties have not directed us to authority that is contrary to the foregoing conclusion.

As a preliminary matter in our consideration of the statutes, we note that Neb. Rev. Stat. § 76-203 (Reissue 2003) defines the term "deed" as "embrac[ing] every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for less time." Under § 76-203, we consider both the deed of trust and the notice of commencement to be instruments covered by chapter 76 of the Nebraska Revised Statutes.

Neb. Rev. Stat. § 76-237 (Reissue 2003) provides that "[e]very deed, entitled by law to be recorded, shall be recorded in the order and as of the time when the same shall be delivered to the register of deeds for that purpose, and shall be considered recorded from the time of such delivery." Similarly, Neb. Rev. Stat. § 76-238(1) (Cum. Supp. 2006) provides that "[a]ll deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording . . . ." Thus, under chapter 76, the deed of trust and the notice of commencement that were "delivered" together were "recorded" together at the time of such delivery.

Deeds of trust are "recorded," Neb. Rev. Stat. § 76-1017 (Reissue 2003), as are notices of commencement, § 52-145(1)(c). See, also, § 52-127(13) (providing that under NCLA, "record" means "to present [a document] to the register of deeds for the county where the land is situated"). Taking this series of statutory sections just referred to together, and giving the statutory language its plain meaning, see *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008), both deeds of trust and notices of commencement are "recorded" at the time of delivery, and in the absence of instruction, under the statutes, it logically follows that if delivered together, they are considered as having been recorded simultaneously. The statutes as a whole negate the argument by Borrenpohl and Bartels that under the statutes, the time stamp controls recordation and hence priority.

The Bank argues that under our case law applying the relevant statutes, when documents are filed simultaneously, the relative priority of the competing interests is resolved by considering

the intent of the parties. In support of this argument, the Bank relies on this court's opinion in *Judkins-Davies v. Skochdopole*, 122 Neb. 374, 240 N.W. 510 (1932), in which we considered Comp. Stat. § 76-217 (1929), now codified as § 76-237, which provides that real property instruments are recorded from the time of delivery. In *Judkins-Davies*, a bank cashier sent two mortgages, one securing a $5,000 note and the second securing a $2,400 note, in the same envelope to the register of deeds to be recorded. The mortgages related to the same piece of property, but each was in favor of a different lender. The cashier did not include filing instructions in the envelope. The register of deeds recorded the $2,400 mortgage first, and the $5,000 mortgage immediately thereafter. A dispute arose concerning the priority of the respective liens.

[5] In *Judkins-Davies, supra*, the defendant claimed that it was the intention of the parties that the $5,000 mortgage would have priority. The trial court agreed with the defendant, and this court affirmed, stating "[t]he mere fact that the $2,400 mortgage was indexed and recorded just ahead of the $5,000 mortgage does not, of itself, give it priority." *Id.* at 376, 240 N.W. at 511. We noted that under the state statutes generally, mortgages were considered recorded from the time of delivery to the register of deeds' office. We further stated, however, that the appeal appeared to involve "a disputed question of fact, to be determined from the evidence, [as to] which of the two mortgages is prior," *id.* at 377, 240 N.W. at 512, and we affirmed the trial court's decision finding the $5,000 mortgage superior, based upon evidence of the intention of the parties. See, also, *Reitz v. Petersen*, 131 Neb. 706, 711, 269 N.W. 811, 814 (1936) (stating that "the mere fact that a mortgage was first received for record by the register of deeds . . . does not prevent a mortgage received for record later being awarded priority when shown by competent evidence to have been intended by all parties in interest to be prior"). Extending the reasoning of *Judkins-Davies*, we agree with the Bank's argument that based on our statutes and case law, in this case, where documents were delivered simultaneously without instructions, the relative priority of the interests represented by the documents is resolved by considering the intentions of the parties.

In the instant case, in support of its motion for partial summary judgment, the Bank presented the affidavits of representatives from the Bank and DaBeers, each of whom stated that it was the intention of both the Bank and DaBeers that the Bank's lien would be second only to that of Carson's deed of trust, and therefore the Bank's deed of trust was superior to the notice of commencement and construction liens subsequently filed against the property. The record reflects that neither Borrenpohl nor Bartels presented evidence regarding the parties' intentions concerning lien priorities, and there is no evidence that contradicts the evidence of the Bank. The fact that the actual recordation reflecting the intentions of the Bank and DaBeers "was not efficiently done" does not defeat their agreed-upon priority. See *Reitz, supra*, 131 Neb. at 713, 269 N.W. at 814.

[6,7] 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. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). 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. *Id.* The Bank, as the moving party, offered evidence in support of its argument that the parties intended that the Bank's lien would be superior to the notice of commencement and construction liens subsequently filed against the property. The burden then shifted to Borrenpohl and Bartels to produce contradictory evidence, and no such evidence was produced. The evidence submitted supports the ruling of the district court that the parties intended that the Bank's deed of trust have priority over the notice of commencement and, as a consequence, priority over the construction liens at issue here. Accordingly, the district court did not err in entering partial summary judgment in favor of the Bank, and the appeal by Borrenpohl and cross-appeal by Bartels are without merit.

CONCLUSION

In this appeal following proceedings on a motion for partial summary judgment, the district court did not err in entering partial summary judgment in favor of the Bank and in determining

that the Bank's deed of trust had priority over the notice of commencement and therefore over the construction liens of Borrenpohl and Bartels. Finding no merit to the appeal and cross-appeal, we affirm the decision of the district court.

AFFIRMED.

JAMIE GAVIN, APPELLANT, V. ROGERS TECHNICAL SERVICES, INC., APPELLEE.

755 N.W.2d 47

Filed August 22, 2008. No. S-07-465.

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. **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.
3. **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.
4. **Employer and Employee: Discrimination.** To constitute a hostile work environment, harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.
5. ____: ____. Courts examine the totality of the circumstances to determine whether there is a hostile work environment, considering the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior unreasonably interfered with the employee's work performance.
6. **Employer and Employee: Discrimination: Proof.** To make a prima facie case for a hostile work environment based on sexual harassment, the plaintiff must show that (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the sexual harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.
7. **Employer and Employee: Discrimination: Words and Phrases.** Conduct is considered "unwelcome" when the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive.
8. **Employer and Employee: Discrimination.** For sexual harassment to be actionable, the work environment must be both objectively and subjectively offensive—one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.

9. ____: ____. Whether workplace harassment is severe, pervasive, and objectively offensive is a question of fact.
10. **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.
11. **Employer and Employee: Discrimination: Words and Phrases.** Constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit.
12. **Employer and Employee: Discrimination: Proof.** To prove constructive discharge, a plaintiff must demonstrate that (1) a reasonable person in her situation would find the working conditions intolerable and (2) the employer intended to force the employee to quit.
13. **Employer and Employee: Discrimination.** In a constructive discharge cause of action, the element of intending to force the employee to quit is satisfied if the employer could have reasonably foreseen that the employee would quit as a result of its actions.
14. ____: ____. An employee who quits without giving her employer a reasonable chance to work out a problem has not been constructively discharged.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded for further proceedings.

Kathleen M. Neary, of Vincent M. Powers & Associates, for appellant.

Sean J. Brennan, of Brennan & Nielsen Law Offices, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case presents an appeal from a summary judgment entered against appellant, Jamie Gavin, in a suit involving alleged sexual harassment by Gavin's supervisor. Gavin alleged that the harassment resulted in a hostile work environment and her constructive discharge. In granting the employer's motion for summary judgment, the district court determined that Gavin failed to make a prima facie case that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. We reverse the judgment of the district court, because

we find genuine issues of material fact as to both the hostile work environment and constructive discharge claims.

BACKGROUND

In April 2005, Gavin was hired by Rogers Technical Services, Inc. (RTSI), as a business manager and assistant to William Keith Rogers, president of RTSI. Gavin was scheduled to begin work at 7 a.m. on Monday, Wednesday, and Friday and at 8 a.m. on Saturday. Typically, Gavin would report to work at Rogers' apartment. Gavin was expected to let herself into the apartment with a key Rogers gave to her and go to an office located in a second bedroom. She typically worked in the apartment office for a short time before she and Rogers went out to breakfast. They would then travel to RTSI's manufacturing facilities in Friend, Nebraska, where they would work most of the rest of the day.

Rogers and Gavin always traveled to the Friend facilities together, and Rogers always paid for the breakfasts, which Gavin called a "welcomed benefit." Rogers told Gavin that he wanted her to travel with him between Lincoln, Nebraska, and Friend because "he gets tired." Additionally, Rogers has diabetes and he trained Gavin how to provide him with an insulin injection if he became incapacitated. At the end of the day, after returning from Friend, Gavin and Rogers would sometimes continue to work at Rogers' apartment. Gavin would usually go home "[b]etween six and eight."

Two or three days after Gavin began working for RTSI, she began feeling uncomfortable around Rogers. Gavin testified in her deposition that Rogers began "making inappropriate sexual comments" and "telling inappropriate sexual stories on a daily basis." Gavin further explained that their conversations "[a]lways had a sexual overtone, if they weren't outright about sex." On "several occasions [Rogers] would make the comment that nobody is hornier than he is." Rogers would also "always bring up . . . this hot blond . . . [f]rom his past."

On one occasion, Rogers told Gavin about a pool party where the wife of Rogers' former employer "had gotten this one hot blond to take him into the bathroom" to have oral sex. When Rogers started to describe the details of this encounter, Gavin

"stopped the conversation" and told Rogers she was not comfortable hearing the story about the pool party. She told Rogers, "'Maybe I'm the only person left in this world with morals, but I think [it's] not right'" to talk that way.

Gavin testified further, "[Rogers] kept asking me questions about myself. At first I would just blow them off and then he kept asking me and prying into my personal life . . . . [H]e always had to be near me." According to Gavin, Rogers once told her about swelling in his testicles after deep sea diving. Rogers then explained to Gavin that the two of them "needed to be able to talk about personal things like this." When Rogers repeated that they needed to "be more open with each other," Gavin "kind of felt the need to share." So she told Rogers, "I don't really have anything wrong with me except I have a fibroid tumor." Gavin thinks she may have specified that the tumor was on her uterus.

On another occasion, Rogers asked Gavin about her boyfriend and how he treated her. After Gavin explained to Rogers that her boyfriend had been unfaithful, Rogers commented, "Well, you're a hot girl, and if you were my girl, I'd treat you much better than him." At one point, Gavin told Rogers that she did not "like to hear about sexual things" and that she "didn't like being hit on and . . . didn't like being called a hot girl." In response to this comment, "[Rogers] got really upset and he said there was something wrong with me because . . . I didn't like being hit on and I didn't like being called a hot girl." Gavin also testified that on two occasions, she "told [Rogers] to stop the conversation, that it was disgusting," and that she did not "like talking about sex."

Gavin testified that she felt especially uncomfortable because RTSI's office was in Rogers' apartment. Gavin had suggested to Rogers that it would be more efficient to move the apartment office to empty space at the facility in Friend, but Rogers did not seem amenable to the idea. On the last Saturday Gavin worked for RTSI, she went to Rogers' apartment as usual at 8 a.m., knocked at the door, and unlocked the door with the key Rogers had given to her. When Gavin walked down the hallway toward the office, she saw Rogers sitting at his computer viewing "a scantily clad blond woman in neon." Gavin could only

see that Rogers was wearing a T-shirt and socks. She could not tell for certain if Rogers was wearing any underwear or shorts, but he did not appear to be. Gavin stood there for a moment and then turned around and went home. Rogers never acknowledged Gavin's presence, and Rogers and Gavin did not discuss the incident.

On Monday, Gavin returned to work. Gavin explained that she was nervous and upset about the incident on Saturday and that she thought Rogers would want to have a conversation about the incident. Gavin arrived at Rogers' apartment at 7:15 a.m. Gavin "knocked loudly" twice at the door, used the key to open the door, and called out "Hey" after opening the door. As she walked toward the office, Gavin saw Rogers sleeping in a chair in the living room wearing what looked like only a pair of boxer shorts. The television was blaring loudly, and Rogers did not respond to Gavin's greeting. Gavin felt uncomfortable and left. Gavin never returned to work or communicated with Rogers again.

On cross-examination, Gavin admitted that Rogers never asked her to have sex with him, never asked to view any intimate part of her body, never asked her to let him touch her inappropriately, never specifically discussed her breasts or any other body parts, and never touched her inappropriately. Gavin admitted she told Rogers on only two occasions, during the 3 weeks she worked for him, that she did not want to talk about sexual subjects. During the second week that Gavin worked at RTSI, Gavin also told a RTSI manager that Rogers "tells a lot of stories and [that] it kind of made [her] uncomfortable." However, she "didn't specify and [the RTSI manager] didn't ask" her to elaborate about the topic of those "stories." Gavin did not make any other complaints to anyone else in the company.

On the basis of these facts, Gavin brought suit against RTSI, alleging sexual harassment and constructive discharge in violation of title VII of the Civil Rights Act of 1964 (Title VII).[1] RTSI moved for summary judgment. The district court determined that Gavin had not pled a prima facie case for hostile work environment or constructive discharge. The court observed that Rogers'

[1] 42 U.S.C. § 2000(e) et seq. (2000 & Supp. V 2005).

behavior was "chauvinistic, unprofessional, and immature," but that such conduct was not directed at Gavin and was not sufficient to support a hostile work environment claim. The court also noted that there was no evidence that Rogers intended to force Gavin to quit or that he should reasonably have foreseen that she would quit as a consequence of his conduct.

ASSIGNMENTS OF ERROR

Gavin assigns, consolidated and restated, that the district court erred in sustaining RTSI's motion for summary judgment because (1) genuine issues of material fact were in dispute and (2) RTSI was not entitled to judgment as a matter of law.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[3]

ANALYSIS

[3] On appeal, Gavin argues that the district court erred in granting summary judgment to RTSI because there are genuine issues of material fact regarding her claims of hostile work environment and constructive discharge. 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.[4] We turn first to the hostile work environment claim.

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[2] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[3] *Coffey v. County of Otoe*, 274 Neb. 796, 743 N.W.2d 632 (2008).

[4] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

Hostile Work Environment

Title VII prohibits employers from discriminating against an employee based on the employee's sex.[5] Sexual harassment is a form of sex discrimination prohibited by Title VII.[6] Two theories of sexual harassment have been recognized by the courts: "quid pro quo" and "hostile work environment" harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands are generally referred to as "quid pro quo" cases.[7] These are distinguished from cases based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment."[8] Here, we consider only hostile work environment sexual harassment.

[4-6] To constitute a hostile work environment, harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[9] Courts examine the totality of the circumstances to determine whether there is a hostile work environment, considering the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior unreasonably interfered with the employee's work performance.[10] To make a prima facie case for a hostile work environment based on sexual harassment, the plaintiff must show that (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the sexual harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and

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[5] 42 U.S.C. § 2000e-2(a)(1).

[6] See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

[7] *Id.*

[8] *Id.* at 751.

[9] *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004); *Brenneman v. Famous Dave's of America, Inc.*, 507 F.3d 1139 (8th Cir. 2007); *Gordon v. Shafer Contracting Co., Inc.*, 469 F.3d 1191 (8th Cir. 2006).

[10] *Brenneman v. Famous Dave's of America, Inc., supra* note 9; *Nitsche v. CEO of Osage Valley Elec. Co-op.*, 446 F.3d 841 (8th Cir. 2006); *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021 (8th Cir. 2004).

(5) the employer knew or should have known of the harassment and failed to take proper remedial action.[11]

[7] The record, taken in the light most favorable to Gavin, indicates that she established the five elements of a prima facie case of hostile work environment. First, as a female, Gavin belongs to a protected group.[12] Second, there is evidence that Gavin was subjected to unwelcome sexual harassment. Conduct is considered "unwelcome" when the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive.[13] In this case, Gavin described numerous sexually explicit comments Rogers made to Gavin during her employment at RTSI which she considered offensive. RTSI does not argue that Gavin, in any way, solicited or invited these remarks. In fact, Gavin testified that she had told Rogers that she did not "like to hear about sexual things," "didn't like being hit on," and "didn't like being called a hot girl." Finally, on one of her last days at work, Gavin was presented with the disturbing and uninvited scene of Rogers, apparently without pants, viewing a "scantily clad blond woman" on his office computer.

The record also discloses sufficient evidence of the third element, that the sexual harassment was based on Gavin's sex. While alleged sexual harassment need not be explicitly sexual in nature,[14] the record is replete with plainly sexual behavior directed at Gavin, including Rogers' comments to Gavin about oral sex, the swelling of his genitals, and Gavin's physical appearance, as well as his aforementioned viewing of a "scantily clad blond woman" on an office computer during normal working hours. Rogers' conduct carries with it clear sexual overtones and permits an inference of gender-based harassment. A trier of fact could reasonably find that the harassment, because of its sexual nature, was based on Gavin's sex.

[8,9] The fourth element of Gavin's prima facie claim of hostile work environment sexual harassment requires that the

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[11] See, e.g., *Stuart v. General Motors Corp.*, 217 F.3d 621 (8th Cir. 2000).

[12] See *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988).

[13] See, e.g., *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986).

[14] *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997).

harassment affected a term, condition, or privilege of her employment. For sexual harassment to be actionable, it must be sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment.[15] Isolated or trivial incidents generally will not be sufficient.[16] Considering the totality of the circumstances, the work environment must be both objectively and subjectively offensive—one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.[17] Whether workplace harassment is severe, pervasive, and objectively offensive is a question of fact.[18]

The record here discloses that Gavin was subjected to acts of sexual harassment over her 3-week tenure at RTSI. Gavin found these incidents upsetting and testified that she was offended by Rogers' inappropriate and sexually explicit comments. There was sufficient evidence of improper conduct to present to the trier of fact the question of whether the alleged harassment affected a term, condition, or privilege of employment.

The final element of a prima facie case for hostile work environment is that the employer knew or should have known of the harassment and failed to take proper remedial action. In this case, there is no dispute that Rogers was Gavin's supervisor as well as the "the corporate officer and/or majority shareholder and/or president" of RTSI at the time the alleged conduct occurred. Therefore, what Rogers knew or should have known is attributable to RTSI. When harassment is committed by an employer-owner, there is no difficulty with finding liability under Title VII, because the person perpetrating the harassment

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[15] See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

[16] See *Moylan v. Maries County, supra* note 13.

[17] *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349 (8th Cir. 1997).

[18] *Chancellor v. Pottsgrove School Dist.*, 529 F. Supp. 2d 571 (E.D. Pa. 2008). See, also, *O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093 (10th Cir. 1999) (noting that severity and persuasiveness evaluation is particularly unsuited for summary judgment because it is quintessentially question of fact).

is the employer.[19] As already discussed, twice Gavin told Rogers that she considered the topics of Rogers' conversation and his comments about her to be unwelcome and sexually offensive. Therefore, Gavin has made a prima facie case that RTSI knew or should have known of the harassment and failed to take remedial action.

[10] Having considered the five elements of a prima facie case for a hostile work environment sexual harassment claim, we conclude that Gavin produced sufficient evidence to present her claim to the trier of fact. We determine, therefore, that the district court erred in granting RTSI's motion for summary judgment as to the hostile work environment claim. We turn now to whether the court was correct in granting summary judgment on Gavin's claim of constructive discharge. 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]

Constructive Discharge

[11-14] Constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit.[21] To prove constructive discharge, a plaintiff must demonstrate that (1) a reasonable person in her situation would find the working conditions intolerable and (2) the employer intended to force the employee to quit.[22] The element of intending to force the employee to quit is satisfied if the employer could have reasonably foreseen that the employee would quit as a result of its actions.[23] However, a reasonable employee has an obligation not to assume the worst and

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[19] *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993); 1 Mark A. Rothstein et al., Employment Law § 2.14 (3d ed. 1994).

[20] *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

[21] *Brenneman v. Famous Dave's of America, Inc., supra* note 9.

[22] *Id.*; *Tatum v. Arkansas Dept. of Health*, 411 F.3d 955 (8th Cir. 2005).

[23] *Brenneman v. Famous Dave's of America, Inc., supra* note 9; *Wright v. Rolette County*, 417 F.3d 879 (8th Cir. 2005).

not to jump to conclusions too quickly.[24] And an employee who quits without giving her employer a reasonable chance to work out a problem has not been constructively discharged.[25]

In this case, we determine that the evidence presents a genuine issue of material fact concerning Gavin's constructive discharge claim. First, there is evidence that a reasonable person could find the working conditions at RTSI intolerable. As described above, the record indicates that Gavin was subjected to numerous offensive remarks of a sexual nature, as well as offensive behavior.

As to the second element of constructive discharge, although there is no clear evidence that RTSI or Rogers intended to force Gavin to quit, there is evidence that RTSI could have reasonably foreseen Gavin would quit as a result of the harassing conduct. For example, during the second week of her employment, Gavin told a RTSI manager that Rogers made her feel uncomfortable. Gavin also attempted to convey to Rogers, on at least two separate occasions, her discomfort with Rogers' conduct. Gavin's hasty departure after she saw Rogers, partially unclothed, looking at a "scantily clad blond woman" on his work computer could also be seen as notice to her employer that she might quit her job to avoid the environment to which she was being subjected.

Consequently, we conclude that there are genuine issues of material fact as to Gavin's constructive discharge claim. Based on the evidence, a trier of fact could find that Gavin was constructively discharged from RTSI. We determine, therefore, that the district court erred in granting RTSI's motion for summary judgment as to the constructive discharge claim.

CONCLUSION

For the foregoing reasons, we reverse the district court's entry of summary judgment in favor of RTSI and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[24] *Brenneman v. Famous Dave's of America, Inc., supra* note 9.

[25] *Id.*; *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002).

STATE OF NEBRASKA, APPELLEE, V. ION DRAGANESCU, APPELLANT.

755 N.W.2d 57

Filed August 22, 2008. No. S-07-797.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.
2. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Search and Seizure.** Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.
3. **Constitutional Law: Motor Vehicles.** An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
5. **Constitutional Law: Probable Cause: Intent.** Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.
6. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.
7. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** To detain a motorist for further investigation past the time reasonably necessary to conduct a routine investigation incident to a traffic stop, an officer must have a reasonable, articulable suspicion that the motorist is involved in criminal activity unrelated to the traffic violation.
8. ____: ____: ____: ____. Reasonable suspicion for further detention must exist after the point that an officer issues a citation.
9. **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.
10. ____: ____: ____. Courts must determine whether reasonable suspicion exists on a case-by-case basis.
11. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention. It is something more than an inchoate and unparticularized hunch—but less than the level of suspicion required for probable cause.
12. **Probable Cause.** Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.

13. **Search and Seizure: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Generally, the factors supporting an officer's reasonable suspicion of illegal drug activity when coupled with a well-trained dog's positive indication of drugs in a vehicle will give the officer probable cause to search the vehicle.
14. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
15. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
16. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
17. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
18. ____: ____. Relevancy requires only that the degree of probativeness be something more than nothing.
19. **Criminal Law: Evidence.** Evidence of a defendant's consciousness of guilt is relevant as a circumstance supporting an inference that the defendant is guilty of the crime charged.
20. ____: ____. When the evidence is sufficient to justify an inference that the defendant acted with consciousness of guilt, the fact finder can consider such evidence even if the conduct could be explained in another way.
21. ____: ____. Unlike general denials of guilt, a defendant's exculpatory statements of fact that are proved to be false at trial are probative of the defendant's consciousness of guilt.
22. **Rules of Evidence: Hearsay.** Hearsay is not admissible except as provided by the Nebraska Evidence Rules.
23. ____: ____. A trial judge does not have discretion to admit inadmissible hearsay statements.
24. **Rules of Evidence: Hearsay: Appeal and Error.** Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.
25. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
26. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
27. **Rules of Evidence: Hearsay: Words and Phrases.** A written assertion offered to prove the truth of the matter asserted is a hearsay statement under Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 1995), unless it falls within an exception or exclusion under the hearsay rules.

28. **Rules of Evidence: Hearsay.** Computerized printouts that are merely the visual counterparts to routine electronic business records are usually hearsay, but they can be admissible under the business records exception.
29. **Rules of Evidence: Hearsay: Pretrial Procedure: Notice.** An adverse party's knowledge of a statement is not enough to satisfy the notice requirement of Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995). The proponent of the evidence must provide notice before trial to the adverse party of his or her intentions to use the statement to take advantage of the residual hearsay exception.
30. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.
31. **Rules of Evidence: Appeal and Error.** An appellate court can consider whether the record clearly shows an exhibit was admissible for the truth of the matter asserted under a different rule from the one applied by the trial court when both parties had a fair opportunity to develop the record on the underlying facts.
32. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts may look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
33. **Evidence.** A party's possession of a written statement can be an adoption of what its contents reveal under circumstances that tie the party to the document in a meaningful way.
34. **Trial: Evidence.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.
35. ____: ____. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.
36. **Trial: Evidence: Appeal and Error.** An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
37. **Rules of Evidence.** Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 1995), does not impose a high hurdle for authentication or identification.
38. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.
39. ____: ____. If a proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1995).
40. ____: ____. A proponent may authenticate a document under Neb. Evid. R. 901(2)(a), Neb. Rev. Stat. § 27-901(2)(a) (Reissue 1995), by the testimony of someone with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents.
41. ____: ____. Under Neb. Evid. R. 901(2)(d), Neb. Rev. Stat. § 27-901(2)(d) (Reissue 1995), a proponent may authenticate a document by circumstantial evidence, or its appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

42. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
43. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
44. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
45. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
46. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
47. **Controlled Substances: Intent: Evidence: Expert Witnesses: Juries.** Evidence of the quantity of a controlled substance possessed combined with expert testimony that such quantity indicates an intent to deliver can be sufficient for a jury to infer an intent to deliver.
48. **Lesser-Included Offenses: Jury Instructions: Evidence.** When the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, the defendant must offer some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
49. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
50. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
51. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
52. **Criminal Law: Motor Vehicles: Evidence.** A passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession.
53. **Controlled Substances: Motor Vehicles: Evidence.** Possession of an illegal substance can be inferred from a vehicle passenger's proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.
54. ____: ____: ____. A passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic

stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.

55. **Controlled Substances: Motor Vehicles: Evidence: Juries.** A juror may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite someone into his or her vehicle who had no knowledge of the driver's drug activities.
56. **Controlled Substances: Intent: Circumstantial Evidence.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance.
57. ____: ____: ____. Circumstantial evidence to establish possession of a controlled substance with intent to distribute or deliver may consist of several factors: the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
58. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
59. **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 violence involved in the commission of the crime.

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

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

CONNOLLY, J.

I. SUMMARY

A jury convicted Ion Draganescu of possession of a controlled substance with intent to deliver, a Class III felony. Although this appeal presents numerous issues, we believe there are three primary issues. First, did the Nebraska State Patrol have probable cause to initially stop the vehicle in which Draganescu was a passenger? Second, did the State Patrol have probable cause to search the vehicle? Third, was an airline ticket stub, which

the State Patrol took from Draganescu's pocket after his arrest, admissible under the residual hearsay exception?

We spell out our holding with some specificity in the following pages, but briefly stated, it is this: We hold that the State Patrol did have probable cause to stop the vehicle. We further hold that the State Patrol had probable cause to search the van following a canine sniff. Finally, although the district court erred in admitting the airline ticket stub under the residual hearsay exception, we hold that this evidence was admissible as an adopted statement. We affirm.

II. BACKGROUND

On March 27, 2006, Nebraska State Trooper Chris Bigsby stopped a van on Interstate 80, just east of Lincoln. He stopped the van because the driver was following a semi-truck too closely. The driver was Herbert Truesdale; Draganescu was the passenger. While conducting an investigation incident to the stop, Bigsby became suspicious of drug activity and requested a canine unit. Following the canine sniff, troopers searched the van and found 275 pounds of marijuana. The State charged Draganescu with possession of a controlled substance with intent to deliver.

Draganescu moved to suppress any evidence obtained from the stop and search of his person and the van. He alleged that state troopers searched the van without probable cause or reasonable suspicion. The district court held two suppression hearings. The first focused on whether Bigsby had probable cause to stop the van; whether Bigsby had reasonable suspicion to order a canine sniff; and whether the length of the detentions was unreasonable. The second suppression hearing concerned the reliability of Duke, the drug dog. Draganescu argued that because Duke was unreliable, the State lacked probable cause to search the van.

1. First Suppression Hearing

(a) Initial Stop of the Van

At the hearing, the State submitted a videotape from Bigsby's patrol car camera that shows the timeline of events. Bigsby testified that while in a marked patrol car monitoring traffic on

Interstate 80 in Lincoln, he noticed the eastbound van in which Draganescu was a passenger. He thought he saw Nevada plates on the van. He testified that the van caught his eye because it "[a]ppeared to be possibly a rental and it was from Nevada. And I've had some success as far as Nevada plated vehicles and contraband and rental vehicles." He pulled onto the interstate to observe the van and another vehicle.

Bigsby initially passed the van when he saw that the plates were from Washington instead of Nevada. But as he was passing the semi-truck in front of the van, he saw the van moving closer to the truck. From his rearview mirror, he saw the van was following the truck about one car length behind it and decided to stop the van. At 9:33 a.m., Bigsby stopped the van and asked for a vehicle registration and licenses from Truesdale and Draganescu. He intended to issue a warning ticket and asked Truesdale to sit in the patrol car while he issued the ticket.

(b) Detainment Before Issuing Warning Ticket

Bigsby testified that as he approached the van, he observed fast-food wrappers, trash, and pillows in the van. He described the van as having a "lived-in" look. He stated that while he was in the patrol car, the dispatcher informed him that the computer that runs background checks was down. He asked Truesdale about his travels and his criminal and driving history. Truesdale stated that he had one previous arrest for driving under the influence and another arrest because someone had possessed a gun while in his vehicle. He said that he had flown to Seattle, Washington, around March 2, 2006, and that Draganescu had flown to California. He said that after he rented the van in Washington, he went to Los Angeles, California, for a few days and then met up with Draganescu in Las Vegas, Nevada. He stated that Draganescu had flown to Las Vegas and that they stayed in Las Vegas for a couple of days in a hotel and then left on the previous Thursday or Friday. Truesdale gave Bigsby the rental agreement for the van, which showed that Truesdale was overdue to return the van.

Bigsby went to the van to get its vehicle identification number and return Draganescu's identification. He asked Draganescu about his travels. Draganescu said that he worked for a transport

company in Detroit, Michigan, and had driven a truck to Seattle for them, where he met Truesdale. He said that he and Truesdale had left Seattle a couple of days ago and were driving straight back to Michigan on Interstate 80, without mentioning Las Vegas. He stated that they had been sleeping in the van at truck-stops on their way back. While Bigsby was returning to the patrol car, he called for a canine unit.

At 9:58 a.m., the dispatcher reported that there were no outstanding warrants and that Truesdale's license was valid. The dispatcher also reported that Draganescu had a drug-related criminal history. Bigsby finished writing the warning ticket at 10:01 a.m.

(c) Detainment After Issuing Warning Ticket

After Bigsby issued the warning ticket, Truesdale started to exit the patrol car. But Bigsby asked him if he could answer a few more questions, and Truesdale agreed. Bigsby testified that he asked Truesdale whether he would allow Bigsby to search the van and whether he would mind waiting for a dog to "come out and run around" the van. Truesdale refused consent. Bigsby then told him that he was being detained. After other troopers arrived, state troopers placed Draganescu in a different patrol car to wait while they conducted a canine sniff.

At 10:16 a.m., the canine unit arrived. At 10:25 a.m., Nebraska State Trooper Jeremy Dugger did a prestimulation ritual with Duke. Dugger then took Duke around the vehicle three times. After this deployment, Dugger took Duke away from the van briefly. At 10:30 a.m., Dugger deployed Duke again. After taking Duke around the van two more times, Duke gave a final indication of drugs. At 10:32 a.m., Bigsby opened the van's hatch and discovered the drugs.

(d) District Court's Ruling

The district court found that there was probable cause to stop the van. It also found a sufficient factual basis to create a reasonable suspicion that Truesdale and Draganescu were involved in a crime that was occurring or about to occur. It further concluded that the detention for the traffic stop and the canine sniff was reasonable in length. The court overruled the motion to suppress.

2. Second Suppression Hearing Regarding Duke's Reliability

The second suppression hearing concerned Dugger's handling of Duke during the canine sniff. Draganescu argued that Dugger's mishandling of Duke made Duke's indication of drugs unreliable. Thus, he argued probable cause was lacking to conduct a search. Regarding his qualifications, Dugger testified that he had completed 8 weeks of canine training. He also stated that Duke was one of the Patrol's "most reliable and accurate dogs" and had received very high certification scores in 2005 and 2006.

(a) Duke's First Deployment

Dugger explained that he did a prestimulation ritual because Duke was distracted. The ritual involved Dugger's showing Duke a sterile ball, acting suspiciously with the ball alongside the van, and then putting the ball in his pants pocket when Duke was not watching. Without the ball, Dugger then took Duke around the van by his leash as he moved his other hand up and down the van in the places that he wanted Duke to sniff. They went around the van three times in this manner. Dugger stated that even though Duke seemed distracted, he had almost immediately alerted to the rear of the van. He described an "alert" as a change in the dog's body behavior that means the dog has noticed the odor of drugs. In contrast, an "indication" of drugs is the dog's prescribed behavior of barking, whining, or scratching, or a combination of these behaviors, to indicate the strongest source of the odor.

(b) Duke Tries Again

After these three rounds, Dugger told Bigsby that although Duke had alerted, the dog was distracted because of the rain and was not sniffing properly. Dugger took Duke away briefly and had another officer perform a prestimulation ritual with a different sterile toy. At 10:30 a.m., Dugger took Duke around the van two more times. He testified that Duke was sharper during this deployment because he was sniffing nasally with his mouth closed. At the end of the second round, Duke jumped up onto the rear bumper. Dugger testified that Duke scratched at the van, giving a final indication of drugs.

(c) Defense Expert Opines That Duke's Indication of Drugs Was "Possibly" Contaminated

The court also received, over the State's objections, an expert report from a retired Florida police officer, Bobby G. Mutter. Mutter had expertise with drug dogs. In his report, he stated that he had reviewed Dugger's deposition, Duke's training and service records, logs of Duke's history, and two videotape recordings of the stop and search. He concluded that Duke was a well-trained narcotics dog and had alerted to the rear of the van. But he believed that Dugger "could very possibly have contaminated this search by showing the canine an object prior to the search and going to the vehicle with the object[,] thus, making the dog think there was already drugs in the vehicle."

The district court found that "[t]he evidence is uncontested that [Dugger] did not take an object to the vehicle." It therefore overruled Draganescu's motion to suppress "due to the handling of the drug sniffing dog."

3. Draganescu's Trial

During Draganescu's search incident to his arrest, troopers found an airline ticket stub in his pocket. The ticket stub, exhibit 20, was from U.S. Airways. It showed that Draganescu had a seat on a March 23, 2006, flight from Los Angeles to Las Vegas. The court overruled Draganescu's foundation, relevance, and hearsay objections to exhibit 20. Bigsby testified that 275 pounds of marijuana were found in the van. He further testified that the marijuana was worth $275,000 (or $1,000 a pound). He stated that this amount was consistent with distribution, not personal use. According to Bigsby, the State Patrol found no fingerprints or DNA evidence linking Draganescu to the drugs. Bigsby also stated that he did not smell marijuana in the van before or after the arrest.

After the State rested, Draganescu moved to dismiss. The court overruled the motion. At the jury instruction conference, the court also refused Draganescu's proposed jury instruction No. 3. This instruction set out a lesser-included offense of possession of more than 1 pound of marijuana. The jury returned a guilty verdict. The district court sentenced Draganescu to imprisonment for 5 to 11 years, with credit for time served. The

court acknowledged that Draganescu's sentence was longer than Truesdale's sentence. But the court stated that it had reached its determination because of Draganescu's criminal history.

III. ASSIGNMENTS OF ERROR

Draganescu assigns, restated, that the district court erred in (1) overruling Draganescu's motion to suppress evidence that state troopers seized while searching the van and admitting this evidence at trial over his objections; (2) admitting exhibit 20, an airline ticket stub, over Draganescu's objections regarding relevancy, hearsay, and foundation; (3) failing to instruct the jury on the lesser-included offense of possession of marijuana; (4) finding there was sufficient evidence to support a conviction; and (5) imposing an excessive sentence.

IV. ANALYSIS

1. Motions to Suppress

Draganescu argues that neither probable cause nor reasonable suspicion supported the following three searches or seizures: (1) the initial stop of the van; (2) his continued detention after the initial stop; and (3) the search of the van.

(a) Standard of Review

[1] In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous.[1] But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.[2]

(b) Probable Cause to Stop the Van

Draganescu concedes that we have held traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle.[3] But he contends that the standard for determining that a driver is following a vehicle too closely is subjective. He

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[1] See *State v. Royer, ante* p. 173, 753 N.W.2d 333 (2008).

[2] See *id.*

[3] See, e.g., *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

also contends that the State failed to prove Truesdale violated the governing statute. He argues that because the standard is subjective, law enforcement officers could always rely on it to stop drivers for inarticulate hunches. He further argues that Bigsby admitted at trial that the real reason for the stop was his hunch that the passengers were involved in transporting contraband. He asks us to hold that under these circumstances, an officer's stop of a vehicle for this offense violates an individual's Fourth Amendment right to be free from unreasonable searches and seizures.

[2-4] The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision."[4] Further, "'[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.'"[5] But in determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable,[6] the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.[7]

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[4] *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Accord *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[5] *State v. Childs*, 242 Neb. 426, 432, 495 N.W.2d 475, 479 (1993), quoting *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

[6] See *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[7] *Whren, supra* note 4; *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

Draganescu argues that the rule he advocates is consistent with our holding in *State v. Childs*.[8] But he ignores a critical distinction. There, a police officer stopped the motorist to check his vehicle registration because of his in-transit tags. The motorist was not driving suspiciously and had not violated a statute. His vehicle's in-transit tags were in compliance with the governing statutes. We held that "a constitutional investigatory stop cannot be made solely to check a motorist's documentation when the vehicle is properly displaying in-transit tags."[9] In *Childs*, the officer lacked outward observable signs that would support probable cause to believe that the driver was violating any traffic regulation.[10]

In contrast, Bigsby had probable cause to stop the vehicle for a traffic violation—following too closely. Neb. Rev. Stat. § 60-6,140(1) (Reissue 2004) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, and such driver shall have due regard for the speed of such vehicles and the traffic upon and the condition of the roadway." But we need not analyze Draganescu's argument that the "reasonable and prudent" standard is too indefinite or subjective because he has not challenged the statute for vagueness. Moreover, Bigsby testified that he used an objective standard for determining whether the van was following the truck too closely: one car length for every 10 m.p.h. of speed. Bigsby further stated that he observed the van following one car length behind the semi-truck while both vehicles were traveling over 70 m.p.h. in the rain.

[5,6] Because this evidence showed Bigsby had probable cause to believe a traffic violation had occurred, the stop was objectively reasonable. Although Draganescu disputes Bigsby's motivation for stopping the van, the issue is irrelevant. Both the U.S. Supreme Court and this court have rejected "pretextual" arguments regarding routine traffic stops. "Subjective intentions

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[8] *Childs, supra* note 5.

[9] *State v. Bowers*, 250 Neb. 151, 160, 548 N.W.2d 725, 731 (1996) (distinguishing *Childs, supra* note 5).

[10] See, *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), citing *Prouse, supra* note 5.

play no role in ordinary, probable-cause Fourth Amendment analysis."[11] If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.[12] Draganescu's argument that the initial stop was unsupported by probable cause is without merit.

(c) Reasonable, Articulable Suspicion to Justify Draganescu's Continued Detention

Draganescu does not appeal the district court's decision that the length of his detention was reasonable. Instead, he contends that Bigsby did not have reasonable suspicion to enlarge the scope of the traffic stop and detain him for a canine sniff after Truesdale attempted to exit the patrol car.

[7,8] To detain a motorist for further investigation past the time reasonably necessary to conduct a routine investigation incident to a traffic stop,[13] an officer must have a reasonable, articulable suspicion that the motorist is involved in criminal activity unrelated to the traffic violation.[14] Reasonable suspicion for further detention must exist after the point that an officer issues a citation.[15]

[9-11] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.[16] Courts must determine whether reasonable suspicion exists on a case-by-case basis.[17] Reasonable suspicion entails some minimal level of objective justification for detention. It is something more than an inchoate and

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[11] *Whren, supra* note 4, 517 U.S. at 813.

[12] See, *Dallmann, supra* note 7; *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

[13] See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

[14] See, *Louthan, supra* note 3; *Voichahoske, supra* note 13; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *disapproved in part on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[15] See, *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *Anderson, supra* note 14.

[16] *Louthan, supra* note 3.

[17] See *id.*

unparticularized hunch—but less than the level of suspicion required for probable cause.[18]

Regarding an officer's reasonable suspicion, we have previously considered factors similar to those present in this case. Those factors included an officer's testimony that (1) the motorist had not taken the most direct route from the occupants' stated point of origin to their stated destination[19] and (2) the driver or passengers gave implausible or contradictory answers regarding their travel plans.[20] And, although of limited usefulness, a court may consider, with other factors, evidence that the occupants exhibited nervousness.[21] Finally, a court can consider, as part of the totality of the circumstances, the officer's knowledge of a person's drug-related criminal history.[22]

[12] Moreover, factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.[23] For example, evidence that a motorist is returning to his or her home state in a vehicle rented from another state is not inherently indicative of drug trafficking when the officer has no reason to believe the motorist's explanation is untrue.[24] But a court may nonetheless consider this factor when combined with other indicia that drug activity may be occurring—particularly the occupants' contradictory answers regarding their travel purpose and plans[25] or an occupant's previous drug-related convictions.[26]

Here, the rental agreement showed that Truesdale should have returned the van to Seattle 5 days before the traffic stop. His

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[18] *Id.*

[19] *Voichahoske, supra* note 13.

[20] See, *id.*; *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005); *Lee, supra* note 15.

[21] *Verling, supra* note 20; *Lee, supra* note 15.

[22] *Lee, supra* note 15. Accord, *U.S. v. Finke*, 85 F.3d 1275 (7th Cir. 1996). See, also, *U.S. v. McRae*, 81 F.3d 1528 (10th Cir. 1996).

[23] See *Voichahoske, supra* note 13.

[24] See *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998).

[25] See *Verling, supra* note 20.

[26] See *Finke, supra* note 22.

explanation to Bigsby that he had obtained a 3-day extension did not explain why the van was in Nebraska 2 days after it was due for return in Washington.[27] More important, Draganescu's statement that he and Truesdale were traveling straight back to Michigan from Washington was inconsistent with their presence on Interstate 80 in Nebraska. And, most telling, Truesdale and Draganescu gave contradictory answers about their travel plans. Finally, Draganescu's background check revealed a drug-related criminal history. Considering the totality of these circumstances, we conclude that these facts, when viewed from the standpoint of an objectively reasonable police officer,[28] created a reasonable, articulable suspicion. The court did not err in concluding that Bigsby had a reasonable, articulable suspicion that Truesdale and Draganescu were involved in unlawful activity at the time Bigsby issued the warning citation.

(d) Probable Cause to Search the Van

Draganescu argues that probable cause to search the van hinged on Duke's reliability. He claims that the district court clearly erred in finding that Dugger did not approach the van with an object in his hand. He also claims that the videotape clearly shows Dugger did not properly handle Duke during the canine sniff.

[13] Generally, the factors supporting an officer's reasonable suspicion of illegal drug activity when coupled with a well-trained dog's positive indication of drugs in a vehicle will give the officer probable cause to search the vehicle.[29] Draganescu's expert agreed that the evidence showed Duke was a well-trained drug dog and had alerted to the rear of the van.

Draganescu, however, contends that the court did not need an expert to conclude that the canine sniff was improperly conducted for two reasons. First, Duke scratched the rear of the van only after Dugger placed his hands there. Second, it took Duke five trips around the van before he indicated drugs. But Dugger explained that Duke was distracted during the first deployment

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[27] See *McRae, supra* note 22.

[28] See *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

[29] See *Verling, supra* note 20.

because of the rain. The videotape showed that Duke scratched the van's rear door, indicating drugs, on his second trip around the van during the second deployment. Dugger further explained that he moves his hands around a vehicle to direct the dog to a place he wants it to sniff, and he did this throughout both deployments. Without countervailing evidence, Dugger's training and experience and Duke's training and past reliability satisfy us that the procedures used did not improperly cause Duke to indicate drugs.

We agree with Draganescu's argument that the district court clearly erred in finding that Dugger did not take an object to the van. The court apparently focused only on the second deployment. But the videotape shows that before Duke's first deployment, Dugger displayed a ball to Duke, acted suspiciously with the ball around the van while the dog was watching, and then showed Duke a clean hand. Again, however, Dugger testified that this prestimulation ritual was a part of Duke's training and that he received the same training that many states use. The statements in Draganescu's expert's report are inconclusive. Mutter stated that Dugger "could very possibly have contaminated the search" by using this ritual during an actual deployment because dogs are initially trained to alert by using the same method.

In an unpublished opinion, the Nebraska Court of Appeals considered this same expert's report in reviewing Truesdale's joint suppression hearing.[30] It concluded that the expert's critical comments were mere conjecture. We agree that Mutter's statements in his report did not undermine the district court's determination that Dugger's handling of Duke had not contaminated the canine sniff. We conclude in our de novo review that the state troopers had probable cause to search the van.

2. Admissibility of Airline Ticket Stub

The court admitted the airline ticket stub, exhibit 20. This exhibit showed that Draganescu had a seat on a March 23, 2006, flight from Los Angeles to Las Vegas. The court overruled

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[30] See *State v. Truesdale*, No. A-07-715, 2008 WL 582530 (Neb. App. March 4, 2008) (selected for posting to court Web site).

Draganescu's objections and ruled that (1) the evidence was relevant; (2) it was properly authenticated by testimony that the ticket stub was found on Draganescu's person after he was arrested; and (3) it was admissible under the residual hearsay exception. Draganescu argues that the court erred in all three rulings.

(a) Standard of Review

[14,15] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[31] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.[32]

(b) Relevance of Exhibit 20

Draganescu contends that exhibit 20 was not relevant because it was not probative of any material element of the crime. The State counters that exhibit 20 showed Draganescu was lying to Bigsby when he stated that he was only in the van to catch a ride home from Washington. It contends that exhibit 20 was therefore relevant to show Draganescu's real purpose for being in the van was his possession of the marijuana and his intent to deliver it.

(i) Standard of Review

[16-18] The exercise of judicial discretion is implicit in determining the relevance of evidence. And a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[33] Evidence is relevant if it tends in any degree to alter the probability of a material fact.[34] Relevancy requires only that the degree of probativeness be something more than nothing.[35]

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[31] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[32] See *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

[33] See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[34] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[35] *Id.*

(ii) Analysis

[19-21] Exhibit 20 is relevant because a juror could infer from this circumstantial evidence that Draganescu lied about traveling with Truesdale from Washington to dissociate himself from their purpose in California and Nevada—illegal drug activity. Evidence of a defendant's consciousness of guilt is relevant as a circumstance supporting an inference that the defendant is guilty of the crime charged.[36] When the evidence is sufficient to justify an inference that the defendant acted with consciousness of guilt, the fact finder can consider such evidence even if the conduct could be explained in another way.[37] Many courts have held that, unlike general denials of guilt, a defendant's exculpatory statements of fact that are proved to be false at trial are probative of the defendant's consciousness of guilt.[38] We agree. We conclude that the district court did not abuse its discretion in determining that evidence showing Draganescu made false exculpatory statements is relevant to his guilt.

(c) Admissibility of Exhibit 20 Under Nebraska's Hearsay Rules

Draganescu contends that exhibit 20 was hearsay and was not admissible under the residual hearsay exception because the State did not show that the declarant was unavailable. The State does not contend that exhibit 20 was admissible under the residual hearsay exception. Instead, it contends that the ticket stub was not a hearsay statement for two reasons: (1) A computer produced it, and (2) Draganescu adopted the statement through his possession of it.

Before analyzing the hearsay issue, we explain why we are not first analyzing a preliminary question—authentication.

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[36] See, *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991).

[37] See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Curlile*, 11 Neb. App. 52, 642 N.W.2d 517 (2002).

[38] See, e.g., *U.S. v. Glenn*, 312 F.3d 58 (2d Cir. 2002); *United States v. McDougald*, 650 F.2d 532 (4th Cir. 1981); *United States v. Merrill*, 484 F.2d 168 (8th Cir. 1973); *U.S. v. Isaac-Sigala*, 448 F.3d 1206 (10th Cir. 2006); *People v. Hughes*, 27 Cal. 4th 287, 39 P.3d 432, 116 Cal. Rptr. 2d 401 (2002); *Perry v. State*, 344 Md. 204, 686 A.2d 274 (1996).

Neb. Evid. R. 104(1),[39] like its federal counterpart,[40] requires a trial court to determine preliminary questions of admissibility. Unlike its federal counterpart, however, Nebraska's rule 104(1) does not include this final sentence: "In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges."[41] Because of this provision, federal courts frequently decide authentication issues before hearsay issues. Those courts reason that "[a]uthenticity and admissibility, though often closely related, are separate inquiries. The mere fact that a document is authentic does not necessarily mean that it is admissible in evidence."[42] But Nebraska's rule 104 does not permit that order of analysis. We must first determine whether the district court properly ruled that exhibit 20 was not hearsay before considering whether the document's contents could support the court's ruling that it was properly authenticated.

(i) Standard of Review

[22-24] We pause here to clarify our standard of review for hearsay rulings. Hearsay is not admissible except as provided by the Nebraska Evidence Rules.[43] In *State v. Jacob*,[44] we held that a trial judge does not have discretion to admit inadmissible hearsay statements. So we overruled cases applying an abuse of discretion standard to review rulings under the excited utterances exception to hearsay. Shortly after issuing this opinion, however, we implicitly carved out an exception for the residual hearsay exception. We did this because of the factors a trial court must weigh in deciding whether to admit evidence under this exception.[45] Thus, we have applied an abuse of discretion

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[39] Neb. Rev. Stat. § 27-104(1) (Reissue 1995).

[40] Fed. R. Evid. 104(a).

[41] *Id.*

[42] *U.S. v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994). Accord *U.S. v. Chu Kong Yin*, 935 F.2d 990 (9th Cir. 1991).

[43] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[44] See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[45] *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993), citing *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

standard to review hearsay rulings under the residual hearsay exception.[46]

[25,26] In three other cases, we have stated that we will uphold a court's application of the Nebraska Evidence Rules unless clearly erroneous when judicial discretion is not a factor in assessing admissibility.[47] In these cases, however, we have not distinguished between findings of fact and conclusions of law. "Clearly erroneous" is the standard we normally apply for reviewing a district court's underlying factual findings when the issue on appeal presents a mixed question of fact and law.[48] But when judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.[49] This rule is consistent with other courts' de novo review of a trial court's application of hearsay rules.[50] Thus, we adopt the following standard of review for hearsay rulings: Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.

(ii) Analysis

[27] We have determined that exhibit 20 was relevant to prove that Draganescu lied to Bigsby when he stated that he and Truesdale were traveling straight back to Michigan from Washington. Thus, the airline ticket stub was a written assertion

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[46] See, e.g., *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

[47] See, *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003); *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000); *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

[48] See, e.g., *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[49] See, e.g., *Eberly, supra* note 28. See, also, *U.S. v. Salgado*, 250 F.3d 438 (6th Cir. 2001).

[50] See, e.g., *U.S. v. Gaitan-Acevedo*, 148 F.3d 577 (6th Cir. 1998); *Zacarias v. U.S.*, 884 A.2d 83 (D.C. 2005); *Burkey v. State*, 922 So. 2d 1033 (Fla. App. 2006); *State v. Newell*, 710 N.W.2d 6 (Iowa 2006); *State v. White*, 804 A.2d 1146 (Me. 2002); *Bernadyn v. State*, 390 Md. 1, 887 A.2d 602 (2005); *State v. Schiefelbein*, 230 S.W.3d 88 (Tenn. Crim. App. 2007).

offered to prove the truth of the matter asserted, i.e., that Draganescu had a reserved seat on a flight from Los Angeles to Las Vegas on March 23, 2006. Exhibit 20 was intended to support a finding that contrary to his statements to Bigsby, Draganescu had been in California just before driving through Nebraska. The State does not contend otherwise. A written assertion is a statement under Neb. Evid. R. 801(1).[51] Because it was a statement offered to prove the truth of the matter asserted, it is hearsay under rule 801(3) unless it falls within an exception or exclusion under the hearsay rules.

[28] We reject the State's assertion that the document was not hearsay because a computer produced it. Computerized printouts that are merely the visual counterparts to routine electronic business records are usually hearsay, but they can be admissible under the business records exception.[52] Here, the State did not attempt to lay foundation for the business records exception. The court, however, admitted exhibit 20 under the residual hearsay exception.

[29] We agree with Draganescu that the district court erred in admitting exhibit 20 under the residual hearsay exception. Neb. Evid. R. 804(2)(e)[53] provides in part:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

An adverse party's knowledge of a statement is not enough to satisfy the notice requirement of rule 804(2)(e).[54] The proponent of the evidence must provide notice before trial to the adverse party of his or her intentions to use the statement to take advantage of the residual hearsay exception under rule 804(2)(e).[55]

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[51] Neb. Rev. Stat. § 27-801(1) (Reissue 1995).

[52] See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[53] Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995).

[54] See *Robinson, supra* note 46.

[55] *Id.* See, also, *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001).

[30] The record fails to show that the State provided Draganescu with advance notice of its intent to use exhibit 20. The first mention in the record of the State's intent to use exhibit 20 is during his trial. The court's admission of the evidence under this exception was error. But where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.[56] We conclude that under these circumstances, exhibit 20 was admissible as an adopted statement. We note that when the prevailing party has laid sufficient foundation for the application of another rule, federal appellate courts will similarly consider whether the evidence was admissible under that rule for the same purpose—the truth of the matter asserted.[57]

[31] Although a party on appeal may not assert a different ground for an objection to the admission of evidence than was offered to the trial court,[58] the considerations are different when it was unnecessary for the prevailing party to raise an alternative ground for admission to the trial court.[59] We agree with the federal courts of appeals that hold an appellate court can consider whether the record clearly shows an exhibit was admissible for the truth of the matter asserted under a different rule from the one applied by the trial court when both parties had a fair opportunity to develop the record on the underlying facts.

[32,33] As noted, we conclude that exhibit 20 was admissible as an adopted statement. Rule 801(4)(b) excludes a statement from the definition of hearsay if it is "offered against a party and is . . . (ii) a statement of which he has manifested his adoption or belief in its truth." When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule

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[56] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[57] See, e.g., *Paulino, supra* note 42; *U.S. v. Knox*, 124 F.3d 1360 (10th Cir. 1997); *U.S. v. Williams*, 837 F.2d 1009 (11th Cir. 1988). See, also, *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973) (distinguishing U.S. Supreme Court decisions).

[58] See *Robinson, supra* note 52.

[59] See *United States v. Pugliese*, 712 F.2d 1574 (2d Cir. 1983). See, also, *Blum v. Bacon*, 457 U.S. 132, 102 S. Ct. 2355, 72 L. Ed. 2d 728 (1982).

of evidence, Nebraska courts may look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.[60] Under the federal counterpart to Nebraska's rule 801(4)(b)(ii), a party's possession of a written statement can be an adoption of what its contents reveal under circumstances that tie the party to the document in a meaningful way.[61]

For example, in *U.S. v. Paulino*,[62] the First Circuit affirmed the trial court's admission of a receipt for a postal service money order. Police found the receipt during the search of an uninhabited apartment used as a drug distribution outlet. The receipt bore the defendant's name and the apartment's address. It also included a notation that the money order was for the preceding month's rent. There was no testimony from the landlord or building management. The defendant challenged the admission of the evidence on authentication and hearsay grounds.

The First Circuit reasoned that in addition to possession, other circumstances tied the defendant to the document. The court noted that the document bore the defendant's name and that he had a key to the apartment, had been seen there, and was privy to the criminal enterprise. These circumstances were sufficient to permit a finding that he had "possessed and adopted" the document.[63] The Ninth Circuit similarly held that a motel receipt found on a defendant's person after his arrest was an adopted admission.[64] Finally, the Sixth Circuit held that airline tickets found in the possession of the defendants were admissible as adoptive statements.[65]

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[60] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved in part on other grounds, McCulloch, supra* note 14.

[61] *Paulino, supra* note 42, citing *United States v. Ospina*, 739 F.2d 448 (9th Cir. 1984). See, also, Annot., 156 A.L.R. Fed. 217 (1999).

[62] *Paulino, supra* note 42.

[63] *Id.* at 24.

[64] See *Ospina, supra* note 61. See, also, *U.S. v. Merritt*, Nos. 96-4149, 96-4177, 96-4196, 1998 WL 196614 (4th Cir. Apr. 22, 1998) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 145 F.3d 1327 (4th Cir. 1998)).

[65] *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981).

Similarly here, exhibit 20 bore Draganescu's name and was not the type of document that a person would have had in his possession if it were not his own. Further, the evidence was consistent with Truesdale's statement that Draganescu had flown to Las Vegas. We conclude that the circumstances are sufficient to show that Draganescu adopted the written statement by his possession of it. Exhibit 20 was not hearsay.

(d) Authentication of Exhibit 20

Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims.[66] Draganescu does not contend that the State failed to establish a chain of custody showing that exhibit 20 is the document state troopers took from his pocket when he was arrested. Instead, he contends that Bigsby's testimony was insufficient foundation because Bigsby did not have personal knowledge that exhibit 20 is what the State claims, i.e., an airline ticket stub. The State contends that exhibit 20 was authenticated by its appearance, contents, substance, internal patterns, or other distinctive characteristics under Neb. Evid. R. 901(2)(d).[67]

(i) Standard of Review

[34-36] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.[68] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.[69] We review a trial court's ruling on authentication for abuse of discretion.[70]

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[66] Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1995).

[67] *Id.*

[68] See *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

[69] See *id.* See, also, *U.S. v. Alicea-Cardoza*, 132 F.3d 1 (1st Cir. 1997).

[70] See *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967). See, also, 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 901.02[4] (Joseph M. McLaughlin ed., 2d ed. 2008).

(ii) Analysis

[37-39] Rule 901 does not impose a high hurdle for authentication or identification.[71] A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[72] If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).[73]

[40,41] A proponent may authenticate a document under rule 901(2)(a) by the testimony of someone with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents.[74] But that is not the exclusive means. Under rule 901(2)(d), a proponent may authenticate a document by circumstantial evidence, or its "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[75]

Courts have recognized distinctive labels and brands as prima facie evidence of ownership or origin.[76] Neb. Evid. R. 902(7)[77] specifically includes as self-authenticating "[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin." In this case, exhibit 20 bears the airline's distinctive logotype on both sides and its contact information. Exhibit 20's contents identify the passenger as Draganescu. They also provide the typical flight information found on all airline tickets or boarding

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[71] See *Anglemyer, supra* note 68.

[72] See *id.*

[73] See *id.* See, also, *Alicea-Cardoza, supra* note 69; *U.S. v. Ruggiero*, 928 F.2d 1289 (2d Cir. 1991), citing 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 901(a)[01] (1990).

[74] *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[75] See, *U.S. v. Reilly*, 33 F.3d 1396 (3d Cir. 1994); *Anglemyer, supra* note 68, quoting 28 U.S.C. app. rule 901 (2000).

[76] See, *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924 (9th Cir. 2002), *amended on other grounds* 313 F.3d 1093; *State v. Rines*, 269 A.2d 9 (Me. 1970). See, also, 2 McCormick on Evidence § 229.1 (Kenneth S. Broun et al. eds., 6th ed. 2006).

[77] Neb. Rev. Stat. § 27-902(7) (Reissue 1995).

passes. The information includes the date of flight, gate and seat numbers, boarding and departure times, and departure and arrival cities.

We conclude that the information contained in exhibit 20 supported a finding that it was what it purported to be: the tear-off portion of an airline ticket or boarding pass. A defendant challenging the "type" of document the State produces may refute the obvious inference. Normally, external evidence would be required to authenticate the contents of a ticket that is produced to prove that its contents are true. Here, however, the normal foundation requirements to ensure reliability are lessened because state troopers found the ticket stub on Draganescu's person.[78] We conclude that the contents of exhibit 20 and Draganescu's possession of it were sufficient to support a finding that Draganescu flew from Los Angeles to Las Vegas on March 23, 2006. Under the totality of the circumstances, we are satisfied that the district court did not abuse its discretion in admitting the evidence.

3. Instruction on Lesser-Included Offense of Simple Possession

The court instructed the jury that it could return a verdict of not guilty or "Guilty of Manufacture, Distribution, Delivery, or Dispensing a Controlled Substance." The court also instructed the jury, restated and condensed, that the State must prove beyond a reasonable doubt that Draganescu had knowingly or intentionally (1) possessed marijuana with the intent to distribute or deliver it or (2) aided and abetted another to possess marijuana with the intent to distribute or deliver it.[79]

Draganescu contends that the district court erred in failing to instruct the jury on simple possession. Relying on a Court of Appeals' decision,[80] Draganescu contends that possession of

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[78] See, *Paulino, supra* note 42; *U.S. v. Kandiel*, 865 F.2d 967 (8th Cir. 1989); *U.S. v. Clabaugh*, 589 F.2d 1019 (9th Cir. 1979). See, also, *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984); 2 McCormick on Evidence, *supra* note 76, § 226.

[79] See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

[80] See *State v. Malone*, 4 Neb. App. 904, 552 N.W.2d 772 (1996).

marijuana over 1 pound is a lesser-included offense of possession of marijuana with intent to deliver, regardless of the weight of the marijuana possessed. He further contends that the evidence adduced at his trial provided a rational basis for a juror to acquit him of possession with intent to deliver and convict him of simple possession.

(a) Standard of Review

[42-44] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[81] Whether jury instructions given by a trial court are correct is a question of law.[82] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[83]

(b) Analysis

[45,46] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[84] To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.[85]

In looking to the elements, Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2006) provides in part: "Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance."

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[81] *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[82] *Molina, supra* note 81.

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

[84] *Blair, supra* note 81; *Molina, supra* note 81.

[85] See, *Molina, supra* note 81; *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

Marijuana is a Schedule I controlled substance.[86] As relevant here, § 28-416(1)(a) criminalizes the act of knowingly or intentionally possessing marijuana with the intent to distribute or deliver it. For simple possession, § 28-416(12) provides: "Any person knowingly or intentionally possessing marijuana weighing more than one pound shall be guilty of a Class IV felony."

This court has previously held that possession of a controlled substance is a lesser-included offense of distribution of the controlled substance.[87] The Nebraska Court of Appeals has specifically held that possession of marijuana weighing more than 1 pound is a lesser-included offense of possession with intent to deliver the marijuana.[88] The State does not dispute this point. The issue here is whether the evidence provided a rational basis for acquitting Draganescu of the greater offense and convicting him of the lesser offense.

Draganescu argues that the jury could have believed that he was simply catching a ride home with Truesdale and that he was not involved in the distribution or delivery of marijuana, even if he was aware of its presence in the van. The State contends that because of the quantity of marijuana found in the van, a jury could not have rationally found that Draganescu possessed the marijuana without also finding that he possessed it with the intent to deliver or distribute.

Draganescu's argument that the jury could have found he only knew there was marijuana in the van is an argument for acquittal—it is not a rational basis upon which a jury could have convicted him of simple possession. Proving Draganescu's knowledge alone would have been insufficient to satisfy the elements of either simple possession of the marijuana or possession with the intent to deliver it. The State was also required to prove Draganescu's control or dominion over the marijuana or that he aided and abetted Truesdale's control and dominion over the marijuana.[89] And the court instructed the jury to that effect:

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[86] See Neb. Rev. Stat. § 28-405(c)(10) (Cum. Supp. 2006).

[87] *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[88] See *Malone, supra* note 80.

[89] See, *Johnson, supra* note 87; *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

"'Possession' of a controlled substance means either knowingly having it on one's person or knowing of the substance's presence and having control over the substance, mere presence is not sufficient."[90] Under this instruction, the jury could not have found that Draganescu had possessed the marijuana unless it found that he had control over it. Thus, the only issue is whether there was a rational basis for a jury to conclude that Draganescu did not intend to deliver the marijuana.

[47,48] We have held that evidence of the quantity of a controlled substance possessed combined with expert testimony that such quantity indicates an intent to deliver can be sufficient for a jury to infer an intent to deliver.[91] When the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, the defendant must offer some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.[92] Because Draganescu did not dispute the State's evidence on the separate element of intent to deliver, he was not entitled to an instruction on the lesser-included offense of simple possession.

4. Sufficiency of the Evidence

Draganescu contends that the evidence was insufficient to sustain his conviction because the only direct evidence linking him to the marijuana was his presence in the van. He argues that his mere presence in the place where the marijuana was found is insufficient to show his knowledge of it. The State contends that the circumstantial evidence established Draganescu's guilt beyond a reasonable doubt.

(a) Standard of Review

[49,50] When reviewing for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable

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[90] See NJI2d Crim. 4.2.

[91] *State v. Utter*, 263 Neb. 632, 641 N.W.2d 624 (2002).

[92] *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[93] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[94]

(b) Analysis

[51-55] Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.[95] It is true that a passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession.[96] But possession of an illegal substance can be inferred from a vehicle passenger's proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.[97] Generally, a passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.[98] Courts have reasoned in part that a juror may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite someone into his or her vehicle who had no knowledge of the driver's drug activities.[99] We agree.

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[93] See *Gutierrez, supra* note 43.

[94] *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[95] *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[96] See, e.g., *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967).

[97] See *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980). Compare, *Flores, supra* note 95; *Nelson, supra* note 94.

[98] See, *Paez v. O'Lone*, 772 F.2d 1158 (3d Cir. 1985); *U.S. v. Norwood*, 140 Fed. Appx. 850 (11th Cir. 2005); *State v. Palacio*, 205 N.J. Super. 256, 500 A.2d 749 (1985); *Robinson v. State*, 174 S.W.3d 320 (Tex. App. 2005).

[99] See, *Paez, supra* note 98; *Palacio, supra* note 98. Compare *U.S. v. Garcia-Flores*, 246 F.3d 451 (5th Cir. 2001).

Here, Draganescu admitted that he had been traveling with Truesdale and that they had been sleeping in the van. The drugs were easily accessible to someone from the back seat. The quantity of marijuana was sufficient to support an inference that Truesdale was engaged in illegal drug trafficking[100] and that he would not have invited Draganescu to travel with him if he had no knowledge of the scheme. Truesdale's and Draganescu's explanations of their travel plans were contradictory. These contradictory statements supported an inference that they were attempting to conceal their activities. Finally, Draganescu made false exculpatory statements regarding his presence in California. A juror could reasonably infer that he was attempting to distance himself from traveling with Truesdale in California because of their illegal activities there. We conclude that the totality of the circumstantial evidence supported the jury's finding that Draganescu jointly possessed the marijuana.

[56,57] Circumstantial evidence may also support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance.[101] Circumstantial evidence to establish possession of a controlled substance with intent to distribute or deliver may consist of several factors: the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.[102] Bigsby's testimony established that this quantity of marijuana showed an intent to distribute, and Draganescu does not contend otherwise.

5. Excessive Sentence

Finally, Draganescu argues that his sentence was excessive because he was eligible for intensive supervision probation and his incarceration will impose a hardship on his wife and family.

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[100] See *Anderson, supra* note 14.

[101] See, *Johnson, supra* note 87; *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

[102] See *Konfrst, supra* note 101.

(a) Standard of Review

[58] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.[103]

(b) Analysis

[59] 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 violence involved in the commission of the crime.[104] Possession of a controlled substance with intent to deliver is a Class III felony,[105] punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both.[106] Because of his previous drug convictions, the district court sentenced Draganescu to 5 to 11 years' imprisonment, a sentence clearly within the statutory limits. After reviewing the record and the presentence investigation report, which reflects previous drug-related convictions and sentences of probation, we conclude that the district court's sentence was not an abuse of its discretion.

V. CONCLUSION

We conclude that the district court did not err in overruling Draganescu's motion to suppress evidence. The state trooper had probable cause to stop the vehicle, in which Draganescu was a passenger, for a traffic violation; reasonable suspicion to detain the occupants for further investigation; and probable cause to search the vehicle. We further conclude that the district court did not err in admitting exhibit 20 over Draganescu's foundation, hearsay, and relevance objections. Nor did the court err in failing to instruct the jury on the lesser-included offense of simple possession. Finally, we conclude that the evidence was sufficient

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[103] *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007).

[104] *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[105] See § 28-416(2)(b).

[106] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

to support Draganescu's conviction and that the court did not err in sentencing him to 5 to 11 years' imprisonment.

AFFIRMED.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL, APPELLEE AND CROSS-APPELLANT, V. CONSUMER'S CHOICE FOODS, INC., ET AL., APPELLEES, AND JAYCO ACCEPTANCE CORPORATION, APPELLANT AND CROSS-APPELLEE.

755 N.W.2d 583

Filed August 29, 2008. No. S-07-240.

1. **Consumer Protection: Equity.** The Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 through 59-1622 (Reissue 2004 & Cum. Supp. 2006), is equitable in nature.
2. **Deceptive Trade Practices: Equity.** The terms of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 through 87-306 (Reissue 1999 & Cum. Supp. 2006), provide only for equitable relief consistent with general principles of equity.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, an 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.
4. **Consumer Protection: Contracts: Assignments: Debtors and Creditors: Sales.** The holder/assignee of a retail installment contract which includes the Federal Trade Commission's holder rule is subject to any claim or defense the debtor could assert against a seller, as long as the claim or defense arises out of or is connected with the original transaction.
5. **Consumer Protection: Debtors and Creditors: Sales.** The Federal Trade Commission's holder rule was designed to reallocate the cost of seller misconduct to the creditor, who is in a better position to absorb the loss or recover the cost from the guilty party—the seller.
6. **Consumer Protection.** Pursuant to the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 through 59-1622 (Reissue 2004 & Cum. Supp. 2006), unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.
7. **Deceptive Trade Practices.** The Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 through 87-306 (Reissue 1999 & Cum. Supp. 2006), provides that a person has engaged in a deceptive trade practice when, in the course of business, he or she represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.

8. **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.
9. **Consumer Protection: Debtors and Creditors.** The Federal Trade Commission's holder rule limits a debtor's recovery to the amounts paid by the debtor.
10. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
11. **Consumer Protection: Deceptive Trade Practices: Equity.** A consumer can seek equitable relief under both the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 through 59-1622 (Reissue 2004 & Cum. Supp. 2006), and the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 through 87-306 (Reissue 1999 & Cum. Supp. 2006).
12. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
13. ____. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

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

Nichole S. Bogen and James B. Luers, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Jon Bruning, Attorney General, and Jeffrey A. Gaertig for appellee State of Nebraska.

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

WRIGHT, J.

I. NATURE OF CASE

The State of Nebraska, through its Attorney General, brought this action against Consumer's Choice Foods, Inc.; its principals, Chris Johnson and Jason Johnson; and its sales manager, Kimberly Stigge-Johnson (collectively CCF). The State alleged CCF had violated the Uniform Deceptive Trade Practices Act (UDTPA), see Neb. Rev. Stat. §§ 87-301 through 87-306 (Reissue 1999 & Cum. Supp. 2006), and the Consumer Protection Act (CPA), see Neb. Rev. Stat. §§ 59-1601 through 59-1622 (Reissue 2004 & Cum. Supp. 2006). Jayco Acceptance Corporation (Jayco), which had purchased consumer installment contracts from CCF, was also named as a defendant.

The district court for Lancaster County entered judgment against CCF and awarded damages to certain consumers. It also awarded costs, attorney fees, civil penalties, and injunctive relief. Jayco was found to be jointly and severally liable with CCF, but the amount recoverable from Jayco was limited to $96,308.21 plus interest and costs. Jayco was ordered to send notices to credit and collection organizations on behalf of each consumer, stating that the contract had been obtained by deception and had been rescinded. Jayco appealed, and the State has cross-appealed.

II. SCOPE OF REVIEW

[1,2] The CPA is equitable in nature. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). The terms of the UDTPA provide only for equitable relief consistent with general principles of equity. *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997).

[3] In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, an 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. *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

III. FACTS

CCF used installment contracts to sell food service plans and appliances to consumers. It supplied frozen foods, meats, and nonperishable dry goods but did not provide perishable items such as bread, milk, and fresh produce. Prospective consumers were told by CCF representatives that they would reduce their costs and would receive higher quality food. CCF also represented that its program would save the consumers time. The telephone marketers told the consumer that CCF would provide a new freezer that did not cost "'anything extra.'" Sales representatives then met with the consumer at home and represented the program as a savings of time and money.

CCF offered several types of purchase programs. In the premium program, the consumers enrolled in a 48-month plan. They were promised a 20-percent discount on food at the end of the term, a new freezer or other appliance, and a free ninth order with upgrade. Consumers were told that the freezer was included in the cost of food or at no additional cost, but salespeople were trained not to use the term "free."

Consumers were asked to sign two contracts: a food contract and a freezer contract. The food contract required a purchase of 6 months' worth of food at a price of $199 to $519 per month. The food contract was renewable every 6 months.

Under the freezer contract, consumers were offered a freezer, an alternate appliance, electronic equipment, or a gift certificate. Consumers were told there was no extra charge for the item. As part of the 48-month program, consumers also signed a membership contract at a cost of $90 to $99 per month for 48 months. The price of the food contract was reduced by the amount of the membership contract. Consumers could choose whether to renew the food contract at any time after the initial 6-month trial, but if no food was ordered after that period, consumers were required to pay the monthly membership contract for the entire 48 months.

CCF stored dry goods and paper products in a warehouse. It had a walk-in freezer for meat and frozen products. CCF purchased the dry goods, paper, and nonperishable products in bulk at retail grocery stores and paid retail prices. Freezers and refrigerators were purchased from an appliance store and delivered to CCF customers at a cost of between $400 and $500.

In 2002, CCF had financial difficulties and by April was issuing checks without sufficient funds. At that time, CCF frequently shorted consumers on their food orders. However, it continued to sell membership contracts into September 2002 and went out of business December 31. CCF's principals and its sales manager filed suggestions of bankruptcy in August 2003.

CCF's business practice was to immediately assign its interests in the contracts to Jayco in consideration for a portion of the total value of the contract, less a percentage which Jayco would realize through receipt of the consumers' payments over the 4-year period.

After receiving more than 120 complaints about CCF and Jayco, the Attorney General requested that the Nebraska State Patrol investigate. In January 2001, the State Patrol began an undercover operation, and in April 2002, the State Patrol videotaped an encounter with one of CCF's sales representatives. The videotape shows a representative of CCF stating that its program would save the consumer time and money and that the food costs would never go up. As an incentive, CCF would provide a new freezer, which would include a 100-percent parts-and-labor warranty. The freezer was represented as being included in the program. The $99 monthly payment was represented as part of the food contract, because, as the representative stated, no one would pay $4,800 for a freezer.

The suit against CCF and Jayco asserted three causes of action: (1) violation of the UDTPA by representing that goods or services had characteristics, uses, or benefits that they did not have, including the representation that the food service plan would save consumers time and money and that the freezer, appliance, or gift certificate was free or at no additional cost; (2) violation of the UDTPA by engaging in unconscionable acts or practices in connection with consumer transactions by inducing consumers to sign both a food contract and a freezer contract; and (3) violation of the CPA by engaging in unfair and deceptive acts or practices in the conduct of trade or commerce by representing that the freezer, appliance, or gift certificate was free. The State sought injunctive relief prohibiting the defendants from continuing the deceptive practices, restitution, rescission of the agreements, a civil penalty against each of the defendants, and recovery of costs and attorney fees.

At trial, 36 consumers testified that they did not save time or money as represented by CCF. They were led to believe that they would receive free freezers, but later learned that they were required to pay Jayco either a $90 or $99 monthly payment for the 48-month membership benefit or freezer contract even if they were no longer receiving food from CCF.

The district court entered joint and several judgment in favor of the State and against CCF and Jayco in the amount of $96,308.21, to be distributed among 34 former CCF customers. The court awarded a total of $115,480.50 in attorney fees,

jointly and severally against CCF and Jayco. The court also awarded costs in the amount of $10,457.14, also jointly and severally against the parties. The court determined that the total amount to be recovered from Jayco could not exceed $96,308.21 plus costs. It concluded that collection of costs from Jayco was not limited by the Federal Trade Commission's holder rule (FTC Holder Rule), 16 C.F.R. § 433.2 (2008). Jayco appeals, and the State cross-appeals.

IV. ASSIGNMENTS OF ERROR

Jayco claims the district court erred in finding that it violated §§ 59-1602 and 87-302(a)(5) and in awarding excessive damages, injunctive relief, civil penalties, costs, and attorney fees.

In its cross-appeal, the State asserts that the district court misconstrued the CPA, the UDTPA, and the FTC Holder Rule by limiting the State's recovery from Jayco.

V. ANALYSIS

1. FTC Holder Rule

Jayco is the only defendant that has appealed to this court. Thus, we consider the basis of Jayco's liability under the causes of action brought by the State. The district court concluded Jayco's liability was based upon 16 C.F.R. § 433.2, the FTC Holder Rule. Jayco was the assignee of CCF's installment contracts, and under the FTC Holder Rule, an assignee or holder of consumer credit contracts is subject to all claims that the consumer may assert against the seller.

The federal regulation provides in pertinent part:

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:
>
> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND

> DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2. The regulation interprets the Federal Trade Commission Act. *Maberry v. Said*, 911 F. Supp. 1393 (D. Kan. 1995).

[4] Pursuant to the FTC Holder Rule, "a consumer-debtor may assert against a creditor-assignee of a consumer credit contract any and all affirmative claims for recovery, as well as defenses, that the consumer-debtor would be entitled to assert against the seller had the contract not been assigned." *Beemus v. Interstate Nat. Dealer Serv.*, 823 A.2d 979, 986 (Pa. Super. 2003). In other words, the holder/assignee of a retail installment contract which includes the FTC Holder Rule is subject to any claim or defense the debtor *could assert* against a seller, as long as the claim or defense arises out of or is connected with the original transaction. *Primus Auto Financial Serv. v. Brown*, 163 Ohio App. 3d 746, 840 N.E.2d 254 (2005). "Claims and defenses may be raised against the assignee, even where the seller . . . is insolvent, as long as the claims were asserted or could have been asserted against the seller." *Id*. at 749, 840 N.E.2d at 257.

The purpose of the FTC Holder Rule was to modify the effect of the holder-in-due-course rule on consumer purchases of goods and services. *Ambre v. Joe Madden Ford*, 881 F. Supp. 1182 (N.D. Ill. 1995). The holder-in-due-course principle allowed the creditor to assert its right to be paid by the consumer even if there was misrepresentation, breach of warranty or contract, or fraud on the part of the seller. *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405 (W.D. La. 1998). "Under the holder[-]in[-]due[-]course rule, a consumer's obligation to pay for goods or services was not conditioned upon the seller's corresponding duty to perform his promises." *Ambre v. Joe Madden Ford*, 881 F. Supp. at 1185. If a consumer purchased defective goods on credit, the obligation to pay the third-party creditor remained, even though the seller failed to perform. *Id*.

[5] The FTC Holder Rule was "designed to reallocate the cost of seller misconduct to the creditor, who is in a better position to absorb the loss or recover the cost from the guilty party—the seller." *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411, 416 (W.D. La. 1998). See, also, *Simpson v. Anthony Auto Sales, Inc., supra*; *Maberry v. Said, supra*; *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987).

In the case at bar, the FTC Holder Rule allows a CCF consumer to assert against Jayco any affirmative claim for recovery that the consumer could assert against CCF. The only express limitation in the rule concerns the maximum recovery available to a debtor. *Beemus v. Interstate Nat. Dealer Serv., supra*.

In the State's petition, Jayco was named as a defendant. It was alleged that Jayco had purchased consumer installment contracts sold by CCF during the previous 4 years. The action was not brought against Jayco for its conduct, but because it was an assignee of the contracts from CCF. The petition alleged that the "[r]espondents" violated the CPA and the UDTPA, but it does not contain any specific allegations against Jayco. It is clear that Jayco's liability is based upon the FTC Holder Rule, as the district court so found.

Jayco does not argue that the FTC Holder Rule does not apply, and it concedes that the rule should be applied here. Thus, under the rule, CCF consumers could assert claims for recovery against Jayco as the assignee of the contracts between the consumers and CCF. Jayco's liability therefore arises from the fact that CCF violated the CPA and/or the UDTPA and the fact that Jayco was the assignee of the consumer contracts with CCF. See *Milchen v. Bob Morris Pontiac-GMC Truck*, 113 Ohio App. 3d 190, 197, 680 N.E.2d 698, 703 (1996) (assignee agreed to be "derivatively liable" for seller's violations of Consumer Sales Practices Act when it accepted terms of consumer contract). If CCF violated the CPA and/or the UDTPA, Jayco was subject to all claims which the consumers could assert against CCF. As the holder of the contracts assigned from CCF, Jayco was, in effect, subject to any claims made against CCF. If CCF violated the CPA and/or the UDTPA, Jayco could be held liable, subject to the limitations in the FTC Holder Rule. We therefore examine whether CCF violated the CPA and/or the UDTPA.

(a) Violation of CPA

[6] Pursuant to the CPA, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful." § 59-1602. The CPA does not define "unfair" or "deceptive," and this court has not defined these terms in case law. The U.S. District Court for the District of Nebraska has interpreted the CPA in a case involving a dispute between merchants. The court stated that in order to prove an unfair practice when merchants have entered into a contract, the plaintiff must prove that the practice either "(1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous." *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998). In addition, the plaintiff must "show that the promisor had no intent to perform the promise when it was made" and the plaintiff must "prove that the practice possessed the tendency or capacity to mislead, or created the likelihood of deception." *Id.*

The record in this case is replete with examples of deceptive acts on the part of CCF that were unethical and unscrupulous. Most of the consumers who testified had signed 48-month membership contracts that included the notice required under the FTC Holder Rule. A majority of the consumers signed contracts that required them to purchase a freezer or appliance, rather than receiving it free as represented to them by the CCF representative. Consumers testified that even if they had a freezer, they accepted the freezer from CCF because the company "implied that it would be silly of us not to take the free freezer because it was free" or "it was part of the bonus" of becoming a CCF consumer. After making monthly payments of $90 or $99 on the freezer contracts over a 4-year period, consumers ended up paying as much as $4,752 for a freezer, even though they no longer received food and service from CCF.

CCF told consumers that they would save time and money by signing a food contract, when in reality, consumers saved neither. Consumers testified that they spent more money on food than they had before entering into the contracts. CCF's prices were higher when compared to the same product in a grocery store. One consumer used CCF's point system to determine he

paid $15 for a bag of brand-name hash browns that normally cost about $2 at the grocery store. The food contracts were based on a point system that was illusory because it did not inform the consumers as to how much food they would receive each month.

Consumers testified they did not save time because they went to the grocery store 12 to 15 times in a month to buy items not provided by CCF or to supplement their orders. When they ran out of items from CCF, the consumers spent time on the telephone trying to reorder from CCF. It also took time to rearrange the food when it was delivered, because the food was not placed in the freezer in an orderly fashion.

There was evidence that the deceptive practices of CCF were aggravated by the fact that CCF had no intention of keeping its promises or agreements. The company continued to sell contracts even after it began to have financial difficulty and was going out of business. The sales techniques of CCF had the capacity to mislead, because consumers were led to believe they would save time and money by enrolling in the program. And it was represented to them that the freezer or another appliance was free as a part of the program, when the reality was that the consumers were paying more than $4,000 for the freezer over a 4-year period. The evidence presented at trial established that CCF engaged in unfair and deceptive practices in the sale of assets and services and in commerce as contemplated by the CPA. The record supports a finding that CCF violated the CPA.

(b) Violation of UDTPA

[7] The UDTPA provides that a person has engaged in a deceptive trade practice when, in the course of business, he or she "[r]epresents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have." § 87-302(a)(5). Thus, to establish a violation of the UDTPA, there must have been a representation regarding the nature of goods or services and the representation must have been for characteristics or benefits that the goods or services did not have.

CCF represented that the freezer offered to consumers was provided at no extra charge. However, the freezer was included

as a part of the 48-month contract, which required consumers to sign two separate contracts: one for food and one for the freezer. The freezer contract required them to pay an extra $90 to $99 per month for 48 months. Over the course of the contract, the consumers would pay an additional $4,000 for the freezer, which CCF purchased from another retailer for between $400 and $500.

Consumers were deceived in other ways. One consumer requested an electric stove as her "free" appliance to replace her gas stove. CCF promised installation of the stove, but at the time of trial, the stove was still in the consumer's garage. Several consumers reported that they attempted to use the freezer or food spoilage warranty included in the membership contract, but received no help from CCF. The company also refused to honor the guarantees of a price freeze and satisfaction with the food. It failed to provide a nationwide network for consumers if they moved out of Nebraska and refused to offer the lifetime 20-percent discount as promised. CCF also failed to provide the free ninth order as provided in the membership contract.

Consumers were told that they needed to sign both a food contract and a freezer contract because "it was law, you cannot combine food and service contracts." They were told that the Attorney General's office had recommended two contracts. This representation was false. In addition, consumers were told that the contracts would not be sold to a third party, but the contracts were sold to Jayco.

The evidence showed that CCF sold goods and services that were not as advertised, misrepresented the characteristics of goods and services, caused misunderstanding as to the source of goods and services, and caused confusion and misunderstanding as to CCF's affiliation with other food service businesses throughout the country, all in violation of the UDTPA.

(c) Jayco's Liability

Jayco, as the holder of CCF's contracts, was liable under the FTC Holder Rule for CCF's violations under the CPA and the UDTPA. Jayco was liable on any claims or defenses upon which the consumers succeeded. The district court found that

the consumers were entitled to recover from Jayco on the claims they had against CCF to the extent of any money they paid to Jayco. The record showed that Jayco purchased the membership contracts of 34 of the 36 consumers from CCF and that Jayco had been paid $96,308.21 by those consumers. Thus, Jayco was liable to the extent it received proceeds on 34 of the membership contracts.

Both the CPA and the UDTPA are equitable in nature. See, *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). Thus, this is an appeal of an equity action, and as such, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, an 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. *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

CCF bought its food and freezers from other retail establishments. It was therefore obvious that CCF would not be able to pass on savings to consumers and that CCF knew the products it was selling were not as advertised. CCF promised goods and services that it did not intend to deliver. We have reviewed the factual questions de novo on the record and reach an independent conclusion that the evidence supports a finding that CCF violated the CPA and the UDTPA. Under the FTC Holder Rule, Jayco is therefore liable for CCF's actions.

2. Award

Having found that Jayco was liable, we next consider the district court's award of damages. The court determined that the FTC Holder Rule limits the debtors' recovery against Jayco to the amount the debtors paid on the membership contracts, which was $96,308.21.

The State has filed a cross-appeal as to the amount of damages awarded. The State argues that it should be able to recover attorney fees because the CPA and the UDTPA provide for discretionary attorney fees.

The Federal Trade Commission's Bureau of Consumer Protection has stated:

> "**[The FTC Holder Rule] limits the consumer to a refund of monies paid under the contract,** in the event that an affirmative money recovery is sought. In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; **but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in**. . . . The limitation on affirmative recovery does not eliminate any other rights the consumer may have as a matter of local, state, or federal statute."

Riggs v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 411, 416 (W.D. La. 1998).

In Nebraska, both the CPA and the UDTPA allow for attorney fees. Under the CPA, the prevailing party may recover the costs of the action, including a reasonable attorney fee, at the court's discretion. § 59-1608(1). The court may make additional orders to restore money or property acquired by any act prohibited in the CPA. § 59-1608(2). The UDTPA provides that costs shall be allowed to the prevailing party and that attorney fees may be allowed. § 87-303.

[8] 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). The district court calculated the amount of damages to be awarded against Jayco by determining the amount of money Jayco received on the contracts it obtained by assignment from CCF.

The issue whether the FTC Holder Rule limits the amount of recovery against Jayco is one of first impression before this court. Courts are divided as to the award of attorney fees. In *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985), the Texas Supreme Court awarded attorney fees in a deceptive practices action where the contract included the FTC Holder Rule. The court held the assignee bank jointly liable for attorney fees

on appeal. In *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987), the court held the assignee liable for attorney fees because the assignee waived its claim to the allocation of attorney fees at trial by failing to object. In *Oxford Finance Companies, Inc. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991), the court relied on *Home Sav. Ass'n v. Guerra, supra*, noting that the *Guerra* court's position was consistent with a determination that a buyer's recovery against a creditor/assignee is limited. The court held that the buyer could recover only the attorney fees that resulted from her attorney's pursuit of claims against the assignee lender.

The National Consumer Law Center (Center), in its treatise on unfair and deceptive acts and practices, states:

> The purpose of attorney fees is to encourage settlement, make it economically feasible for consumers to bring small claims, and to discourage sellers and creditors from using their superior legal resources to wear down the consumer. All of these purposes would be thwarted if attorney fees were lumped in with the recovery on the merits and capped at the amount of the creditor's maximum liability.

Jonathan Sheldon et al., Unfair and Deceptive Acts and Practices, § 6.6.3.5 at 614 (6th ed. 2004). The Center stated that the "creditor's liability for the consumer's attorney fees should not be capped by the creditor's maximum liability for seller-related claims." *Id.* Because the right to recover is based on a deceptive practices statute, not on the FTC Holder Rule, the phrase "'recovery hereunder'" should not apply to the recovery of attorney fees and should not be subject to the cap. *Id.*

Some courts have allowed attorney fees but limited the amount under the FTC Holder Rule. The federal court in Louisiana held that the plaintiff could recover a share of attorney fees, "provided that the maximum recovery by any plaintiff may not exceed the amount paid [the holder] by that plaintiff." *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405, 410 (W.D. La. 1998).

In *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411 (W.D. La. 1998), the court stated that the purpose of the language in the FTC Holder Rule is to not allow a consumer to recover more than he has paid. The court stated:

> A rule of unlimited liability would place the creditor in the position of an insurer or guarantor of the seller's performance. This court does not construe this to be the purpose of the FTC rule. Accordingly, this court holds that a creditor's derivative liability for seller misconduct under the FTC rule is limited to the amount paid by the consumer under the credit contract. . . . [E]ach lender's liability is limited to the amount paid to it by that plaintiff.

Id. at 417. See, also, *Simpson v. Anthony Auto Sales, Inc., supra*; *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987).

The *Riggs* court awarded each plaintiff his or her actual damages, the costs of the action, and the "lender's pro rata share of reasonable attorney's fees, provided that the maximum recovery by any plaintiff may not exceed the amount paid the lender by that plaintiff." 32 F. Supp. 2d at 417.

The Ohio Court of Appeals held that attorney fees were not "claims" that the consumer could assert under the FTC Holder Rule where the assignee was not involved in effecting consumer transactions. *Hardeman v. Wheels, Inc.*, 56 Ohio App. 3d 142, 565 N.E.2d 849 (1988). The assignee should not be subject to claims which "encompass penalties specifically designed to be assessed against the supplier . . . for the supplier's statutory or common-law infractions." *Id*. at 146, 565 N.E.2d at 853.

The State argues that the fee award should not be capped by the FTC Holder Rule's language and cites another section of the Center's treatise, which states:

> If this limit applied to attorney fees as well, this would effectively insulate holders from such awards, even if they refused to reach reasonable settlements of [defective practices] claims. Courts have thus found that the holder is liable for the consumer's attorney fees, even if these fees exceed the amount of the debt, at least for attorney fees incurred to overcome the holder's denial of liability.

Jonathan Sheldon et al., Unfair and Deceptive Acts and Practices, § 8.8.9 at 812 (6th ed. 2004).

[9] We agree with the federal court's interpretation in *Riggs v. Anthony Auto Sales, Inc., supra*, that the FTC Holder Rule limits a debtor's recovery to the amounts paid by the debtor. We conclude that under the FTC Holder Rule, the maximum recovery

by any plaintiff may not exceed the amount paid to the holder by that plaintiff; the debtor may not recover more than the amount the debtor paid. In this case, Jayco was paid $96,308.21 by CCF consumers and judgment was entered against Jayco in that amount, along with interest and costs.

[10] In the cases cited above, the claims were brought by the consumers. Here, the petition was filed by the State through the Attorney General, and it is the State which seeks attorney fees for the time spent by its Attorney General. A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). We find no abuse of discretion in the district court's award which held that the total recovery from Jayco could not exceed $96,308.21, the amount paid by the consumers to Jayco, plus court costs of $10,457.14 and interest at the rate of 7.094 percent per annum. The award was proper under the FTC Holder Rule. The State's cross-appeal asserting that it should be able to recover attorney fees is without merit.

[11] Jayco also argues that it should not have been subject to injunctive relief, which is available under the CPA and the UDTPA but not provided for in the FTC Holder Rule. We disagree. Under the FTC Holder Rule, Jayco is subject to the same claims and defenses that a consumer might have against CCF, the originator of the contract. A consumer can seek equitable relief under both the CPA and the UDTPA. See §§ 59-1609 and 87-303. The FTC Holder Rule does not limit the type of remedies that can be sought against a holder in due course. The district court was correct in granting the injunctive relief.

3. Remaining Assignments of Error

[12] Jayco asserts that the district court abused its discretion in relying on irrelevant evidence and evidence not identified in the pretrial order. However, Jayco does not identify any specific evidence or testimony that was irrelevant and erroneously received by the district court. In a bench trial, the court is presumed to have considered only competent and relevant evidence in making its decision. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). In a review de novo on the record, an appellate court reappraises the evidence

as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). This court tries factual questions de novo on the record and does not consider any impermissible or improper evidence. See *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). Our de novo review of the record does not reveal that the district court abused its discretion in the admission of evidence in contravention to the pretrial order.

[13] Jayco also claims the district court erred in failing to grant judgment to it under § 87-303.01(1), which provides that an "unconscionable act or practice by a supplier in connection with a consumer transaction" is a violation of the UDTPA. Jayco argues that the CCF contracts were not unconscionable. However, the district court made no findings of fact or conclusions of law as to the unconscionability of the actions of CCF or Jayco. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007). We need not address this alleged error any further.

We find no merit to the remaining assignments of error asserted by Jayco.

VI. CONCLUSION

The judgment of the district court is affirmed. The cross-appeal has no merit, and it is dismissed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
STEPHEN C. KUHL, APPELLANT.
755 N.W.2d 389

Filed September 5, 2008. No. S-06-1393.

1. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

2. **Judgments: Appeal and Error.** When deciding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.
3. **Pleas: Appeal and Error.** Withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
4. **Evidence: Waiver: Appeal and Error.** A defendant waives the right on appeal to assert prejudicial error concerning evidence received without objection.
5. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
6. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.
7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's determination is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **Drunk Driving: Blood, Breath, and Urine Tests: Evidence: Proof.** A driving under the influence offense can be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test.
9. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
10. **Drunk Driving: Evidence: Proof.** To show a violation for driving under the influence, the State must prove, beyond a reasonable doubt, that the defendant was operating or in actual physical control of a motor vehicle either (1) while under the influence of alcoholic liquor or of any drug, (2) when having a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (3) when having a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath.
11. **Expert Witnesses.** A trial court is not bound to accept the conclusion of a particular expert.
12. ____. The weight and credibility of an expert's testimony are a question for the trier of fact.
13. **Drunk Driving: Blood, Breath, and Urine Tests: Expert Witnesses: Evidence.** The evidence for being guilty of driving with a breath or blood alcohol content over the statutory limit is not necessarily insufficient simply because the defendant's expert testimony as to the margin of error is not specifically rebutted by expert testimony from the State.
14. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** A test made in compliance with the statutory scheme, and its corresponding regulations, is sufficient to make a prima facie case on the issue of blood alcohol concentration.

15. ____: ____: ____. There are four foundational elements the State must establish for admissibility of a breath test in a prosecution for driving under the influence: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services Regulation and Licensure, and (4) that all other statutes were satisfied.

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 Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of Court of Appeals affirmed.

Steven Lefler, of Lefler Law Office, for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In a bench trial, Stephen C. Kuhl was found guilty of driving under the influence (DUI) in violation of Omaha Mun. Code, ch. 36, art. III, § 36-115 (2001). The conviction was based on the trial court's finding that Kuhl was operating a motor vehicle while having a concentration of at least .08 of 1 gram or more by weight of alcohol per 210 liters of his breath. Kuhl argues that the trial court should have given him the benefit of the margin of error for the machine used to test his breath alcohol content. His expert's testimony was not rebutted by the State. He also claims that his right to confront witnesses against him was violated by the admission of the test results when Kuhl did not have access to the machine's source code. We affirm.

BACKGROUND

On May 12, 2005, at approximately 9:40 p.m., Kuhl was pulled over for speeding. Officer Steven J. Garcia noticed that Kuhl had an odor of alcohol emanating from him and that he

had slurred speech. Kuhl admitted to having consumed four beers over the course of the evening, and Garcia asked Kuhl to take some field sobriety tests. The details of these tests are not relevant to this appeal, because the trial court found that there was insufficient evidence to establish a relationship between Kuhl's field sobriety test results and his ability to operate a motor vehicle. Kuhl was taken to the police station, where he submitted to an analysis of his breath by a DataMaster 130457 machine at approximately 10:40 p.m. The test yielded a result of .100 of 1 gram of alcohol per 210 liters of breath.

Kuhl was charged with violation of Omaha Mun. Code § 36-115, and, during discovery, Kuhl sought the "source code" for the DataMaster, which Kuhl explained was the "underlying computer technology in language that tells the machine to do what it's supposed to do." The parties stipulated that the State did not have the source code in its possession and that the manufacturer of the DataMaster would not provide the source code to the State. The trial court found that the source code was not within the State's "possession, custody, or control," as would be required to compel discovery under Neb. Rev. Stat. § 29-1914 (Reissue 1995).

At trial, Officer James Brady, a senior crime laboratory technician with the Omaha Police Department, testified about the maintenance of the DataMaster, the holders of various permits to both maintain and conduct tests on the DataMaster, and the documentation relating to maintenance of the machine. Patricia A. Osier, a crime laboratory technician, testified about the administration of the test conducted on Kuhl. The test results were admitted into evidence without objection, and the State concluded its case in chief.

Dr. John Vasiliades, an expert in the field of forensic toxicology, testified on behalf of Kuhl. Vasiliades explained the chemical processes by which alcohol is ingested, absorbed, and eliminated, and he described random increases and decreases in breath alcohol called "spiking." He testified further that the infrared spectrophotometric technique used by the DataMaster did not always distinguish alcohol from other volatile substances that might be present for other reasons—for example, because the subject had been around solvent fumes. Vasiliades

opined that the test was inaccurate because the "partition ratio" used to extrapolate the subject's blood alcohol from the breath sample did not reflect the average of the population. He also felt that the test did not meet the standards of forensic toxicology because it took two readings of the same breath sample rather than two separate breath samples. He opined that, "[f]rom the forensic point of view, if you can not [sic] show duplication, the result should not be used for forensic purposes." Vasiliades noted studies showing that infrared spectrophotometric breath alcohol tests might inaccurately read "mouth alcohol" that could have returned to the oral cavity if the subject burped.

Based on his training and experience, Vasiliades stated his opinion within a reasonable degree of scientific certainty that the margin of error for the DataMaster was plus or minus .03 grams. In support of this opinion, Vasiliades cited a study done 15 years earlier on a different version of the DataMaster machine. In that study, 2,668 individuals had given two consecutive breath samples in the DataMaster, and the average correlation between the breath alcohol reading for the two breaths was ".95." Vasiliades described this as the "Standard Error of Estimate" at "one standard deviations." But, he explained that "[f]or forensic purposes you need to multiply that times three, because we want to be 100 percent certain of the results which we report. . . . Margin of errors on any . . . analytical technique, you need to go up three standard deviations." When questioned further regarding the study on which his opinion was based, Vasiliades testified that he was giving the current DataMaster the "benefit of the doubt, because your data may be worse than that, I don't know. Unless you do the study, and actually you probably should do that study to show that — what your margin of error is."

The trial court found Kuhl guilty of DUI based solely on its finding that Kuhl was operating a motor vehicle while having a concentration of at least .08 of 1 gram or more by weight of alcohol per 210 liters of his breath. The trial court and the Nebraska Court of Appeals affirmed the judgment.[1] We granted Kuhl's petition for further review.

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[1] See *State v. Kuhl*, 16 Neb. App. 127, 741 N.W.2d 701 (2007).

ASSIGNMENTS OF ERROR

Kuhl asserts, consolidated and restated, that the Court of Appeals should have reversed his conviction because (1) he was unable to examine the source code for the DataMaster machine used for the test, (2) the trial court failed to admit evidence concerning the importance of the DataMaster source code, (3) the trial court denied Kuhl's request to withdraw his plea in order to attack the constitutionality of a statute and ordinance that allegedly create a "rebuttable presumption" of guilt once test results are entered into evidence, and (4) the trial court failed to apply the unrebutted .03 margin of error testified to by Kuhl's expert witness.

STANDARD OF REVIEW

[1] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[2]

[2] When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court.[3]

[3] Withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.[4]

ANALYSIS

Source Code

Kuhl's first argument is that the admission of the Breathalyzer results when Kuhl did not have access to the source code of the machine violated his right to confrontation under the Sixth Amendment to the U.S. Constitution. The trial court found that the source code was not within the State's "possession,

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[2] *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

[3] *Id.*

[4] *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

custody, or control," as would be required to compel discovery under § 29-1914. Kuhl does not challenge this finding. At trial, Kuhl did not attempt to serve a subpoena duces tecum on the DataMaster manufacturer. Still, according to Kuhl, "the State should be required to make every reasonable attempt to recover the source code, and, if the patent holder is still uncooperative, then that is when the court needs to evaluate the importance of a trade secret as opposed to a fundamental right guaranteed by our Constitution."[5] He then concludes: "If the State is unwilling or unable to turn over the source code, the results of the breath test should be inadmissible . . . ."[6]

[4] While Kuhl may have made these arguments during the pretrial discovery hearing, there is nothing in the record to reflect that Kuhl objected to the admission of the test results which he now asserts violated his right to confrontation. A defendant waives the right on appeal to assert prejudicial error concerning evidence received without objection.[7] Thus, in the absence of plain error, we cannot review Kuhl's claim that the admission of the DataMaster results violated his right to confrontation.[8]

[5] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[9] We find no plain error in the admission of the DataMaster test results in this case.[10] Kuhl's first assignment of error is without merit.

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[5] Brief for appellant in support of petition for further review at 3.

[6] *Id.*

[7] See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[8] See *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002).

[9] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[10] See, e.g., *U.S. v. Washington*, 498 F.3d 225 (4th Cir. 2007); *City of Fargo v. Levine*, 747 N.W.2d 130 (N.D. 2008); *State v. Chun*, 194 N.J. 54, 943 A.2d 114 (2008); *State v. Crager*, 116 Ohio St. 3d 369, 879 N.E.2d 745 (2007); *Wimbish v. Com.*, 51 Va. App. 474, 658 S.E.2d 715 (2008).

And having so found, we can find no error in the court's refusal to allow Kuhl's offer of proof of an expert witness to show the importance of a source code to challenging the breath test results. Therefore, Kuhl's second assignment of error is also without merit.

Withdrawal of Plea

[6,7] Next, Kuhl argues that the trial court erred in refusing to allow him to withdraw his plea. Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.[11] Withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.[12] An abuse of discretion occurs when a trial court's determination is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[13]

At the pretrial hearing, Kuhl argued that he should be allowed to withdraw his plea as follows:

> I think I'm 99% percent [sic] sure you probably won't let me do this, I'd like to withdraw my previous entered pleas of not guilty, and allow me to argue point number 3 in my motion about the fact that the use of the machine creates a rebuttable presumption, therefore, it's unconstitutional, because I think it invades my client's Fifth Amendment Rights. Obviously, in the future, from now on, I — before my client tenders a plea, I will be found [sic] an appropriate motion to quash or the demurer [sic]. To attack the constitutionality, I have in fact, noticed in, the attorney general's office as I'm required to do so, whenever I ack- the cons- — attack the constitutionality with particular statute. So I make that small pitch.

Kuhl did not present any evidence in support of his motion to withdraw the plea.

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[11] *State v. Liston*, 271 Neb. 468, 712 N.W.2d 264 (2006).

[12] *State v. Schneider, supra* note 4.

[13] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[8] A DUI offense can be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test.[14] In *State v. Kubik*,[15] we held that there was a rational relationship between proscribing a particular concentration of breath alcohol and the purpose of prohibiting people from driving while under the influence of drugs or alcohol. In addition, in other cases, we have said that it is a judicial function to determine whether the breath test evidence is sufficient to sustain a conviction[16] and that submission of the blood alcohol test results do not create a "presumption of guilt."[17] We find no abuse of discretion in the trial court's refusal to allow Kuhl to withdraw his plea.

Margin of Error

Finally, Kuhl asserts that under our case law, if the defendant presents unrebutted evidence at trial as to the margin of error for the breath test reading, then that defendant must be given the benefit of that margin of error. In other words, he asserts that it is clear error for the trial court to find the defendant guilty of an impermissible breath alcohol content when the result, calculated with the margin of error established by such unrebutted testimony, would fall below the legal limit.

[9] While Kuhl failed to make any motions for directed verdict either at the close of the State's case in chief or at the close of all the evidence, he may still challenge the sufficiency of the evidence to sustain his convictions.[18] Thus we will address Kuhl's argument that the evidence was insufficient to support his DUI conviction because Vasiliades presented the only evidence as to the DataMaster's margin of error, which would have placed Kuhl's breath test results below the statutory limit of .08. When reviewing a criminal conviction for sufficiency of

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[14] See, e.g., *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

[15] *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990).

[16] *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987).

[17] *State v. Dush*, 214 Neb. 51, 54, 332 N.W.2d 679, 682 (1983).

[18] See *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[19]

[10] A DUI violation is a single offense that can be proved in more than one way.[20] The State must prove, beyond a reasonable doubt, that the defendant was operating or in actual physical control of a motor vehicle either (1) while under the influence of alcoholic liquor or of any drug, (2) when having a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (3) when having a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath.[21]

To prove blood or breath alcohol content, Neb. Rev. Stat. § 60-6,201 (Reissue 2004) sets forth that, to be considered valid, the tests must be performed according to methods approved by the Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit from that department, a licensed health care provider, or a certified clinical laboratory. Section 60-6,201(1) provides that any test,

> if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor or drugs or involving driving or being in actual physical control of a motor vehicle when the concentration of alcohol in the blood or breath is in excess of allowable levels.

In DUI cases where the State's own experts establish that the test used to measure the defendant's alcohol level has an inherent margin of error that, if applied in the defendant's favor, would result in a measurement below the legal limit,

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[19] *Id.*

[20] *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

[21] Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

we have held that the State has failed to meet its burden of proof for a conviction based solely on test results.[22] In *State v. Bjornsen*, where the State's chemist testified that the margin of error could place the test results below the legal limit, we rejected the State's argument that statutes stating that tests made in conformity therewith "shall be competent evidence" make any variances inherent in the testing process irrelevant. We explained:

> While the Legislature has the acknowledged right to prescribe acceptable methods of testing for alcohol content in body fluids and perhaps even the right to prescribe that such evidence is admissible in a court of law, it is a judicial determination as to whether this evidence is sufficient to sustain a conviction, if the evidence is believed. The Legislature has selected a particular percent of alcohol to be a criminal offense if present in a person operating a motor vehicle. It is not unreasonable to require that the test, designed to show that percent, do so outside of any error or tolerance inherent in the testing process.[23]

In *State v. Adams*, where the State's expert testified that the margin of error inherent to the blood test conducted could place the defendant's levels under the legal limit, we said: "[W]hen there is a margin of error in a chemical test for alcohol, the test result must be adjusted and the defendant given the benefit of the adjusted reading."[24]

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[22] See, *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). See, also, *State v. Munoz*, 11 Neb. App. 266, 647 N.W.2d 668 (2002).

[23] *State v. Bjornsen, supra* note 22, 201 Neb. at 710-11, 271 N.W.2d at 840. See, also, *State v. Burling, supra* note 16; *Haynes v. State, Dept. of Public Safety*, 865 P.2d 753 (Alaska 1993); *State v. Boehmer*, 1 Haw. App. 44, 613 P.2d 916 (1980). Compare, e.g., *Wieseler v. Prins*, 167 Ariz. 223, 805 P.2d 1044 (Ariz. App. 1990); *State v. Rucker*, 297 A.2d 400 (Del. Super. 1972); *Nugent v. Iowa Dept. of Transp.*, 390 N.W.2d 125 (Iowa 1986) (revocation).

[24] *State v. Adams, supra* note 22, 251 Neb. at 467, 558 N.W.2d at 302.

We also applied that principle in *State v. Burling*.[25] At the time *Burling* was decided by this court, the DUI statute necessitated the conversion of the chemical analysis of a subject's breath to the amount by weight of alcohol in a subject's blood.[26] The defendant presented expert testimony that the breath test device used an inaccurate conversion formula and that giving the defendant the benefit of the actual range of breath-to-blood distribution ratios in the population would place his blood alcohol level below the legal limit. The State failed to present any evidence to controvert this testimony. We held that because the testimony as to the margin of error was uncontroverted and because we must adjust the defendant's test results so as to give the defendant the benefit of a margin of error, the evidence was clearly insufficient to establish a prohibited blood alcohol level.[27]

In contrast, in *State v. Hvistendahl*,[28] the State's expert and an expert called by the defendant disputed the inherent margin of error for the testing device. We explained that "when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt."[29]

[11,12] In *State v. Baue*,[30] we relied on *Hvistendahl* and departed from our conclusion in *Burling.* We noted that the trial court is not bound to accept the conclusion of a particular expert.[31] And "[w]hether an adjustment is required is dependent upon the credible evidence in each case."[32] The weight and

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[25] *State v. Burling, supra* note 16.

[26] See Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

[27] *State v. Burling, supra* note 16.

[28] *State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987).

[29] *Id.* at 318, 405 N.W.2d at 276.

[30] *State v. Baue, supra* note 20.

[31] See, *id.*; *State v. Hvistendahl, supra* note 28.

[32] *State v. Babcock*, 227 Neb. 649, 653, 419 N.W.2d 527, 530 (1988). See, also, *State v. Hvistendahl, supra* note 28; *State v. Baue, supra* note 20.

credibility of an expert's testimony are a question for the trier of fact.[33]

Applying these principles, in *Baue*, we held that the trial court was correct in denying the defendant's motion in limine to exclude the defendant's breath test results from the jury. Vasiliades testified in *Baue* as well, and he opined that the Intoxilyzer Model 4011AS, the device used in that case, had an inherent analytical error of plus or minus .03. If this margin had been applied in the defendant's favor, his test results would have fallen below the legal limit. The State offered no rebuttal to Vasiliades' testimony during the hearing on the motion in limine. But we explained:

> [W]hile Vasiliades' opinion with respect to the margin of error was not specifically rebutted during the pretrial hearing at which he testified, it was not binding upon the trial court, and [the defendant] was not entitled to have the test result adjusted downward as a matter of law at that time.[34]

We further stated that to the extent *Burling* was inconsistent with our holding, it was overruled.

Kuhl points out that in *Baue*, the testimony at trial, as opposed to the hearing on the motion in limine, was controverted. Thus, he asserts that our holding in *Burling* is still valid and stands for the proposition that the test results must be adjusted to unrebutted *trial* testimony as to the margin of error.

In *Baue*, we observed that the State presented evidence at trial to dispute Vasiliades' opinion as to the margin of error (the State's expert testified that the test was accurate to within 5 percent). We then cited *Hvistendahl* and concluded that "the trial court did not err in refusing to adjust the test result as a matter of law and in submitting the issue to the jury for determination."[35]

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[33] See *id.*

[34] *State v. Baue, supra* note 20, 258 Neb. at 979, 607 N.W.2d at 201.

[35] *Id.*

[13,14] We recognize that our reference to *Hvistendahl* and the facts of *Baue* may have caused some confusion. To be clear, we hold that the evidence for being guilty of driving with a breath or blood alcohol content over the statutory limit is not necessarily insufficient simply because the defendant's expert testimony as to the margin of error is not specifically rebutted by expert testimony from the State. It is a longstanding principle that a test made in compliance with the statutory scheme, and its corresponding regulations, is sufficient to make a prima facie case on the issue of blood alcohol concentration.[36] That scheme does not require evidence as to any margin of error for the testing device. And the trial court is not required to accept as credible any expert testimony called by the defendant to rebut the State's prima facie case.

[15] Currently, § 60-6,201 requires that a chemical test be performed in accordance with the procedures approved by the Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit issued by that department for such purpose.[37] We have explained that there are four foundational elements the State must establish for admissibility of a breath test in a DUI prosecution: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services Regulation and Licensure, and (4) that all other statutes were satisfied.[38]

Kuhl does not argue that this prima facie case was not made during his trial. While Kuhl attempted to rebut this prima facie case with Vasiliades' expert testimony, the trial court apparently did not find this testimony to be credible. We note that Vasiliades himself admitted that he knew of no studies that specifically related to the DataMaster used to test Kuhl and that

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[36] *State v. Kubik, supra* note 15. See, also, e.g., *State v. Fox*, 177 Neb. 238, 128 N.W.2d 576 (1964).

[37] See *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997).

[38] See *State v. Baue, supra* note 20.

such a particularized study would be necessary to accurately access the machine's margin of error. We find the evidence sufficient to support the trial court's determination that Kuhl was driving while having a concentration of at least .08 of 1 gram or more by weight of alcohol per 210 liters of his breath.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of Appeals affirming the judgment of the county court.

AFFIRMED.

MICHAEL G. PICK ET AL., APPELLEES, V.
NORFOLK ANESTHESIA, P.C., APPELLANT.
755 N.W.2d 382

Filed September 5, 2008. No. S-07-264.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous.
2. ____: ____. 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.
3. **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.
4. **Employer and Employee: Employment Contracts: Wages.** A payment will be considered a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.
5. ____: ____: ____. Absent an express agreement otherwise, an employee ordinarily forfeits the right to receive a bonus by resigning before the corresponding bonus period ends.

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

David R. Buntain, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Seven nurse anesthetists sued Norfolk Anesthesia, P.C., their former employer, seeking unpaid bonuses under the Nebraska Wage Payment and Collection Act (NWPCA). The nurse anesthetists, all of whom resigned on September 16, 2005, claim that Norfolk Anesthesia violated the NWPCA when it failed to pay them their annual bonuses. A bench trial was held in the district court for Madison County and ultimately resulted in a judgment in favor of the nurse anesthetists. The court awarded the nurse anesthetists damages and attorney fees. Norfolk Anesthesia now appeals. We reverse for reasons set forth below.

BACKGROUND

Norfolk Anesthesia was formed in 1995 by Dr. James Bertus. Dr. Cynthia Ferris joined the practice later that year, as did the seven nurse anesthetists in this case. In 1996, Ferris became a shareholder of the company. Dr. Chris Price joined the practice in 2003. Price joined the practice as an employee and did not become an actual shareholder until 2004.

Since its inception, Norfolk Anesthesia had a practice of paying out annual bonuses to physicians and nurse anesthetists. Until 2004, all of the bonuses were distributed at the company's annual holiday party which was held sometime after Thanksgiving and before Christmas.

In 2004, Bertus left Norfolk Anesthesia. The company bought out Bertus' shares, and Price replaced Bertus as co-owner of Norfolk Anesthesia with Ferris. Shortly after Price became a shareholder, he suggested that the physicians take their bonuses on a quarterly, rather than annual, basis. Ferris agreed. The nurse anesthetists continued to receive their bonuses on an annual basis at the company's holiday party.

On August 31, 2005, Price left Norfolk Anesthesia, making Ferris the sole remaining shareholder. There is some evidence that Price's decision to leave was brought about by a personal rift with Ferris. The company bought out Price's interest for an undisclosed amount. On September 2, 2 days after Price left, the seven nurse anesthetists collectively notified Ferris of their intent to resign effective September 16. At the time of their departure, the full-time nurse anesthetists were earning roughly $120,000 per year before bonuses. Ferris was the sole remaining employee in the office after the nurse anesthetists resigned, and Norfolk Anesthesia wound up its operations shortly thereafter. Ferris did not pay the nurse anesthetists their annual bonuses for 2005.

The nurse anesthetists filed an amended complaint on January 3, 2007, seeking bonuses that had "accumulated and accrued" by the time they resigned. A bench trial was held on January 31. Testimony was presented by the seven nurse anesthetists, Ferris, and Lee Brandt, the bookkeeper for Norfolk Anesthesia. The nurse anesthetists testified that they were promised a bonus in their initial oral employment agreement with Bertus. There was testimony from several nurse anesthetists that pursuant to their agreement with Bertus, the bonuses came from the year-end profits of the company and were distributed at the company's holiday party. Several of the nurse anesthetists also testified that bonuses were dispersed on a 2:1 ratio such that the doctors would share two-thirds of the year-end profits, while the remaining one-third was split among the nurse anesthetists.

Brandt, the bookkeeper, testified that after the physicians switched to a quarterly bonus schedule, he began earmarking funds each quarter for the nurse anesthetists' year-end bonuses. On Brandt's worksheets, the funds were labeled "CRNA Bonus Accrual." ("CRNA" stands for "Certified Registered Nurse Anesthetist," the formal name for nurse anesthetists like those formerly employed at Norfolk Anesthesia.) Brandt made two such accruals for the first and second quarters of 2005, respectively. As of March 2005, $40,000 was allocated for the nurse anesthetists' bonuses. Another accrual was entered on the June 2005 worksheet in the amount of $48,000.

Brandt stated that earmarking the funds in this fashion helped him keep track of the money that would eventually be paid to the nurse anesthetists as part of their year-end bonuses. Brandt testified that Ferris knew of, but did not object to, his decision to track the money in this manner. (Ferris testified that she objected to Brandt's setting aside money in this fashion as soon as she learned about it.)

Brandt also testified that due to the buyout of Price's interest in Norfolk Anesthesia, the company did not have sufficient profits to pay the $88,000 that had accrued for the nurse anesthetists' bonuses. According to Brandt, the buyout left the company with a mere $15,251 in profits as of September 15, 2005, and paying $88,000 in accrued bonuses to the nurse anesthetists would result in a loss of $72,749 to the company.

Ferris reaffirmed the idea that the physicians' and nurse anesthetists' bonuses were to be based on a 2:1 ratio from the year-end profits of the company. However, Ferris denied the bonuses were intended to enhance productivity. She also testified that between 2001 and 2003, three employees—one physician and two nurse anesthetists—left the company in the middle of the calendar year. None of these individuals received a whole or partial bonus even though, as the nurse anesthetists testified, one of these employees specifically requested her bonus.

The district court issued its order on February 12, 2007. The court found that in their verbal employment agreements with Norfolk Anesthesia, each of the nurse anesthetists was promised an annual bonus from the corporation's year-end profits. The court also found that the bonuses were paid according to the 2:1 ratio discussed earlier. It is not clear, however, whether the court found that this specific ratio was part of the bonus agreement between Bertus and the nurse anesthetists. The court did find, however, that there was no stated condition that the nurse anesthetists had to remain on staff for the full year in order to receive their bonuses. Instead, the court concluded that the only stated condition was that the corporation had some profit at the end of the year. As such, the court concluded the bonuses were wages under the NWPCA.

While the court acknowledged that due to the buyout of Price's interest, the company had a profit of only $15,251 as of

September 2005, it refused to accept that number because "the costs of buying out owners is not a proper deduction" to count against a corporation's profits. Finding no other evidence of Norfolk Anesthesia's actual net profits as of September 2005, the court concluded that the nurse anesthetists were entitled to the $88,000 in bonus accrual.

The court entered an award in the amount of $88,000 in damages, with $13,333 to each of the six full-time nurse anesthetists and $8,002 to the lone part-time nurse anesthetist. The court awarded an additional $3,333 in attorney fees to each of the six full-time nurse anesthetists and $2,000 in attorney fees to the part-time nurse anesthetist. Finally, the court ordered Norfolk Anesthesia to pay court costs. Norfolk Anesthesia appealed to the Court of Appeals, and we advanced the case to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Norfolk Anesthesia assigns, restated, that the district court erred when it (1) found that the nurse anesthetists were entitled to payment of their annual bonuses for 2005 under the NWPCA and (2) awarded the nurse anesthetists damages in the amount of $88,000.

STANDARD OF REVIEW

[1,2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous.[2] 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.[3]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

[3] *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

[3] 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.[4]

ANALYSIS

[4] The NWPCA essentially permits an employee to sue his or her employer if the employer fails to pay the employee's wages as they become due.[5] "Wages" are defined as "compensation for labor or services rendered by an employee, including fringe benefits, 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."[6] On the basis of this language, we have held that a payment will be considered a wage subject to the NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.[7] In *Knutson v. Snyder Industries, Inc.*,[8] we held that a bonus qualifies as a wage subject to the NWPCA if these three criteria have been satisfied.

The district court found—and the parties agree—that the bonuses at issue were compensation for labor or services. The parties dispute, however, whether such payment was previously agreed to and whether the conditions stipulated have been met.

Regarding the existence of an agreement, Norfolk Anesthesia claims that there was no express agreement to pay bonuses. But the nurse anesthetists all testified that an annual bonus was part of an oral employment agreement entered into with Bertus when they were hired. The district court credited the nurse anesthetists' testimony and found that there was a prior

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[4] *Id.*; *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[5] See Neb. Rev. Stat. § 48-1231 (Reissue 2004).

[6] Neb. Rev. Stat. § 48-1229(4) (Supp. 2007).

[7] See *Knutson v. Snyder Industries, Inc.*, 231 Neb. 374, 436 N.W.2d 496 (1989).

[8] *Id.*

agreement between the company and the nurse anesthetists regarding an annual bonus in late November or early December each year. Norfolk Anesthesia does not point to any evidence which might show that the district court clearly erred in making this determination.

This leaves only the third element—whether the conditions stipulated have been met regarding payment of the bonuses to the nurse anesthetists. The district court found that the only express condition which would trigger Norfolk Anesthesia's obligation to pay the bonuses was that it had a profit at the end of the year. As such, the court concluded that there was no express condition that the nurse anesthetists stay on throughout the entire year in order to receive the bonuses. Although we do not quarrel with this factual finding, we disagree that the lack of such an express condition is dispositive.

In *Knutson*, an employer, Snyder Industries, Inc., refused to pay a bonus to an employee, Linda Knutson, who voluntarily resigned before receiving a bonus that she would have received had she remained on staff. As is true here, Snyder Industries' sole reason for refusing to pay Knutson the bonus was the fact she "was not employed at the time the bonus was to be paid."[9] We rejected this justification and awarded Knutson her bonus.

We recognized a distinction in *Knutson* between bonuses designed to "improve productivity" and those intended to "retain long-term employees."[10] Our conclusion that Knutson was entitled to a bonus was, at least in part, based on the fact that "the evidence in this case would support, if . . . not compel, a finding that the purpose of the bonus plan was to improve productivity."[11]

[5] It is important to note, however, that *Knutson* did not involve an unqualified annual bonus. Instead, an express part of the bonus agreement was that the bonus would be paid provided "a certain profit level was reached *for the fiscal year*

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[9] *Id.* at 375, 436 N.W.2d at 498.

[10] *Id.* at 377, 436 N.W.2d at 499.

[11] *Id.*

ending July 31, 1985."[12] While Knutson did not remain on staff long enough to actually receive her bonus, "she was employed at the end of the fiscal year."[13] Viewed in light of that fact, *Knutson* does not disturb the commonsense notion that absent an express agreement otherwise, an employee ordinarily forfeits the right to receive a bonus by resigning before the corresponding bonus period ends.[14]

In *Knutson*, under the terms of the bonus agreement, the bonus period began on January 15, 1985, and concluded with the close of the company's fiscal year on July 31. By remaining on staff beyond July 31, Knutson fulfilled her obligation to remain on staff throughout the bonus period. But the same cannot be said here. All parties agree that this was an annual bonus based on the year-end profits from that calendar year and paid at the company's holiday party between late November and early December of each year. The relevant bonus period, then, was from late November or early December 2004 to late November or early December 2005. Therefore, when the nurse anesthetists resigned in September 2005, they, unlike Knutson, failed to remain on staff for the duration of the bonus period.

As noted above, an employee could still receive an annual bonus despite a premature resignation if the employer expressly promised to pay the bonus under such circumstances. But as Norfolk Anesthesia points out, the nurse anesthetists have not shown anything to suggest that anyone at Norfolk Anesthesia made such a promise. We conclude, therefore, that the nurse anesthetists lost their right to receive this bonus by resigning prematurely.

CONCLUSION

We conclude that under these facts, the nurse anesthetists forfeited their right to receive the annual bonus by resigning before late November 2005, the earliest date on which the

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[12] *Id.* at 375, 436 N.W.2d at 498 (emphasis supplied).

[13] *Id.*

[14] Cf. *Sinnett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970).

bonus period for 2005 would have concluded. Because there was no express agreement by Norfolk Anesthesia to pay the bonus despite such a premature resignation, we conclude that the nurse anesthetists are not entitled to the annual bonus from 2005, and we reverse the district court's judgment.

REVERSED.

WRIGHT, J., not participating.

GERRARD, J., concurring.

I reluctantly concur in the result reached by the majority, but write separately to make clear the basis for my conclusion that the nurse anesthetists were not entitled to the annual bonus under these circumstances.

According to the nurses anesthetists' testimonies, their base salary was generally considered insufficient and the year-end bonus was intended to supplement this deficiency. Indeed, the record indicates that at some point in May 2004, Ferris presented the nurse anesthetists with the option of increasing their monthly salary and decreasing their year-end bonus. But, for whatever unfortunate reason, the nurse anesthetists declined this offer and instead chose to continue receiving a year-end bonus based on the year-end profits from each calendar year.

Given these circumstances, it is apparent that employment through the end of the bonus period was a known and negotiated condition of receiving the bonus. And the nurse anesthetists resigned on September 16, 2005, before the year-end bonuses had been distributed, and before the end of the calendar year upon which the bonuses were to be based on "year-end profits." Because the nurse anesthetists were no longer employed at the time the bonuses were to have been distributed, they did not meet an essential employment condition of receiving the bonuses. Therefore, I concur in the judgment.

THE COUNTY OF SARPY, NEBRASKA, APPELLANT, V. THE CITY OF GRETNA, NEBRASKA, APPELLEE.

755 N.W.2d 376

Filed September 5, 2008. No. S-07-498.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
2. **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.
3. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
4. ____: ____. When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate to determine the judgment to be entered or the action to be taken thereon.
5. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.
6. ____: ____. The law-of-the-case doctrine promotes judicial efficiency and protects the parties' settled expectations by preventing parties from relitigating settled issues within a single action.
7. **Appeal and Error.** The law-of-the-case doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.
8. **Waiver: Appeal and Error.** Under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Lee K. Polikov, Sarpy County Attorney, and Michael A. Smith for appellant.

John K. Green for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The City of Gretna sits entirely within the borders of Sarpy County, Nebraska. This challenge by Sarpy County, related to

annexation ordinances enacted by Gretna, is before us for the third time. In *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004) (*Sarpy I*), we concluded that Sarpy County had standing to challenge the annexations. We reversed the judgment of the district court for Sarpy County which had dismissed the action, and we remanded the cause for further proceedings. On remand, the district court found that the annexation ordinances were valid and further found that, in any event, Sarpy County had not produced evidence of damages.

Sarpy County appealed and claimed as its sole assignment of error that the district court had erred in concluding that Gretna's annexation ordinances were valid. On appeal, we concluded that the annexation ordinances were invalid because the lands Gretna sought to annex were not contiguous or adjacent to the corporate limits of Gretna. See *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007) (*Sarpy II*). We reversed the judgment of the district court and remanded the cause with directions to enter judgment consistent with our opinion.

On remand, Sarpy County filed a motion for accounting, seeking an order for an accounting for fees collected by Gretna. An accounting had been requested by Sarpy County as relief in its amended petition in *Sarpy I*. On April 4, 2007, the district court entered judgment on our mandate without addressing Sarpy County's motion for accounting.

Sarpy County appeals and asserts that the district court erred in failing to address its motion for accounting. We conclude that issues with regard to an accounting were waived by Sarpy County when it did not raise those issues on appeal in *Sarpy II*; therefore, such issues were not part of our mandate and the district court did not err when it did not address such issues on remand. We affirm.

STATEMENT OF FACTS

The facts of the underlying dispute are set forth more fully in *Sarpy I* and *Sarpy II*. In sum, the Gretna City Council adopted ordinances by which it sought to annex certain lands in Sarpy County. The lands Gretna sought to annex included strips of certain highways. On June 20, 2002, Sarpy County

filed a petition in the district court challenging the annexations on various bases. Sarpy County filed an amended petition on August 12 in which it prayed for relief including, inter alia, an order for an accounting of sums collected by Gretna since July 3, 2001, for rezoning applications, building permit fees, and other zoning fees for the areas purportedly annexed pursuant to the ordinances. Gretna filed a demurrer to the amended petition asserting various bases. The district court sustained the demurrer on the basis that Sarpy County lacked standing to bring the action. Sarpy County appealed. We concluded that Sarpy County had standing to challenge the annexations. We reversed the judgment of the district court and remanded the cause for further proceedings. See *Sarpy I*.

On remand, the district court conducted a bench trial. Evidence was adduced regarding the annexations and the nature of the land encompassed thereby. A planning and zoning administrator for Sarpy County also testified as to various fees Sarpy County would have collected but for the annexations. In its judgment entered May 23, 2005, the district court found that the ordinances were valid and further stated, "Even though the ruling was in favor of the Defendant [Gretna], the Plaintiff [Sarpy County] did not produce evidence of damages of any specific losses." The district court entered judgment against Sarpy County and dismissed the action. Sarpy County appealed. In *Sarpy II*, Sarpy County's sole assignment of error on appeal was that the district court erred in entering judgment in favor of Gretna "where the undisputed evidence clearly showed that the statutory requirements of adjacency and contiguity of lands to be annexed to a second-class city were not met." We stated that "[t]he single issue presented in this appeal is whether the two parcels of land which Gretna sought to annex were contiguous or adjacent to its existing corporate limits." 273 Neb. at 95, 727 N.W.2d at 694. We concluded that the annexations were invalid and void because they did not meet the contiguity or adjacency requirement of Neb. Rev. Stat. § 17-405.01 (Reissue 1997). We therefore reversed the judgment of the district court and remanded the cause "with directions to enter judgment consistent with this opinion." 273 Neb. at 98, 727 N.W.2d at 696.

Our decision in *Sarpy II* was filed February 23, 2007. Our mandate was filed in the district court on April 2. That same day, Sarpy County filed a motion for accounting. In its motion, Sarpy County noted that its amended petition asked for an accounting as relief sought and asserted that the district court's prior order did not order an accounting because the court did not find Gretna's ordinances invalid and did not reach the issue whether Sarpy County was entitled to an accounting. Sarpy County asserted that an accounting was appropriate given the evidence adduced in the case and the mandate filed therein. Sarpy County requested that the court order an accounting. On April 4, the district court entered a "Judgment on Mandate" in which it entered judgment pursuant to this court's opinion in *Sarpy II* which related solely to the propriety of the annexations. The district court did not address Sarpy County's motion for accounting in the April 4 judgment or elsewhere.

Sarpy County appeals the April 4, 2007, order.

ASSIGNMENT OF ERROR

Sarpy County asserts that the district court erred when it failed to fully address Sarpy County's motion for accounting and related issues prior to issuance of the final judgment on mandate.

STANDARDS OF REVIEW

[1,2] The construction of a mandate issued by an appellate court presents a question of law. *Pennfield Oil Co. v. Winstrom, ante* p. 123, 752 N.W.2d 588 (2008). On questions of law, we are obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Sarpy County contends that the district court should have considered its motion for accounting on remand pursuant to our mandate in *Sarpy II*. We conclude that the district court ruled against Sarpy County on the accounting issue in the order appealed from in *Sarpy II*, that Sarpy County failed to assign error to such ruling, and that our mandate in *Sarpy II* was not broad enough for the district court to permit Sarpy County

to relitigate issues it had waived on appeal. Accordingly, we affirm.

[3,4] The primary legal issue in this appeal is whether a consideration of Sarpy County's motion for accounting was within the scope of our remand to the district court in *Sarpy II*. After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *Pennfield Oil Co., supra*. In *Sarpy II*, we remanded the cause to the district court "with directions to enter judgment consistent with this opinion." 273 Neb. at 98, 727 N.W.2d at 696. When an appellate court's mandate makes its opinion a part thereof by reference, the lower court should examine the opinion with the mandate. This allows the lower court to determine the judgment to be entered or the action to be taken thereon. *Pennfield Oil Co., supra*. Thus, we examine our opinion in *Sarpy II* to determine whether our mandate permitted the district court to consider Sarpy County's motion for accounting on remand.

In our opinion in *Sarpy II*, we noted that "[t]he single issue presented in this appeal is whether the two parcels of land which Gretna sought to annex were contiguous or adjacent to its existing corporate limits." 273 Neb. at 95, 727 N.W.2d at 694. We concluded that the annexations were invalid and void because they did not meet the contiguity or adjacency requirement of § 17-405.01. We remanded with directions to enter judgment consistent with the opinion; because the opinion addressed only the issue of whether the annexations were valid, the only judgment to be entered by the district court consistent with the opinion was an order declaring the annexations invalid and void.

Sarpy County argues that its request for an accounting should have been considered by the district court on remand, because it was still an open issue or the issue was reopened when we determined that the annexations were invalid and void. However, we note that in the May 23, 2005, order appealed from in *Sarpy II*, the district court stated that although it found in favor of Gretna with regard to the validity of the annexations, it nevertheless further found that Sarpy County "did not produce evidence of damages of any specific losses."

We read this portion of the order as a ruling on the issue of an accounting in which the court found that Sarpy County failed, despite certain evidence, to prove entitlement to such relief. Sarpy County did not assign error to this ruling in its appeal in *Sarpy II*, and we therefore determine that such ruling became the law of the case with regard to an accounting.

[5-7] The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage. *Pennfield Oil Co. v. Winstrom, ante* p. 123, 752 N.W.2d 588 (2008). The doctrine promotes judicial efficiency and protects the parties' settled expectations by preventing parties from relitigating settled issues within a single action. *Id.* The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal. *Id.* Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits. *Id.*

[8] We have recognized that under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision. *Id.* An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal. *Id.* Also, we have recognized that an exception to the law-of-the case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court. *Id.*

We conclude that Sarpy County waived the issue of an accounting when it failed to assign error to the district court's ruling against it on the damage issue in *Sarpy II*. Sarpy County had the opportunity to raise the issue on appeal in *Sarpy II* and had incentive to do so in order to preserve the issue in the event this court ruled in its favor on the issue of the validity of the annexations. There is no credible assertion that there has been a material and substantial difference in the underlying facts justifying an exception to the law-of-the-case doctrine. Sarpy County argues that there is a difference now because the annexations have been declared invalid and an accounting has

become an issue of greater relevance than at the time of the May 23, 2005, order. We find this argument unpersuasive. In *Sarpy II*, Sarpy County appealed from the district court's May 23 order in which the court had determined that the annexations were valid and that Sarpy County had proved no damages. At the time of the appeal in *Sarpy II*, it was apparent that the issue of entitlement to an accounting and damages would become relevant if this court held in Sarpy County's favor on the annexation issue. Sarpy County should have assigned error to the district court's finding of no damages in order to preserve the issue for further proceedings; Sarpy County did not assign such error. Because Sarpy County waived the damages issue on appeal in *Sarpy II*, the district court's finding of no damages in the May 23 order stands as the law of the case.

An appellant waives claims that were decided against it by the trial court if the appellant elects not to raise those issues on appeal. *Pennfield Oil Co., supra*. Sarpy County waived the accounting issue by failing to assign error to the district court's finding of no damages in the May 23, 2005, order from which it appealed in *Sarpy II*. The district court's finding on damages in the May 23 order stands as the law of the case. The issue was not part of our mandate on remand, and the district court did not err when it did not address Sarpy County's motion for accounting.

CONCLUSION

Sarpy County waived its challenge to the district court's finding of no damages when it failed to assign error to the finding in its appeal in *Sarpy II*. Our mandate in *Sarpy II* was not broad enough to permit Sarpy County on remand to relitigate the law of the case regarding damages. We therefore conclude that the district court did not err when it did not address Sarpy County's motion for accounting, and we affirm the district court's order entering judgment in accordance with our mandate in *Sarpy II*.

AFFIRMED.

IN RE INTEREST OF TYLER F., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TYLER F., APPELLANT.

755 N.W.2d 360

Filed September 5, 2008. No. S-07-554.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling.
4. **Miranda Rights.** *Miranda* rights apply only where there has been such a restriction on a person's freedom as to render him or her in custody.
5. **Investigative Stops: Miranda Rights.** In the absence of custody, authorities may freely question a suspect—and use any resulting statements at trial—even without advising a suspect of his or her *Miranda* rights.
6. ____: ____. In resolving whether a suspect was in police custody for *Miranda* purposes, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.
7. **Investigative Stops.** Whether the requisite degree of restraint occurred to render a suspect in custody is to be determined based on how a reasonable person in the suspect's situation would perceive his or her circumstances.
8. ____. A court must examine all of the circumstances surrounding the interrogation and determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.
9. ____. To assist in the circumstantial custody inquiry, courts will find it helpful to employ a six-factor test: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to leave, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of the questioning.
10. **Due Process: Confessions.** If a confession was given involuntarily, then use of the confession at trial violates the defendant's 14th Amendment due process rights.
11. **Confessions: Proof.** The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.
12. ____: ____. The factors used to determine whether an incriminating statement was voluntarily given include whether (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the

promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf, (4) defendant is aware of his constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent.

13. **Confessions: Minors.** A factor to consider in determining the voluntariness of an incriminating statement is whether the suspect was a minor.
14. **Appeal and Error.** Error without prejudice provides no ground for relief on appeal.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

Richard J. Epstein and Nancy A. Rath for appellant.

Donald W. Kleine, Douglas County Attorney, Emily A. Beller, and Benjamin Pinaire for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Tyler F., a minor, appeals his adjudication in the separate juvenile court of Douglas County on allegations of criminal impersonation, count I, and disturbing the peace, count II. According to the allegations, Tyler, posing as one Kimberly V., created an Internet posting to attract men interested in sexual encounters. Several men contacted Kimberly, a married mother of two children, using the contact information included in the post. After a bench trial, the juvenile court found counts I and II of the petition to be true and Tyler was found to be a child as defined by Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006). This appeal followed. We affirm for the reasons set forth below.

II. BACKGROUND

Early in the fall of 2006, Kimberly and Tyler's family had a dispute for reasons that are not entirely clear from the record. In mid-October of that same year, Kimberly began receiving calls and visits to her home from men who were interested in

having sexual relations with her. The men were responding to a message posted under Kimberly's name on "Craigslist," a Web site analogous to the classifieds section of a local newspaper. The Craigslist posting included statements that Kimberly was single and looking to have sexual intercourse with men, and also provided her home address and telephone number. The posting also included photographs of the exterior of Kimberly's home as well as graphic images of women posing nude and engaging in various sexual acts with men.

Kimberly contacted the Omaha Police Department. Officers Paul Milone and Eric Nordby investigated the incident. Based on information supplied by Craigslist and an Internet service provider, the officers determined that the Internet address of the computer used to generate the online posting belonged to Tyler's family's computer. Milone and Nordby then visited Tyler's parents at their home. Tyler's mother told officers that she did not really know how to use the computer. She also stated that Tyler, who was a few months "shy of" his 15th birthday at the time, was the member of the household who used the computer most often. She then gave Milone and Nordby permission to speak with Tyler.

Milone and Nordby, dressed in plain clothes, went to Omaha Central High School (OCHS), where Tyler was enrolled. The officers made contact with an Officer Kelly, a uniformed police officer assigned to OCHS. Kelly asked the school's security guards to bring Tyler to his office. The guards contacted Tyler in his biology class and escorted him to Kelly's office. Milone, Nordby, and Kelly were waiting for Tyler inside the office. The office itself is a very small, windowless room. The door to the office was closed during the questioning. Kelly left the room before the questioning began.

By all accounts, the officers questioned Tyler for approximately 20 minutes. The officers never read Tyler his *Miranda* rights. Tyler initially told the officers that he had no knowledge of the Craigslist posting. However, Tyler eventually confessed after officers explained that the Internet address of the computer used to generate the posting belonged to his family's computer. After confessing to the crime, Tyler was allowed to return to class.

Prior to trial, Tyler attempted to suppress his confession. Milone and Nordby testified for the prosecution at the suppression hearing. Tyler conceded on the witness stand that the officers told him he was not under arrest. Nevertheless, Tyler testified that he did not feel free to leave the interview and that he believed he was obligated to answer the officers' questions. Regarding the details of the interrogation itself, Tyler's account of what transpired differs from the officers' accounts on three key details. First, Tyler testified that he was never told he was free to leave. Milone testified that he and Nordby specifically told Tyler he could leave at any time. Nordby corroborated Milone's testimony. Tyler also testified that the officers threatened to take him into a juvenile detention center for a period of 5 days if he did not "cooperate" with their investigation. Both officers, however, denied that such a threat was ever made. The court specifically credited the officers' testimony in both regards.

Tyler also testified at the suppression hearing that he saw the officers' weapons. However, Milone testified that his weapon was holstered at his hip on his belt and concealed by his suit jacket. Similarly, Nordby testified that he carried his weapon in a shoulder holster near his armpit and that his weapon was also concealed by his jacket during the interrogation. Both officers testified that they did not affirmatively flash their weapons at Tyler. The juvenile court never made a specific finding on this issue, except its more general conclusion that it found "the police officers were credible." It is also worth noting that at one point during the suppression hearing, the juvenile court observed on its own initiative that Tyler is a "large-framed young man." Ultimately, the juvenile court denied Tyler's motion to suppress his confession.

At trial, the prosecution presented testimony from Kimberly and Milone. Kimberly testified that she did not create the Craigslist posting herself. Milone recounted Tyler's confession over a renewed objection from Tyler's counsel. After the prosecution rested, Tyler moved to dismiss count I of the petition because it alleged a violation of "Neb. Rev. Stat. §28-2608," a code section that does not exist. Tyler also moved to dismiss count II of the petition on the theory that it was third

parties—the anonymous men who contacted Kimberly—that actually disturbed Kimberly's peace, not Tyler.

Regarding count I, the court noted that the language in count I was almost identical to that of Neb. Rev. Stat. § 28-608 (Cum. Supp. 2006) and that an extra "2" was added through clerical error. Accordingly, the court felt that in the interest of justice, count I of the State's petition should be amended to reflect § 28-608 rather than "§28-2608." Regarding count II, the court overruled Tyler's motion to dismiss without explanation.

Having disposed of Tyler's motions, Tyler was adjudicated on both counts and the court ordered him to (1) apologize to Kimberly and her family; (2) refrain from using the Internet, e-mail, or other electronic devices which could send or receive messages of the sort involved in this case; (3) avoid any and all contact with Kimberly or her family; (4) reside in his parents' home and obey all of their rules; (5) have perfect attendance at school and turn in all classwork on time; (6) not associate with anyone not approved of by his parents; and (7) immediately inform his attorney and the court of any changes in his contact information. Tyler appeals his adjudication to this court.

III. ASSIGNMENTS OF ERROR

Tyler assigns, restated, that the juvenile court erred when it (1) overruled Tyler's motion to suppress incriminating statements he made to officers, (2) became a witness on behalf of the prosecution by taking note of Tyler's physical stature, and (3) overruled Tyler's motions to dismiss counts I and II of the prosecution's petition.

IV. STANDARD OF REVIEW

[1-3] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings.[1] However, when the evidence is in conflict, the appellate court may consider and give weight to the fact that the trial court observed the witnesses

[1] *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007); *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007).

and accepted one version of the facts over the other.[2] In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling.[3]

V. ANALYSIS

1. Grounds for Suppressing Tyler's Incriminating Statements

In his first assignment of error, Tyler contends that incriminating statements he made to officers at OCHS should have been suppressed for two reasons. First, Tyler argues that use of the statements at trial violated his Fifth Amendment rights because he was not given *Miranda* warnings before officers elicited the confession. Second, Tyler believes the prosecution did not meet its burden to show that Tyler voluntarily made the incriminating statements.

(a) *Miranda* Implications

[4,5] In *Miranda v. Arizona*,[4] the U.S. Supreme Court held that authorities must advise suspects that they have certain rights before subjecting them to a "custodial interrogation." If they do not, any incriminating statements obtained during the interrogation are prone to suppression.[5] However, by limiting the sweep of *Miranda* to cases of custodial interrogation, the Court held that *Miranda* rights apply only "where there has been such a restriction on a person's freedom as to render him [or her] 'in custody.'"[6] In the absence of such restriction, authorities may freely question a suspect—and use any resulting statements at trial—even without advising a suspect of his or her *Miranda* rights. All parties agree that the officers did not advise Tyler of

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[2] See *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

[3] See *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002).

[4] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] See *id.*

[6] *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam). Accord *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003).

his *Miranda* rights. The question, then, is whether Tyler was in custody during the interrogation. If Tyler was in custody, then his confession should have been suppressed and its use at trial violated Tyler's Fifth Amendment rights.

[6-8] In resolving whether a suspect was in police custody for *Miranda* purposes, "'the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'"[7] Whether the requisite degree of restraint occurred is to be determined "based on how a reasonable person in the suspect's situation would perceive his [or her] circumstances."[8] In other words, we "must examine 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.'"[9]

(i) Custody Under Axsom

[9] To assist in the circumstantial custody inquiry, we find it helpful to employ a six-factor test[10] which was originally devised by the Eighth Circuit in *U.S. v. Axsom*.[11] As set forth in *Axsom*,[12] the six factors are as follows:

> "(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to [leave], or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the

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[7] *Yarborough v. Alvarado*, 541 U.S. 652, 662, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (quoting *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam)).

[8] *Yarborough, supra* note 7, 541 U.S. at 662 (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). See, also, *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[9] *Yarborough, supra* note 7, 541 U.S. at 663 (quoting *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (per curiam)).

[10] See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[11] *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

[12] *Id.* at 500.

> suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong[-]arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning."

The first three factors of the *Axsom* test are regarded as "mitigating" factors—that is, their presence suggests the encounter was noncustodial in nature.[13] In contrast, the latter three factors are considered "aggravating" factors; their presence increases the likelihood that a reasonable person would regard the encounter as custodial.[14] Our review of the record in light of these six factors leads us to conclude that Tyler's encounter with officers at OCHS was noncustodial in nature.

There is no dispute regarding the first mitigating factor. Tyler himself conceded at trial that both Milone and Nordby informed him that he was not under arrest. The evidence also supports the second mitigating factor—whether the suspect possessed unrestrained freedom of movement during questioning. When discussing this factor, courts look for traditional hallmarks of a degree of restraint "associated with a formal arrest."[15] For example, in evaluating the presence of this factor in the case before it, the *Axsom*[16] court observed that the suspect "was not handcuffed." Similarly, an officer's "physical contact" with the suspect—such as grabbing or blocking the suspect to prevent or encumber movement—might also preclude a finding that the suspect possessed unrestrained freedom of movement.[17]

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[13] See *McKinney, supra* note 10, 273 Neb. at 364, 730 N.W.2d at 91 (citing *Mata, supra* note 8). Accord *Mata, supra* note 8 (citing *Axsom, supra* note 11).

[14] See *McKinney, supra* note 10, 273 Neb. at 364, 730 N.W.2d at 91.

[15] *Beheler, supra* note 7, 463 U.S. at 1125.

[16] *Axsom, supra* note 11, 289 F.3d at 502.

[17] *U.S. v. Nishnianidze*, 342 F.3d 6, 14 (1st Cir. 2003). See, also, *Locke v. Cattell*, 476 F.3d 46 (1st Cir. 2007); *Axsom, supra* note 11.

There is no evidence that Tyler was handcuffed or physically restrained in any manner during questioning. While the door to the interrogation room was closed, there is no evidence that the door was locked to prevent Tyler from getting outside. Nor is there evidence that officers tried to physically block Tyler from leaving the interview room. In fact, the record shows that Tyler was closest to the door—he was positioned between it and the officers questioning him. Under our precedent, the mere fact that the questioning took place in an unlocked room is not enough to suggest that Tyler's freedom was restrained. In *State v. Mata*,[18] we concluded that there was "no evidence of restrictions placed on [Raymond] Mata's movement during questioning" even though Mata was questioned by a pair of officers in an unlocked room at the police station. All of the above supports the conclusion that Tyler's freedom was not restrained during his encounter with officers.

The third mitigating factor—whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions—presents a more difficult issue. It is clear that Tyler did not initiate contact with authorities. By all accounts, school security guards located Tyler in class, requested his presence at the school administration building, and escorted him there. However, the fact that a suspect was escorted to the interrogation by authorities does not automatically preclude a finding that the suspect voluntarily acquiesced in the interrogation.

In *Mata*, officers found Mata at the home of an acquaintance and eventually drove him to the police station for questioning. Nonetheless, we held that Mata voluntarily acquiesced in the questioning because he agreed to speak with officers after being "told at the police station that he could leave at any time."[19]

The record contains contradictory testimony regarding whether Tyler was advised that he could leave at any time. Tyler maintains that he was never told he was free to leave, while Milone testified that Tyler was so advised. The trial court

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[18] *Mata, supra* note 8, 266 Neb. at 683, 668 N.W.2d at 466.

[19] *Id.* at 681, 668 N.W.2d at 465.

credited Milone's version of the facts. Although we review the record de novo, we may give weight to the trial court's resolution of such inconsistencies.[20] Tyler does not offer any reasons why we should depart from the trial court's resolution of this contradictory testimony. We therefore adopt the trial court's finding that Tyler was told he could leave if he wanted. At the suppression hearing, Tyler admitted that he agreed to speak with the officers. Because he did so after being advised that he was not required to stay, we conclude that Tyler, like Mata, "'voluntarily acquiesced to official requests to respond to questions.'"[21]

The first aggravating factor—and the fourth *Axsom* factor overall—asks whether strong-arm tactics or deceptive stratagems were employed during questioning. The record suggests that they were not. Milone and Nordby were dressed in plain clothes and did not have their firearms drawn. Nor did the officers employ any deceptive stratagems. Instead, the officers merely confronted Tyler with the fact that the Internet posting in question had been traced to his family's computer. Tyler confessed when confronted with that simple fact.

Tyler maintains that the officers threatened to send him to juvenile detention if he did not cooperate, but Milone denied this allegation. The juvenile court specifically credited Milone's testimony over Tyler's on this issue. Once again, we see no reason to reject the trial court's determination in that regard. The first aggravating factor is not present in this case.

The record also fails to support the third aggravating factor—whether the suspect was placed under arrest at the termination of questioning. All parties agree that Tyler was permitted to return to class at the conclusion of the questioning.

A legitimate question remains, however, as to whether the second aggravating factor—whether the questioning took place in a police-dominated atmosphere—is present. Ordinarily, this factor is triggered by questioning which takes place at a police

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[20] See *In re Interest of Brian B. et al., supra* note 2.

[21] *Axsom, supra* note 11, 289 F.3d at 500.

station house.[22] Tyler was questioned in an office in the administrative area of the school. At least one court has indicated that such a context does not qualify as "police dominated" for *Miranda* purposes.[23] On the other hand, questioning which takes place behind closed doors in a small, windowless office can be distinguished from environments that are generally not considered "police dominated," such as questioning in a suspect's own home[24] or outdoors in a public place.[25]

We need not definitively resolve this issue, however, because the circumstances show that Tyler was not in custody even if we assume the questioning occurred in a police-dominated atmosphere. Such an assumption would result in a single aggravating factor, yet the record reveals that all three of *Axsom*'s mitigating factors are present on this record. In that respect, this case is identical to the situation in *Mata*.[26]

Like Mata, Tyler acquiesced in the questioning despite being led to the interrogation by authorities. Neither Tyler nor Mata was restrained during the interrogation, and both individuals were advised that they were not under arrest. No deceptive stratagems or strong-arm tactics were employed in either case. Finally, Mata and Tyler were allowed to leave at the conclusion of questioning. We concluded that Mata's interrogation was not custodial despite the fact that the interrogation took place in an undeniably police-dominated atmosphere. The similarity between this case and *Mata* confirms that Tyler's interrogation was also noncustodial even if it, too, took place in a police-dominated atmosphere.

(ii) Significance of Tyler's Youth

The only real distinction between this case and *Mata* for *Miranda* purposes is the fact that Tyler is a minor. But it is not clear how a suspect's age factors into the custody

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[22] See, e.g., *Mata, supra* note 8.

[23] See *People v. Mayes*, 202 Mich. App. 181, 508 N.W.2d 161 (1993).

[24] Cf. *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

[25] See *Berkemer, supra* note 8.

[26] *Mata, supra* note 8.

determination. As a plurality of the U.S. Supreme Court held in *Yarborough*,[27] "Our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." The plurality conceded that a suspect's age is relevant when assessing "the voluntariness of a statement,"[28] because that inquiry has been said to depend on "the characteristics of the accused,"[29] including "the suspect's age, education, and intelligence . . . as well as a suspect's prior experience with law enforcement."[30] But unlike the voluntariness determination, "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry."[31]

Justice O'Connor wrote separately in *Yarborough* to emphasize that "[t]here may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda*."[32] She did not think the suspect's age was relevant in that case, however, because the suspect "was almost 18 years old at the time of his interview."[33] A fair reading of *Yarborough* therefore compels the conclusion that "[t]he Supreme Court has not definitively ruled on whether a suspect's youth is part of the objective *Miranda* custody analysis."[34]

The difficulty in resolving this issue stems from an inherent tension between the two legitimate policy interests at stake. On one hand, the blanket declaration that a suspect's age is wholly irrelevant to the custody determination would seem clearly wrong in cases involving a young child. For example, the Fifth

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[27] *Yarborough, supra* note 7, 541 U.S. at 666.

[28] *Id.* at 667.

[29] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[30] *Yarborough, supra* note 7, 541 U.S. at 668 (citing *Schneckloth, supra* note 29, and *Lynumn v. Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963)).

[31] *Yarborough, supra* note 7, 541 U.S. at 668.

[32] *Id.* at 669 (O'Connor, J., concurring).

[33] *Id.*

[34] *In re I.J.*, 906 A.2d 249, 262 n.12 (D.C. 2006).

Circuit observed in dicta that "[t]he case of an eleven-year-old is different" and that when presented with such a young suspect, "police should have no difficulty recognizing that their suspect is a juvenile and adjusting their determination whether the suspect would understand his freedom of movement to be constrained accordingly."[35]

On the other hand, it would be difficult to take a suspect's age into account in any principled manner. Courts in a number of states apply "a 'reasonable juvenile' standard, focusing on the impact of the objective circumstances surrounding the interrogation of a juvenile of specific age."[36] But such a standard may offer more in theory than it does in practice. What, for example, is an officer to make of the difference between a reasonable 16-year-old suspect and a reasonable 13-year-old suspect? As Justice O'Connor observed, "Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave."[37]

Moreover, the assumption that all suspects of one particular age are equally sophisticated is almost as unsatisfying as the assumption that all *people*—adults and children—are equally sophisticated. Thus, if a suspect's age is to be taken into account, why not include other "objective circumstances that . . . are [also] relevant to the way a person would understand his situation,"[38] such as the suspect's education and intelligence?[39]

But "[o]ne of the principal advantages" of the *Miranda* rule is that it "'"has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not

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[35] *Murray v. Earle*, 405 F.3d 278, 287 (5th Cir. 2005).

[36] *In re L.M.*, 993 S.W.2d 276, 288 (Tex. App. 1999) (collecting cases).

[37] *Yarborough, supra* note 7, 541 U.S. at 669 (O'Connor, J., concurring).

[38] *Id.* at 674 (Breyer, J., dissenting; Stevens, Souter, and Ginsburg, JJ., join).

[39] See *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002) (collecting cases), *reversed, Yarborough, supra* note 7.

admissible.”’”[40] Consideration of a suspect’s age and other factors “would substantially undermine this crucial advantage of the [*Miranda*] doctrine”[41] by forcing police “to make guesses as to [the circumstances] at issue”[42]—and, as Justice O’Connor observed in her concurrence in *Yarborough*, the *effect* of those circumstances—“before deciding how they may interrogate the suspect.”[43]

In short, there is no easy answer to the issue of whether a suspect’s age should factor into the custody assessment. The complexity inherent in this issue suggests that we proceed cautiously in our attempt to answer it. Ultimately, we believe there are two reasons why it would be best to avoid resolving this difficult question today. First, neither party addressed whether—let alone *how*—a suspect’s age should factor into the custody assessment. This is significant because “[s]ound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute.”[44] Second, our ability to dispose of the instant case does not depend on a definitive resolution of this issue. When compared to interrogations in case law from other jurisdictions, Tyler’s interrogation would not be custodial even if we took his age into account.

In *In re Jason W.T.*,[45] the Wisconsin Court of Appeals heard a case involving a police interrogation of a 12-year-old suspect. A uniformed police officer escorted the suspect from class and proceeded to interrogate him in the principal’s office. (The principal was not present.) At the outset of its analysis, the court explained:

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[40] *Berkemer, supra* note 8, 468 U.S. at 430.

[41] *Id.*

[42] *Id.* at 431.

[43] *Id.*

[44] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 572, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)).

[45] *In re Jason W.T.*, No. 02-0705-FT, 2002 WL 1767211 (Wis. App. Aug. 1, 2002) (unpublished opinion).

> [I]n applying the objective test, it is appropriate to ask what a reasonable child in [the suspect's] circumstances would understand his situation to be; we cannot see how to apply the objective test in a rational way while overlooking the fact that he is twelve years old and not an adult.[46]

Nonetheless, the court concluded that "there is no question that when the officer began to question [the suspect], a reasonable child in his situation would have understood he was not in custody."[47] The court's conclusion was based on the fact that "[t]he officer told [the suspect] that he was free to go, that he was not under arrest, and that he did not have to talk to him if he did not want to."[48]

The Oregon Court of Appeals used nearly identical reasoning in *State ex rel. Juv. Dept. v. Loredo*.[49] In that case, a 13-year-old suspect was summoned from his classroom over the school intercom, went to the principal's office, and was interrogated by a single police officer in plain clothes. Relying on its decision in *Matter of Killitz*,[50] the court explained that its custody assessment must take into consideration "whether a reasonable person in [the] child's position—that is, a child of similar age, knowledge and experience, placed in a similar environment—would have felt required to stay and answer all of [the officer's] questions."[51] The court concluded that the police-student encounter was not custodial because "the officer informed [the] child that he was not under arrest, did not have to speak and could leave if he wanted to."[52] Moreover, the court placed some weight on the fact that the officer, much like the officers in this case, "was dressed in plain clothes [with] his gun . . . hidden

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[46] *Id.* at *3.

[47] *Id.*

[48] *Id.*

[49] *State ex rel. Juv. Dept. v. Loredo*, 125 Or. App. 390, 865 P.2d 1312 (1993).

[50] *Matter of Killitz*, 59 Or. App. 720, 651 P.2d 1382 (1982).

[51] *Loredo, supra* note 49, 125 Or. App. at 394, 865 P.2d at 1315.

[52] *Id.* at 395, 865 P.2d at 1315.

from view under his jacket"[53] and, therefore, had "clearly made an effort to be unimposing in dress and demeanor."[54]

More recently, the Wyoming Supreme Court addressed this issue in *CSC v. State*.[55] In *CSC*, officers arrived at a high school to question a 16-year-old suspect for his part in a sexual assault. School officials brought the suspect from his class to a room in the school administration building where three police officers, the school resource officer, and a school official were waiting. The court, citing "Justice O'Connor's reasoning"[56] from her concurrence in *Yarborough*,[57] "acknowledge[d] that there could be instances where the suspect is so young that his age must be considered by the police."[58] Nevertheless, the court held, "We do not, however, feel that it applies to [the] 16-year-old [suspect] in this case, *especially in light of the fact that he was repeatedly advised . . . that he was not under arrest, was not obligated to answer . . . questions, and could leave at any time*."[59] Accordingly, the court concluded that "the interview was noncustodial."[60]

Tyler's encounter with police was in all relevant aspects indistinguishable from the encounters in *In re Jason W.T.*, *Loredo*, and *CSC*. Those cases involved interrogations wherein the juvenile suspect was not restrained and was advised by officers that he was not under arrest and could leave the interrogation at any time. As was demonstrated earlier, the same is true in this case. Moreover, the facts here are far less indicative of custody than those present in cases where age-sensitive courts concluded that juvenile-police encounters were custodial.

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[53] *Id.* at 392, 865 P.2d at 1313.

[54] *Id.* at 395, 865 P.2d at 1315.

[55] *CSC v. State*, 118 P.3d 970 (Wyo. 2005).

[56] *Id*. at 978.

[57] *Yarborough, supra* note 7.

[58] *CSC, supra* note 55, 118 P.3d at 978.

[59] *Id.* (emphasis supplied).

[60] *Id.*

In *Evans v. Montana Eleventh Jud. Dist. Court*,[61] the Montana Supreme Court took a 14-year-old suspect's age into account in concluding that he was in custody for *Miranda* purposes. The suspect "was questioned for two and one-half hours . . . by two officers wearing visible badges and weapons."[62] Of note is the fact that "[t]he officers repeatedly suggested that [the suspect] had 'more to tell them' and misled him into believing the police had fingerprints from [the victim's] body that could be matched to his" and that "[i]mmediately following the interview, [the suspect] was arrested."[63]

Similarly, in *State v. Doe*,[64] an age-sensitive court held that a 10-year-old suspect was in custody when he "received a mandatory directive to leave his fifth-grade class and report to the faculty room" and "was not informed by school officials or by the [school resource officer] that he could leave, that he did not have to answer the officer's questions or that he could terminate the questioning at any time."[65]

Finally, in *State v. D.R.*,[66] a detective dressed in plain clothes interviewed a 14-year-old suspect in a school administrator's office. In concluding that the encounter was custodial, the court placed "significant" weight on the fact that, unlike Tyler, the suspect "was not told he was free to leave."[67]

In sum, this case is similar to cases where age-sensitive courts found police-juvenile encounters to be noncustodial in nature and is distinct from several cases where such courts concluded that the juvenile was in custody. As a result, we are confident that Tyler's youth does not disturb the fact that his encounter with police officers at OCHS was noncustodial. So although we do not rule out the possibility that a suspect's age

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[61] *Evans v. Montana Eleventh Jud. Dist. Court*, 298 Mont. 279, 995 P.2d 455 (2000).

[62] *Id.* at 284, 995 P.2d at 458.

[63] *Id.*

[64] *State v. Doe*, 130 Idaho 811, 948 P.2d 166 (Idaho App. 1997).

[65] *Id.* at 818, 948 P.2d at 173.

[66] *State v. D.R.*, 84 Wash. App. 832, 930 P.2d 350 (1997).

[67] *Id.* at 838, 930 P.2d at 353.

may factor into the custody assessment in a different case, it is not necessary to resolve that issue here.

(b) Voluntariness of Tyler's Confession

[10] Tyler's next contention is that the prosecution failed to carry its burden to show that he voluntarily confessed to the officers at OCHS. The conclusion that Tyler was not in custody when he confessed means that officers did not violate Tyler's Fifth Amendment right by failing to give him *Miranda* warnings. But it does not resolve whether Tyler's confession was voluntary. If the confession was given involuntarily, then use of the confession at trial violated Tyler's 14th Amendment due process rights.

[11-13] The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.[68] The factors used to determine whether an incriminating statement was voluntarily given include whether

> "(1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf, (4) defendant is aware of his constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent."[69]

An additional factor to consider in making this inquiry is whether the suspect was a minor.[70] Our de novo review of the facts of this case as they relate to the above factors leads us to conclude that Tyler's confession was voluntary.

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[68] *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992).

[69] *Id.* at 945, 492 N.W.2d at 41-42.

[70] See *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

We have already concluded Tyler was not in custody when he confessed to officers. There is no credible evidence that his confession was induced by any promises on behalf of the police. While officers did not read Tyler his *Miranda* rights, they were not required to do so because, again, Tyler was not in custody. The police did, however, inform Tyler that he was free to leave. Hence, Tyler was aware of all the legal rights that the officers were required to provide for him. The interrogation was not protracted; by all accounts, the whole encounter lasted no more than 20 minutes.

The only facts that weigh against a finding that Tyler voluntarily confessed are that Tyler was alone and that he was a minor. But our precedent shows that standing alone, these two factors are insufficient to render a confession involuntary.[71] In *State v. Garner*,[72] for example, police contacted a 15-year-old murder suspect at his grandmother's home. The suspect agreed to accompany police to the police station for questioning. The questioning began at 2:16 a.m. The suspect was questioned, alone, by two officers, until he confessed to the crime at approximately 4 a.m.

In reviewing the above facts, we held that the suspect's confession was voluntary and, therefore, "properly entered into evidence."[73] We see no facts that would preclude the same conclusion here. Accordingly, we conclude that the prosecution met its burden to show that Tyler's confession was voluntarily made and was not the product of coercion.

2. Attention to Tyler's Physical Stature

[14] In his next assignment of error, Tyler contends that the trial court erred when it became a witness in the case for the prosecution during the suppression hearing by taking note of the fact that Tyler is a "large-framed young man." The parties dispute whether that fact is relevant to whether Tyler was in custody or voluntarily confessed to authorities. We find it

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[71] See, *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003); *Garner, supra* note 70.

[72] *Garner, supra* note 70.

[73] *Id.* at 51, 614 N.W.2d at 328.

unnecessary to choose sides in this debate. As our de novo review of both the custody and voluntariness issues shows, it is possible to conclude that Tyler was not in custody and voluntarily confessed without taking his physical stature into consideration. Hence, even if the trial court acted improperly when it took note of Tyler's size, Tyler suffered no prejudice as a result. We have held on countless occasions that error without prejudice provides no ground for relief on appeal.[74] This assignment is without merit.

3. Motions to Dismiss Counts I and II

In his final assignments of error, Tyler contends that the trial court erred in failing to grant his motions to dismiss counts I and II of the prosecution's petition. We address Tyler's challenge to each count separately.

(a) Count I

At trial, Tyler moved to dismiss count I of the petition because the statute cited therein—"Neb. Rev. Stat. §28-2608"—is nonexistent. The juvenile court recognized that the petition should have referred to § 28-*608* and amended it on its own initiative. Tyler believes that the juvenile court exceeded its authority when it did so.

In making this argument, Tyler ignores that the erroneous cite in the petition was accompanied by language identical in all relevant respects to the language found in § 28-608. As such, the accidental inclusion of a "2" in the citation could not have misled Tyler as to the nature of the allegation against him. Therefore, Tyler did not suffer prejudice as a result of that clerical error.[75] Again, error without prejudice provides no ground for relief on appeal.[76]

(b) Count II

In his final argument, Tyler contends that the juvenile court erred when it overruled his motion to dismiss count II of the

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[74] See, e.g., *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[75] See *Tate-Smith v. Cupples*, 355 Ark. 230, 134 S.W.3d 535 (2003).

[76] See *Betterman, supra* note 74.

petition. Count II is an allegation for disturbing the peace in violation of Neb. Rev. Stat. § 28-1322 (Reissue 1995). Even assuming he made the Internet postings, Tyler believes that this allegation must be dismissed because it was the anonymous male callers and visitors who actually disturbed Kimberly's peace, not Tyler himself.

Tyler does not really dispute that his Internet posting encouraged and enabled the anonymous males to contact Kimberly. And he fails to cite any supporting authority for the proposition that one who merely encourages and enables third parties to disturb the victim's peace cannot himself be found guilty of disturbing the victim's peace under § 28-1322. Indeed, our own precedent suggests the opposite is true.

In *State v. Broadstone*,[77] this court discussed the free speech implications of § 28-1322. In the course of its analysis, the *Broadstone* court observed that the crime of disturbing the peace under § 28-1322 "'is the same as'" the common-law crime of breaching the peace.[78] The *Broadstone* court further noted that one is guilty of breaching the peace whether he actively engages in unlawful conduct himself or merely uses speech that might encourage *others* to break the law.[79] *Broadstone* supports the conclusion that Tyler can be found guilty of disturbing Kimberly's peace under § 28-1322 even though he did not harass her directly. Under the rationale implicit in that case, it is sufficient that Tyler encouraged and enabled others to do so. Accordingly, Tyler's argument regarding count II is without merit.

VI. CONCLUSION

We conclude that the juvenile court correctly denied Tyler's motion to suppress incriminating statements he made to officers at OCHS. The confession was not made while Tyler was in police custody, and therefore, it is of no consequence that

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[77] *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989).

[78] *Id.* at 599, 447 N.W.2d at 33 (quoting *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960)).

[79] See *Broadstone, supra* note 77 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)).

officers failed to advise Tyler of his *Miranda* rights. Moreover, the confession was voluntarily made and not the product of coercion.

The rest of Tyler's arguments are also without merit. Tyler did not suffer prejudice from the juvenile court's decision to take note of Tyler's physical stature. Nor did Tyler suffer prejudice from the court's sua sponte decision to fix the clerical error in the petition. Finally, we conclude that Tyler could be found to be a child defined under § 43-247(1) for disturbing Kimberly's peace by enabling and encouraging others to harass her directly. Having found that all of Tyler's assignments of error and arguments on appeal lack merit, we affirm the juvenile court's judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVE STOLEN, APPELLANT.

755 N.W.2d 596

Filed September 12, 2008. No. S-06-1216.

1. **Judgments.** The interpretation and meaning of a prior opinion present a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Criminal Law: Intent.** Neb. Rev. Stat. § 28-901 (Reissue 1995) comprises three separate means of committing obstruction of government operations, and the physical act component must consist of some physical interference, force, violence, or obstacle.
5. ____: ____. The physical act component of Neb. Rev. Stat. § 28-901 (Reissue 1995) consists of disjunctive, or independent, elements.
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. **Criminal Law: Evidence: Case Overruled.** *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994), is overruled to the extent it holds that in every circumstance in which the State charges obstruction by a physical act, the evidence must show force or violence.
8. **Criminal Law: Public Officers and Employees.** Under Neb. Rev. Stat. § 28-901 (Reissue 1995), a defendant may not be convicted of obstructing government operations by a physical act unless the public servant was engaged in a specific authorized act at the time of the physical interference.

9. **Criminal Law.** Obstructing government operations and tampering with evidence are separate offenses covering different conduct.

Petition for further review from the Court of Appeals, SIEVERS, CARLSON, and CASSEL, Judges, on appeal thereto from the District Court for Dakota County, WILLIAM BINKARD, Judge, on appeal thereto from the County Court for Dakota County, DOUGLAS L. LUEBE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Robert B. Deck for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

CONNOLLY, J.

SUMMARY

The State charged Steve Stolen with obstructing government operations under Neb. Rev. Stat. § 28-901(1) (Reissue 1995), a Class I misdemeanor.[1] Stolen and other campers had cleaned up empty beer cans and trash before officers arrived to investigate the accidental drowning death of one of the campers. The deceased camper was a minor. The evidence showed that minors in the group, including the camper who drowned, had consumed alcoholic beverages during the night. The Nebraska Court of Appeals affirmed Stolen's conviction.[2] We granted Stolen's petition for further review. The issue is whether Stolen obstructed government operations by helping to discard empty beer cans and other trash that might have indicated the campers had consumed alcohol.

We reverse and remand with directions to vacate Stolen's conviction and sentence. We conclude that to commit obstruction of government operations, a person must affirmatively interfere with a public servant's active performance of a duty. Here, the officers had not begun an investigation. And the

[1] See § 28-901(2).

[2] *State v. Stolen*, 16 Neb. App. 121, 741 N.W.2d 168 (2007).

evidence fails to show that Stolen affirmatively interfered with the active performance of a duty. Nor does the evidence show that the campers' disposal of beer cans and trash impaired or obstructed the investigation into the cause of the minor's death.

BACKGROUND

On July 3, 2005, Stolen was camping with about 12 people on private property owned by Bradley Jochum. Jochum was also camping on the property with about 20 to 25 people. The property abutted the Missouri River in Dakota County. Stolen and his friend, Kingsley James, had planned an Independence Day party for Stolen's son and his son's Army National Guard friends before they left for Iraq. James brought his son and his son's friend, who were both minors. James' son's friend then invited Ken Willis, Jr., the camper who later died; Willis was also a minor. Three people in Stolen's group were minors. Stolen's group partied with Jochum's group during the night. Their activities included shooting fireworks, playing volleyball, and arm wrestling. People in both groups had brought alcoholic beverages, and the record shows that the minors in Stolen's group consumed alcohol.

Stolen went to sleep about 2 a.m. Around 2:30 a.m., James' son and his son's friend informed James that Willis was missing. After searching for about an hour, the campers concluded that Willis must have left on foot or left with someone, and they returned to their tents. Around 6 a.m., while taking a walk, James found Willis' body partially in the river and woke Stolen.

The record contains conflicting testimony from Stolen, James, and Jochum regarding who suggested that the campers clean up empty beer cans and trash before law enforcement officers arrived. Their testimony also conflicted whether the campers cleaned up part of the mess before waking Jochum and asking him to call the 911 emergency dispatch service. But viewing the evidence in the light most favorable to the State, the evidence supports a finding that the campers, including Stolen, picked up beer cans and trash before officers arrived, because they were concerned about the appearance of alcohol

consumption when minors were present. The State did not present any testimony that the campers cleaned the campsite to deflect an investigation into the cause of Willis' death. Stolen admitted to helping with the cleanup. James testified that the campers put some empty beer cans in Stolen's son's boat; he stated that five campers then left in that boat. Jochum testified that four campers stayed: James, Stolen, James' son, and his son's friend. Stolen testified that the campers put three to four bags of garbage in a pickup belonging to someone in Jochum's group.

Jared Junge, a deputy sheriff for Dakota County, arrived at the campsite 10 to 15 minutes later, about 6:30 a.m. Junge described the campsite as clean. He testified that the campers, including the minors, appeared to have been drinking during the night. Some were still under the influence of alcohol. He saw about six beer cans and said that he generally saw more trash and beer cans at campsites when the campers are hung over or intoxicated. And he normally looks for alcohol containers at a campsite when there is evidence of alcohol consumption. He said that his investigation is hampered if someone has removed the physical evidence. Junge testified that the removal of physical evidence from the scene could distort the picture of what happened and possibly result in the loss of forensic evidence.

Junge testified that his investigation was hampered because the campers had removed all but about six beer cans. But he admitted that during his investigation, he did not attempt to collect any beer cans. Nor was he aware that any other officer attempted to collect physical evidence other than to retrieve Willis' body. He limited his investigation to collecting contact information from the campers so that he could interview them later. No evidence suggests that the campers responded untruthfully to questioning about the minors' alcohol consumption. Nor did they attempt to physically interfere with the officers' active investigation at the campsite.

An autopsy showed Willis had consumed alcohol before his death. The parties stipulated that his blood alcohol level was 157 milligrams per deciliter of blood. The investigators determined Willis' death was accidental.

The State charged Stolen with one count of obstructing government operations under § 28-901 and one count of procuring alcohol for a minor. A jury found him guilty of obstruction and not guilty of procuring alcohol. The court placed him on probation for 18 months and ordered him to complete 90 hours of community service and write letters of apology to Willis' family and law enforcement.

Stolen appealed to the district court, which affirmed. He then appealed to the Court of Appeals. He assigned that (1) there was no physical act that supported an obstruction conviction and (2) the evidence on an underlying unlawful act was insufficient to support an obstruction conviction.

The Court of Appeals held that the circumstantial evidence, when viewed in the light most favorable to the State, was sufficient for a jury to infer that Stolen had committed a physical act "intended to" interfere with an investigation into Willis' death, "which investigation Stolen knew was about to occur."[3] It held that Stolen committed "physical interference" under § 28-901(1) when he cleaned the campsite and removed alcohol containers. It dismissed Stolen's reliance on this court's decision in *State v. Fahlk*.[4]

ASSIGNMENT OF ERROR

Stolen assigns, restated and condensed, that the Court of Appeals incorrectly held that *Fahlk* was not controlling under these facts.

STANDARD OF REVIEW

[1-3] The interpretation and meaning of a prior opinion presents a question of law.[5] Statutory interpretation presents a question of law.[6] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[7]

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[3] *Stolen, supra* note 2, 16 Neb. App. at 126, 741 N.W.2d at 172.

[4] *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

[5] See, *Pennfield Oil Co. v. Winstrom, ante* p. 123, 752 N.W.2d 588 (2008); *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990), citing *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

[6] *State v. Epting, ante* p. 37, 751 N.W.2d 166 (2008).

[7] *State v. Draganescu, ante* p. 448, 755 N.W.2d 57 (2008).

ANALYSIS

[4] Section 28-901(1) provides:

> A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by [1] force, violence, physical interference or obstacle, [2] breach of official duty, or [3] any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

Section 28-901 tracks § 242.1 of the Model Penal Code.[8] As indicated by the numbered brackets we have placed in the quoted statute, we concluded in *Fahlk* that § 28-901 comprises three separate means of committing obstruction of government operations. We further concluded that the "physical act" component "must consist of some physical interference, force, violence, or obstacle."[9]

Stolen contends that under our decision in *Fahlk*, his conduct was not a crime. He argues that the Court of Appeals effectively overruled *Fahlk* and failed to recognize that it was controlling under these facts.

Fahlk Incorrectly Required Force or Violence in All Circumstances Involving Obstruction of Government Operations by Physical Act

In *Fahlk*, the defendant was a high school superintendent. A jury convicted him of obstructing government operations because he supplied an investigator with a falsified checkout sheet for supplies from a school. The checkout sheet purported to show that he had informed school officials when he "checked out" a computer printer. On appeal, the Court of Appeals held that the evidence was sufficient to support his conviction under the third component of § 28-901, which prohibits obstruction

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[8] See Model Penal Code § 242.1, 10A U.L.A. 638 (2001).

[9] See *Fahlk, supra* note 4, 246 Neb. at 853, 524 N.W.2d at 53.

through any other unlawful act. Citing Neb. Rev. Stat. § 28-922 (Reissue 1995) (tampering with evidence), the Court of Appeals concluded that a jury could have found beyond a reasonable doubt that the defendant presented false evidence to the investigator "when [the defendant] realized that an official proceeding was about to be instituted."[10]

This court reversed the judgment of the Court of Appeals. We concluded that the evidence was insufficient under any component of § 28-901. Regarding the physical act component, we stated that the defendant's "actions surpass failing to volunteer information *but lack the element of force or violence* contemplated by § 28-901."[11]

In *Fahlk*, we also rejected the Court of Appeals' reliance on the "other unlawful act" component of § 28-901. We recognized that the evidence might have supported a conviction for tampering with evidence under § 28-922. But we concluded that the Court of Appeals erred when it relied on a violation of § 28-922 because the State had not charged that offense and it was not an issue before the jury.

In this case, the Court of Appeals distinguished *Fahlk*. It concluded that *Fahlk* had not provided guidance on the force or violence necessary to constitute physical interference. It further stated that *Fahlk* did not "address the 'physical interference' or 'obstacle' component of the statute."[12] Although we disagree with the Court of Appeals' interpretation of *Fahlk*, upon reexamination of the decision, we conclude that we were wrong. We determine that *Fahlk* incorrectly requires force or violence in all circumstances alleging obstruction of government operations under the physical act component of § 28-901.

[5,6] In our reexamination of *Fahlk*, we conclude that we failed to focus on the statutory language of § 28-901. The physical act component of § 28-901 consists of disjunctive,

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[10] See *State v. Fahlk*, 2 Neb. App. 421, 436, 510 N.W.2d 97, 106 (1993).

[11] *Fahlk, supra* note 4, 246 Neb. at 854, 524 N.W.2d at 53 (emphasis supplied). See, also, *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006) (clarifying that holding in *Fahlk* was limited to physical act component).

[12] *Stolen, supra* note 2, 16 Neb. App. at 125, 741 N.W.2d at 172.

or independent, elements: "force, violence, physical interference *or* obstacle." In construing statutory language, we attempt to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[13] Although the use of "and" and "or" can be interchangeable,[14] here, the Legislature had no reason to include "physical interference" as a means of committing obstruction if it intended to equate "physical interference" to the physical acts of using "force" or "violence." Thus, a disjunctive reading of the elements is consistent with the plain meaning of the statute. It is also consistent with comments to the Model Penal Code and the way other courts have interpreted similar statutes.

For example, under a similar statute,[15] New York courts have held that physical force was not required when the defendant physically interjected himself into ongoing undercover police operations to purposefully disrupt the operation or warned others involved in criminal activity of the officers' presence.[16] Similarly, courts have concluded that physical interference does not require the use of force or violence when the defendants committed the following acts: (1) Defendants surrounded an officer attempting to arrest a person and allowed that person to flee custody and escape[17]; (2) defendants entered an abortion clinic and chained themselves together with bicycle locks so that police could not transfer them to a jail until a locksmith removed the locks[18]; (3) defendant refused to remove a crutch wedging a door closed so that officers could serve eviction papers[19]; or (4) defendant placed a tractor and dump truck in front of a mobile home to prevent officers from executing

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[13] *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

[14] See *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

[15] See N.Y. Penal Law § 195.05 (McKinney 1999).

[16] See, *Matter of Davan L.*, 91 N.Y.2d 88, 689 N.E.2d 909, 666 N.Y.S.2d 1015 (1997); *People v. Covington*, 18 A.D.3d 65, 793 N.Y.S.2d 384 (2005); *People v. Dolan*, 172 A.D.2d 68, 576 N.Y.S.2d 901 (1991).

[17] See *People v. Shea*, 68 Misc. 2d 271, 326 N.Y.S.2d 70 (1971).

[18] See *State v. Purdy*, 491 N.W.2d 402 (N.D. 1992).

[19] See *State v. Mattila*, 77 Or. App. 219, 712 P.2d 832 (1986).

a replevin order to take possession.[20] Although the inquiries are fact-specific, these cases mirror the intent of § 28-901 as reflected in the comments to Model Penal Code § 242.1. Those comments show that the offense was intended as a gap-filler, to broadly cover conduct that could not be adequately anticipated by more specific offenses against public administration.[21]

[7] Therefore, we overrule *Fahlk* to the extent it holds that in every circumstance in which the State charges obstruction by a physical act, the evidence must show force or violence. Our concern in *Fahlk* about the potential breadth of this statute had been expressed by other courts.[22] But we conclude that this concern is better addressed by focusing on the statute's requirement of affirmative interference.

Section 28-901 Requires Affirmative Interference

Section 28-901 specifically limits its reach by excluding any "means of avoiding compliance with law *without affirmative interference with governmental functions*." Thus, courts have held that the state must allege physical interference with a public servant's active performance of an authorized duty.

For example, an allegation that a defendant publicly announced an undercover officer's identity as an officer was insufficient to support an obstruction charge. There, the charging instrument failed to allege the specific duty the officer was engaged in that the defendant's conduct allegedly interfered with.[23] Likewise, an allegation that the defendant discarded or destroyed contraband when he saw an officer approaching him is insufficient to support an obstruction charge; the officer must

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[20] See *State v. Holloway*, 992 S.W.2d 886 (Mo. App. 1999).

[21] See, Model Penal Code, *supra* note 8; A.L.I., Model Penal Code and Commentaries § 242.1, comment 2 (1980). See, also, *People v. Case*, 42 N.Y.2d 98, 365 N.E.2d 872, 396 N.Y.S.2d 841 (1977).

[22] See, *Case, supra* note 21; *People v. Joseph*, 156 Misc. 2d 192, 592 N.Y.S.2d 238 (1992); *People v. Simon*, 145 Misc. 2d 518, 547 N.Y.S.2d 199 (1989).

[23] *People v. Hinkson*, 184 Misc. 2d 496, 708 N.Y.S.2d 546 (2000).

be actively engaged in attempting to retrieve the contraband.[24] Even under the common law and statutes preceding the Model Penal Code, it was "essential that the obstruction be offered with respect to an official or public duty which the officer is attempting to perform."[25]

[8] We are persuaded by the reasoning of New York courts that have rejected obstruction charges when the charging instrument fails to allege affirmative interference with an active duty. "'[T]he mens rea of this crime is an intent to frustrate a public servant in the performance of a specific function.'"[26] Thus, a defendant may not be convicted of obstructing government operations by a physical act unless the public servant was engaged in a specific authorized act at the time of the physical interference.[27] Every element of § 28-901's physical act component supports the conclusion that the statute was intended to reach only affirmative interference with a public servant's active performance of a duty.

Here, officers were called to the scene to investigate the cause of Willis' death—not whether Stolen had procured alcohol for minors. The State argues that "Stolen's act of picking up the beach was a physical interference and obstacle that obstructed law enforcement's investigation into Willis' death."[28] But accepting this argument would leave § 28-901 without boundaries. No officers were engaged in investigating Willis' death when the campers cleaned up the campsite. Nor did the State allege or argue that Stolen or the other campers physically interfered with the officers' active investigation after they arrived at the campsite. In addition, the State has failed to

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[24] *People v. Vargas*, 179 Misc. 2d 236, 684 N.Y.S.2d 848 (1998); *People v. Ravizee*, 146 Misc. 2d 679, 552 N.Y.S.2d 503 (1990); *Simon, supra* note 22.

[25] 4 Charles E. Torcia, Wharton's Criminal Law § 567 at 268 (15th ed. 1996).

[26] *Vargas, supra* note 24, 179 Misc. 2d at 238, 684 N.Y.S.2d at 850 (emphasis omitted).

[27] *People v. Lupinacci*, 191 A.D.2d 589, 595 N.Y.S.2d 76 (1993); *Vargas, supra* note 24; *Joseph, supra* note 22.

[28] Brief for appellee at 11.

show how Stolen's conduct obstructed, impaired, or perverted their investigation into the cause of Willis' death.

The State did not contend that during the investigation, Stolen lied to investigators about minors consuming alcohol. Junge knew that minors at the campsite had been drinking or were under the influence. And he did not testify that anyone had lied to him about this fact. Nor has the State shown that discarding beer cans deflected or interfered with the investigation into the cause of Willis' death. Junge admitted that he was unaware of any attempt by investigators to retrieve or discover physical evidence showing that the campers had consumed alcohol. The investigators' determination that Willis had consumed alcohol before his death was based on the medical examiner's report, not the presence of beer cans at the campsite.

Unless a defendant's physical interference is firmly tethered to an officer's active performance of a duty, an obstruction charge could potentially be linked to any preinvestigation conduct regarding any offense that the officer uncovers during an investigation. Here, for example, the complaint failed to allege the government operation with which Stolen's conduct allegedly interfered. The court instructed the jury that it must find Stolen intentionally obstructed government operations. But here the jury could have concluded that his intent to obstruct was tied to the offense of procuring alcohol for minors—not the officers' investigation of Willis' death.

[9] We do not consider here whether these facts support a conviction for tampering with evidence under § 28-922; the State did not charge that offense. As we recognized in *Fahlk*, these are separate offenses covering different conduct. The comments to Model Penal Code § 242.1 state that this section is intended *as a supplement* to other crimes proscribing interference with government operations, e.g., bribery, perjury, tampering, and falsification.[29] The American Law Institute's comments to § 242.1 similarly clarify that the other unlawful act component of § 28-901 must be shown by an act that is unlawful independent of a purpose to obstruct government operations.[30]

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[29] See Model Penal Code, *supra* note 8.

[30] See Model Penal Code and Commentaries, *supra* note 21.

CONCLUSION

We conclude that because the evidence failed to show that Stolen committed a physical act that interfered with an officer's active performance of a duty, it was insufficient to support his conviction for obstruction of government operations under § 28-901. We therefore reverse the decisions of the Court of Appeals and the district court, which affirmed the county court's decision. We remand the cause with directions to the Court of Appeals to remand the cause to the district court with directions to vacate Stolen's conviction and sentence and to remand the cause to the county court for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

PAVERS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A PUBLIC BODY CORPORATE OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

755 N.W.2d 400

Filed September 12, 2008. No. S-07-671.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **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. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a 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. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
6. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
7. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Remanded with directions.

Craig C. Dirrim and Terry C. Dougherty, of Woods & Aitken, L.L.P., and John C. Wiltse, Senior Associate General Counsel, University of Nebraska, for appellant.

Timothy R. Engler, Adam J. Prochaska, and John Selzer, of Harding & Schultz, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS and MOORE, Judges.

WRIGHT, J.

I. NATURE OF CASE

This is a contract claim by Pavers, Inc., against the Board of Regents of the University of Nebraska (University). The dispute involves a contract for the performance of earthwork for a student housing project at 16th and Y Streets in Lincoln, Nebraska. The contract was composed of several documents prepared by the University, and the bid included price quotes for 11 separate construction activities.

While Pavers was performing the contract, it became apparent that 3 of the 11 activities would greatly exceed the estimated costs as set forth in the contract. Upon completion of the contract, the University paid Pavers what the University considered to be a reasonable amount, but did not pay the additional amount Pavers claimed for soil disposal, seepage water removal, and seepage water disposal.

Pavers filed a claim with the State Claims Board but then withdrew its claim and initiated an action in the Lancaster County District Court. The matter proceeded to trial, and the court awarded Pavers a judgment on its claim against the University. The University has appealed, and Pavers has cross-appealed.

II. SCOPE OF REVIEW

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

below. *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

[2,3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008). The meaning of a contract and whether a contract is ambiguous are questions of law. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[4] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

III. FACTS

The University and Pavers contracted for earthwork, grading, and overexcavation for a student housing project at 16th and Y Streets in Lincoln. There were 11 separate construction activities in the contract. The University's bid proposal form described and specified a quantity for each activity. The contractors bid a unit price for each quantity of work. In order to obtain an estimate for each activity, the unit prices bid on the activity were multiplied by the University's estimated quantity of work for the respective activity. The estimates for all 11 activities were added together to arrive at the "Base Bid."

The dispute in this case involves three activities within the contract: soil disposal, seepage water removal, and seepage water disposal. Pavers bid a unit price of $27.60 per ton for soil disposal, which is referred to as "work unit 9." It bid $3.90 per gallon for removal of seepage water, which is referred to as "work unit 10," and $3.45 per gallon for seepage water disposal, which is referred to as "work unit 11."

During the performance of the contract, the actual quantities of seepage water and contaminated soil to be removed and

disposed of greatly exceeded the amounts estimated by the University. The contract estimated that Pavers would dispose of 1,400 tons of soil, whereas the actual amount disposed of was 8,071.29 tons. The contract estimated that Pavers would remove and dispose of 1,200 gallons of seepage water, whereas the actual amount removed and disposed of was 173,900 gallons. Pavers claimed that these overruns increased the amounts due under the contract by $184,127.60 for soil disposal, $673,530 for seepage water removal, and $595,815 for seepage water disposal.

On November 5, 2003, Pavers faxed a letter to the University's consultant stating that Pavers was experiencing substantial overruns in the removal of the contaminated materials. However, Pavers did not submit a "Change Order" for these overruns until after the project was completed. The University's lead project manager, Tracy Aksamit, testified that it was anticipated at the outset that a change order would be issued after the project was over in order to take into account any increases or decreases in quantities. Aksamit stated that it was not necessary for Pavers to submit a change order before doing the work.

The district court found that "[t]he University's consultant and inspector" were aware of the cost overruns because they were on the project site regularly. It further found that despite having knowledge of the overruns, the University instructed Pavers to proceed with the work because the project needed to be completed as quickly as possible.

Based on the unit prices submitted in its bid and the quantities of work performed, Pavers sought payment in the total amount of $1,714,996.40. However, based on its interpretation of the contract, the University did not pay the unit prices bid by Pavers for work units 9 through 11. Instead, the University paid a total of $379,336.54, which it claimed was fair and equitable for the work done on the contract.

Pavers filed a claim with the State Claims Board to compel full payment. The board notified Pavers that pursuant to Neb. Rev. Stat. § 81-8,305 (Reissue 2003), either party could object in writing to submission of the dispute to the board and initiate an action in the district court for Lancaster County. Pavers then filed a written objection to submission of the dispute to

the board and initiated this breach of contract action in the district court.

The University moved to dismiss, claiming that § 81-8,305 is unconstitutional because it allows a claimant to initiate an action in the district court in violation of article VIII, § 9, of the Nebraska Constitution. The court found the statute to be constitutional, and the University's motion was overruled.

The matter was tried to the court, and the issue was whether the unit prices for work units 9 through 11 should be equitably adjusted due to the overruns associated with these work units. The district court applied a total cost method of adjustment to the contract price. It awarded Pavers $1,009,773.52, which was the difference between Pavers' total costs of $1,389,110.06 and the amount paid of $379,336.54.

The University has appealed the district court's determination that § 81-8,305 is constitutional and the award of $1,009,773.52 to Pavers. Pavers has cross-appealed and seeks an award for the full amount of the contract in the sum of $1,714,996.40 minus the amount already paid.

IV. ASSIGNMENTS OF ERROR

The University assigns as error, summarized and restated, that the district court erred in finding that § 81-8,305 is constitutional and that Pavers was entitled to recover under the total cost method of damages, in applying the contract's equitable adjustment provision to all of the contract work items, and in failing to limit the adjustment to work units 9 through 11. Pavers cross-appeals that the district court erred in limiting its damages.

V. ANALYSIS

1. Constitutionality of Statute

[5,6] We first address the constitutionality of § 81-8,305, and the following legal principles guide our review: A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Id.* Whether a statute

is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Id.*

Section 81-8,305 provides:

> (1) If agreed to by the claimant and the contracting agency, the State Claims Board shall have the authority to consider, ascertain, adjust, compromise, settle, determine, or allow any contract claim. Upon receipt of a contract claim, the Risk Manager shall immediately notify the claimant and the contracting agency of the option of having the dispute submitted to the State Claims Board.
>
> (2) If the claimant and the contracting agency agree to submit the dispute to the State Claims Board as provided in subsection (1) of this section, the board shall resolve such dispute in the manner provided under the State Miscellaneous Claims Act. For claims submitted to the board under this subsection, the contracting agency shall provide the board with all documents and information relating to the claim which the contracting agency obtained during its investigation.
>
> (3) If either the claimant or the contracting agency objects in writing to submission of the dispute to the State Claims Board within ninety days of mailing of the notice required in subsection (1) of this section, the board shall have no further jurisdiction over the claim and the claimant may initiate an action in the district court of Lancaster County.

The University contends that § 81-8,305 violates the plain language of article VIII, § 9, of the Nebraska Constitution, which states:

> The Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn. Any party aggrieved by the action taken on a claim in which he has an interest may appeal to the district court.

The University argues § 81-8,305 is unconstitutional, because it allows a claimant to bypass the constitutional requirement that all claims against the State shall be examined and adjusted

and allows the claimant to file a direct action against the State in the district court for Lancaster County. It contends that the constitution prohibits direct actions and that claims against the State may come to the district court only by way of appeal.

We are required to reach our determination of the constitutionality of § 81-8,305 independently of the decision reached by the trial court. See *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). Although article VIII, § 9, requires that all claims upon the treasury be examined and adjusted before any warrant in the amount allowed is drawn, it also grants the Legislature authority to provide the method for examination and adjustment of the claim. By virtue of § 81-8,305, the Legislature has given the State Claims Board the authority to adjust, determine, or allow any contract claim. However, under § 81-8,305, the Legislature has also provided that if either the claimant or the contracting agency objects to submission of the dispute to the State Claims Board, the claimant may initiate an action in the Lancaster County District Court. This is another method by which the claim may be examined and adjusted.

We find nothing in article VIII, § 9, which limits a claimant's right to have the claim examined and adjusted by the district court. This is consistent with article V, § 22, of the Nebraska Constitution, which provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Article VIII, § 9, confers authority upon the Legislature to determine how a claim upon the treasury shall be examined and adjusted. The only limitation set forth in article VIII, § 9, is that all claims must be examined and adjusted before any warrant shall be drawn.

The University argues that the phrase "may appeal to the district court" in article VIII, § 9, presumes that a litigant cannot initiate an action in the district court. We disagree. The constitution does not mandate that an aggrieved party must have its claim adjudicated by the State Claims Board before bringing suit in the district court. The claimant is given the right to appeal a decision of the State Claims Board to the district court, but that is not a limitation on how the claim shall be examined and adjusted.

The cases relied upon by the University involved constitutional provisions that did not specifically grant the Legislature authority to determine how claims were to be examined and adjusted. Prior to its amendment in 1964, article VIII, § 9, mandated that "all claims upon the treasury, shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the amount allowed shall be drawn." See 1963 Neb. Laws, ch. 302, § 2(3), p. 896. This section contained a specific limitation that claims "be examined and adjusted by the auditor, and approved by the secretary of state." Now, article VIII, § 9, delegates to the Legislature the authority to determine how claims on the treasury are to be examined and adjusted.

Having concluded that § 81-8,305 is constitutional, we proceed with the remaining issue: whether there should be an equitable adjustment of the contract and, if so, by what method.

2. Contract Dispute

(a) Pavers' Claim

Pavers contracted with the University to perform earthwork (overexcavation and backfill), add crushed rock for stabilization, construct a chain link fence and a silt fence, clear the site, remove contaminated soil, and remove and dispose of seepage water. The project proceeded without any major changes to the type of construction activities, and most of the work was completed by the end of 2003.

For each work unit, the University bid proposal form contained an estimated quantity. Pavers submitted a unit price based on the quantity set forth on the bid proposal form. The form stated that the contract could be modified by change orders which increased or decreased the "Contract Sum" by the actual quantities for each of the work units.

Substantial overruns on the University project were experienced for the disposal of soil and the removal and disposal of seepage water (work units 9 through 11). The actual amount of soil disposed of was 8,071.29 tons, compared to the estimate of 1,400 tons. The actual seepage water removed and disposed of was 173,900 gallons, compared to the estimate of 1,200 gallons.

As the project progressed, Pavers notified the University of the overruns. By fax, Pavers notified Aksamit, the lead project manager, and the University's consultant of the substantial overruns on work units 9 through 11. The University was also aware that cost overruns were occurring, because its lead project manager and its consultant were regularly on the project site. Without requiring a change order for work units 9 through 11, the University told Pavers to continue working on the project, even though the University knew that large quantity overruns, and therefore substantial increases in cost, were imminent. The University instructed Pavers to proceed with the work despite these overruns because the project needed to be completed as soon as possible.

During the course of the project, Pavers maintained detailed records of its expenses, including labor costs, disposal fees, subcontractor charges, trucking expenses, and miscellaneous costs (crushed rock, fuel, and incidentals). Pavers did not keep a separate record of the expenses for each work unit, nor was it required by the contract to do so. The only cost documentation required by the contract for a separate work unit was a record of the soil disposal costs and the seepage water disposal costs associated with the landfill and the water treatment facility.

Pavers submitted a total claim of $1,714,996.40 for the work performed, which included the cost of the large overruns of quantity on work units 9 through 11. Pavers asserted that the contract required that payment be made at the contract unit price bid and that there should not be an equitable adjustment to the contract. Because of the substantial changes in the quantity of soil disposed of and seepage water removed and disposed of (work units 9 through 11), the University claimed that the unit prices for this work should be equitably adjusted.

The district court did not determine what would have been an equitable adjustment to the unit prices for work units 9 through 11. Instead, it concluded that a total cost method should be used to adjust the contract. The court found that Pavers incurred $1,216,383.59 in costs and assigned a 14.2-percent overhead for general administrative costs. It further found that the total costs for the project were $1,389,110.06, which did not include any profit.

The district court concluded that neither awarding Pavers its full unit price for work units 9 through 11 nor requiring Pavers to pay out of its own pocket the increased costs would be equitable. The court found that the University failed to meet its burden for an equitable adjustment to the unit prices. However, it reasoned that a total cost method should be applied, since Pavers' exact losses and increased expenses were difficult to determine "because expenses were not tracked on a per work unit basis." The court found that the total costs expended by Pavers to complete the project were reasonable.

(b) Adjustment of Unit Prices

The issue before this court is whether the unit prices for work units 9 through 11 should be reduced because there were large increases in the quantity of soil disposed of and seepage water removed and disposed of.

The University claims the district court erred in applying a total cost method to adjust the contract. In asking for an equitable adjustment, the University relies upon article 7 of the general conditions of the contract for construction. Article 7 provides:

> **7.1.4** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

The University also claims the contract states that for work units 9 and 11, the "unit price" for disposal of the soil or water could not be more than 15 percent above the actual "unit rate" disposal cost incurred for disposal from a permitted landfill, land application site, or authorized water treatment facility. Brief for appellant at 39-40. In effect, the University contends that Pavers was entitled to no more than 15 percent above the landfill fees and water treatment costs for disposal of the soil and water respectively.

The provision of the contract relied upon by the University states:

> PART 4- BIDDING AND COST VERIFICATION MEASUREMENT AND PAYMENT
>
> The Contractor shall accept the compensation as herein provided, in full payment for furnishing all materials, labor, tools, equipment, and incidentals necessary to complete the Work as Lump Sum Price or Unit Price Items. . . .
>
> . . . .
>
> SOIL DISPOSAL shall include all equipment, materials [and] landfill fees and labor necessary for removing and hauling contaminated soils . . . based on the weight of the disposed soil in tons. . . . The unit rate for soil disposal cannot be more than 15% above the actual unit rate disposal cost incurred from a permitted landfill or land application site. . . . Payment will be made at the contract unit price per ton for "SOIL DISPOSAL".
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> . . . .
>
> SEEPAGE WATER DISPOSAL shall include all equipment, materials [and] landfill fees and labor necessary for removing, hauling and disposing of seepage water which is based in gallon units. The unit rate for seepage water disposal cannot be more than 15% above the actual unit rate disposal cost incurred from an authorized water treatment facility. Subcontract disposal costs must accompany the contractor's invoice as supporting documentation to verify that mark-up does not exceed 15%. . . . Payment will be made at the contract unit price per gallon for "Seepage Water Disposal".

[7] Our reading of these provisions does not lead us to the conclusion that the unit price was limited to a 15-percent markup of the unit rate charged by the landfill or the water treatment facility. We agree with the district court's determination that the contract specifications in work units 9 and 11 did not limit the unit price to 15 percent above the actual disposal costs, as argued by the University. These sections of the contract merely limited the markup by Pavers on the unit rate disposal costs from a landfill and/or water treatment facility to 15 percent as a part of the unit price. Each part of this contract clearly provides that payment will be made at the contract unit price. When the terms of a contract are clear, they

are to be accorded their plain and ordinary meaning. *Katherine R. Napleton Trust v. Vatterott Ed. Ctrs.*, 275 Neb. 182, 745 N.W.2d 325 (2008).

The University next argues that the district court erred by using the total cost method in making an adjustment. The University relies upon *Pacific Architects and Engineers, Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974), where the court stated:

> It is well established that the equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss, or for converting a loss to a profit or vice versa, for reasons unrelated to a [contract] change. A contractor who has underestimated his bid or encountered unanticipated expense or inefficiencies may not properly use a change order as an excuse to reform the contract or to shift his own risks or losses to the Government.

Pacific Architects and Engineers, Inc. v. United States, supra, does not support the University's position, because it is the University, not Pavers, that seeks an adjustment or reformation of the contract. It is the University that underestimated the quantity of soil and water to be removed and disposed of, and it is the University that seeks to reform the contract and shift the costs to Pavers.

Pavers seeks to enforce the unit price of the contract it bid on work units 9 through 11. The University seeks to reform the contract and shift its risk of loss to the contractor. Since the University is asking for a change in the contract, the burden is upon the University to establish a basis for the relief sought. The University had the burden to establish why the unit prices should be equitably adjusted, and it has not sustained that burden.

The district court stated that "the University has failed to meet its burden regarding its proposed equitable adjustment to the unit prices." In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). The appellate court does not reweigh the evidence but considers the judgment

in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

Pavers argues that the equitable adjustment provisions of the contract do not apply and that the district court should not have limited Pavers' award by adjusting the contract price. Pavers claims that the court erred when it concluded that some form of equitable adjustment should be applied to the contract price. We agree.

Although it was not error for the district court to examine whether an equitable adjustment to the unit prices was required, the University did not prove that such an adjustment was warranted. The record does not disclose why the court did not award Pavers the full amount of the contract, except that the court was attempting to reach what it considered an equitable result under the facts presented. However, there is no showing that the University sustained its burden of proof to entitle it to an equitable adjustment of the unit prices.

We conclude the district court erred in not awarding Pavers the full amount of the contract. Without requesting an adjustment in the unit prices, the University directed Pavers to continue working on the project. The University knew large overruns of quantity and, therefore, increased costs were occurring on a daily basis. The University was not without a remedy, as the contract allowed the University to seek an equitable adjustment while the work was being performed. If the University did not agree with Pavers as to what unit price should be charged, the University could have proceeded under the contract to seek an adjustment of the unit price.

Article 7 of the contract gave the University a method for dealing with changes in the quantities of the work to be performed. Paragraph 7.3 permits the University to issue "Construction Change Directives" to change the work and propose a basis for adjustment of the contract sum.

> **7.3.1** . . . The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions,

> the Contract Sum and Contract Time being adjusted accordingly.
>
> **7.3.2** A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.
>
> . . . .
>
> **7.3.6** If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures . . . including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit.

Before the work was completed, the University could have sought relief under article 7 of the contract based on the fact that the quantities had increased substantially from the original estimates. Once it was determined that the quantities had been greatly underestimated, the University had the opportunity to seek an equitable adjustment. However, the University did not tell Pavers to stop the work and did not attempt to seek an equitable adjustment before the work had been performed.

Instead, the University directed Pavers to complete the project and now seeks to reduce the unit prices. We find nothing in the contract that permits the University to unilaterally reduce the unit prices in the contract after the work has been performed. Pavers performed the contract as directed by the University and should receive payment for the unit prices bid on the contract.

It was not the province of the district court to rewrite or adjust the contract to reflect the court's view of what was fair. See *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992). Each part of the contract was bid based upon a unit price. It was incumbent upon the University to seek an adjustment of the unit prices before the work was completed or sustain its burden of proof regarding an equitable adjustment to the unit prices. Because the University did neither, we award Pavers the contract price.

VI. CONCLUSION

For the reasons set forth herein, we remand the cause to the district court with directions to enter judgment in favor

of Pavers in the amount of $1,714,996.40 less credit for the amounts paid by the University.

REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., and STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
AARON WHITE, APPELLANT.
755 N.W.2d 604

Filed September 12, 2008. Nos. S-07-1152, S-07-1153.

1. **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.
2. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Lancaster County, EARL J. WITTHOFF, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

WRIGHT, J.

NATURE OF CASE

These consolidated appeals are before the court without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a). Aaron White entered pleas of no contest to two charges of

driving while under the influence of alcohol (DUI). In each case, he was sentenced to 120 days in jail, to be served concurrently, and fined $200. His driver's license was revoked for 2 years. White contends that he should have been given a sentence of probation.

SCOPE OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. See *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

FACTS

At 12:42 a.m. on July 27, 2006, White was stopped by an officer of the University of Nebraska-Lincoln Police Department because his truck's headlights were not on. The officer noticed an open container of beer, smelled an odor of alcoholic beverage, and observed that White had bloodshot eyes. White showed signs of impairment while performing a series of field sobriety tests. He was placed in custody and transported to a detoxification facility. There, a breath test showed his breath alcohol content (BAC) to be .241 of a gram of alcohol per 210 liters of breath. White was issued a citation for DUI, no proof of insurance, open alcoholic beverage container, no headlights at night, possession of drug paraphernalia, and possession of less than 1 ounce of marijuana. He was then transported to his home.

At 3:44 a.m. the same day, White was stopped a second time after a Lincoln Police Department officer observed White's vehicle with one functioning headlight, no license plates, and homemade "In-Transit" signs. The officer observed that White had watery, bloodshot eyes; his speech was heavily slurred; and there was a strong odor of alcohol on his breath. He was given field sobriety tests and placed in the back seat of the police cruiser. He failed a preliminary breath test and was transported

to the detoxification facility. There, a breath test showed his BAC at that time was .196. White was given a citation for DUI and for not using a seatbelt.

Complaints were filed in Lancaster County Court on August 25, 2006, charging White with second-offense DUI with a BAC of more than .15, in violation of Neb. Rev. Stat. §§ 60-6,196 (Reissue 2004) and 60-6,197.03 (Cum. Supp. 2006). The complaints alleged that White had previously been convicted of DUI in 2003 in Platte County, Nebraska.

After White entered no contest pleas to the charges on March 28, 2007, the trial court found him guilty on each charge of second-offense DUI with a BAC of more than .15. On May 11, White was sentenced in each case to 120 days in jail and ordered in each case to pay a fine of $200. His driver's license was revoked for 2 years. The sentences of incarceration were ordered to be served concurrently. On appeal to the Lancaster County District Court, White's convictions and sentences were affirmed.

ASSIGNMENTS OF ERROR

White assigns the following errors: The district court erred in (1) affirming the order of the trial court that determined White was not eligible for probation, (2) determining the constitutionality of Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2006) and whether the statute violated ex post facto prohibitions, and (3) affirming the trial court's imposition of excessive sentences that were disproportionate to the severity of the offenses.

ANALYSIS

Under § 60-6,197.09, an individual who violates one of several DUI statutes while "participating in criminal proceedings" for DUI is not eligible for probation. White argues that he should have been eligible for probation because he was not "participating in criminal proceedings" when he received the second citation, because he had not yet been arraigned on the first citation. He contends the trial court abused its discretion in finding that he was not eligible for probation. However, we do not reach the question of whether White was "participating in criminal proceedings," because the trial court also concluded

that he was not an appropriate candidate for probation. The only issue we must address, therefore, is whether the court abused its discretion in sentencing White.

[3] White pled no contest to both of the DUI charges and was found guilty of second-offense DUI with a BAC of more than .15. The complaints alleged that White had previously been convicted of DUI in 2003 in Platte County, and he did not challenge that allegation at trial or on appeal. Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. See *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

At the sentencing hearing, the trial court noted that 9 months had passed since the citations were issued and that White had not yet obtained an alcohol evaluation. In addition, there was no evidence that he had attended Alcoholics Anonymous meetings or enrolled in any treatment program. The presentence report indicated that White did not believe he had an alcohol problem. White told the court he had not obtained treatment because he was a seasonal worker and had no funds during the winter.

The trial court stated that it was troubled that White was not willing to accept responsibility for his actions and "seem[ed] to have excuses for what happened that night." It stated to White, "You had to get your truck. You know, [it] had all that valuable stuff in it. Well, the reason why you talked the officer into letting you go home the first time was . . . to look after your dog." Based on these factors, the court determined that White was not eligible for probation. We find no abuse of discretion in the trial court's decision. The record supports a finding that White was not an appropriate candidate for probation.

White argues that the trial court imposed excessive sentences and that the district court erred in affirming the sentences. Pursuant to § 60-6,197.03(3), if a driver has had one prior

DUI conviction, he is guilty of a Class W misdemeanor and the court shall order that the driver's license be revoked for 1 year. A Class W misdemeanor for a second conviction carries with it a maximum sentence of 6 months in prison and a mandatory minimum sentence of 30 days in prison. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2006). Thus, White's sentence of 120 days in jail for each case was within the statutory limits. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

White also assigns as error the district court's determinations that § 60-6,197.09 is constitutional and that it is not an ex post facto law. We do not reach these issues, because neither was raised by White in the courts below. An issue not raised before the trial court will not be considered by the Nebraska Supreme Court on appeal. See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006). Although the district court addressed the issues related to § 60-6,197.09, we are not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before us. See *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

CONCLUSION

The trial court did not abuse its discretion in finding that White was not an appropriate candidate for probation. White's sentences were within the statutory limits and were not an abuse of discretion. The judgment of the district court, which affirmed the judgment of the county court, is affirmed.

AFFIRMED.

SCHUYLER COOPERATIVE ASSOCIATION, APPELLEE, V. CHARLES M. SAHS, APPELLANT.

755 N.W.2d 802

Filed September 19, 2008. No. S-07-454.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Negotiable Instruments: Words and Phrases.** An unconditional promise to pay a fixed amount at a definite time is an enforceable negotiable instrument.
4. **Promissory Notes: Words and Phrases.** Absent a defense, a promissory note is ordinarily a stand-alone, unqualified, enforceable promise to pay.
5. **Uniform Commercial Code: Negotiable Instruments.** Neb. U.C.C. § 3-117 (Reissue 2001) provides generally that to the extent the obligation under an instrument is modified, supplemented, or nullified by another agreement, such other agreement may serve as a defense to the obligation.
6. **Contracts: Breach of Contract: Penalties and Forfeitures: Damages.** The 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.
7. **Promissory Notes: Accounting.** The execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties.
8. **Promissory Notes: Proof.** A written obligation for the payment of a disputed account is conclusive between the parties and cannot be reopened either at law or at equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

Clark J. Grant, of Grant & Grant, for appellant.

Thomas E. Jeffers and Mathew T. Watson, of Crosby Guenzel, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Schuyler Cooperative Association (Schuyler) filed suit in the district court for Colfax County against Charles M. Sahs to enforce a promissory note Sahs had executed in favor of Schuyler. Sahs presented certain defenses which the district court rejected. The district court concluded that the promissory note was enforceable. The court denied Sahs' motion for summary judgment and sustained Schuyler's motion for summary judgment, entering judgment in Schuyler's favor on the promissory note. Sahs appeals. We affirm.

STATEMENT OF FACTS

This action involves enforcement of a promissory note executed February 25, 2004, in which Sahs agreed to pay Schuyler $70,000 on or before March 1, 2004. The terms of the note represented the amount Schuyler agreed to accept and Sahs agreed to pay to resolve a dispute with respect to an unsettled account. The account had been in dispute and the subject of a lawsuit since 2002.

The record shows that on November 12, 2002, Schuyler filed a lawsuit in the district court for Colfax County against Sahs and others, seeking to collect an outstanding debt on an open account. To resolve the matter, Sahs and Schuyler executed several documents, including the promissory note at issue, a stipulation and confession of judgment, a settlement agreement, and a stipulation to dismiss the lawsuit. The promissory note, dated February 25, 2004, states unconditionally that Sahs will pay Schuyler $70,000 on or before March 1, and in the confession of judgment, Sahs confesses judgment in favor of Schuyler in the amount of $70,000.

The written settlement agreement, dated February 27, 2004, recited that Sahs and Schuyler agree that the amount due on the open account is $80,000, and this recital is incorporated into the agreement. Referring to the promissory note, the agreement provides that Sahs represents that the note is valid, legally enforceable, and waives all defenses to Schuyler's right to collect except for the defense of payment. However, the settlement agreement further provides that Schuyler would

forgo collection on the $70,000 promissory note in the event that Sahs paid a compromised sum of $53,072.81 as follows: $19,000 at the time of the execution of the agreement; $1,000 each month thereafter, for 34 months; and a payment of $72.81 in the 35th and final month. These monthly payments were due the 1st of the month and delinquent after the 15th of the month. In the event Sahs failed to timely make these monthly payments, the agreement states that Schuyler had the immediate right to bring an action on the preexisting promissory note for the full $70,000 amount of the note, with credit given for any payments Sahs had made under the settlement agreement.

Sahs made certain payments to Schuyler, in accordance with the schedule of the settlement agreement. However, Sahs failed to make his May 2006 payment when due on May 1, and the payment became delinquent after May 15.

On May 26, 2006, Schuyler filed suit in the district court for Colfax County against Sahs, seeking to enforce the promissory note. This suit gives rise to the instant appeal. In this suit, Schuyler alleged that Sahs had paid $45,000 to date and that therefore, $25,000 was owed on the promissory note. Sahs filed an answer in which he admitted the underlying facts, including execution of the promissory note, but claimed that the amount sought by Schuyler was an unreasonable penalty in violation of public policy, and therefore, unenforceable.

On July 10, 2006, Sahs filed a motion for summary judgment seeking dismissal of the suit. Sahs claimed that the promissory note constituted an unenforceable penalty provision. The court overruled Sahs' motion for lack of an adequate record.

On February 22, 2007, Schuyler filed a motion for summary judgment, which came on for an evidentiary hearing on March 14. In an order filed April 24, the district court sustained Schuyler's motion. The district court entered judgment in Schuyler's favor and against Sahs in the amount of $70,000, with credit for payments already made by Sahs to Schuyler, plus interest as set forth in the promissory note and costs. Sahs appeals.

ASSIGNMENTS OF ERROR

Sahs claims the district court erred (1) in overruling his motion for summary judgment and (2) in sustaining Schuyler's motion for summary judgment.

STANDARDS 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. See *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (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 favorable inferences deducible from the evidence. See *id.*

ANALYSIS

The issue presented in this appeal is whether the promissory note is enforceable. Sahs claims, in effect, that the promissory note serves as the damage provision for breach of the settlement agreement and that such provision is not enforceable, because the $70,000 amount in the promissory note is an unreasonable penalty when compared to the $53,072.81 obligation contained in the settlement agreement. The district court rejected a similar argument and found the promissory note to be enforceable, denied Sahs' motion for summary judgment, and granted Schuyler's motion for summary judgment. Sahs contends that the district court erred when it made these rulings. As discussed below, because the promissory note constituted the stating of a previously unsettled account and is not a damage provision, we conclude that the promissory note is a separate and enforceable agreement. Accordingly, we affirm.

[3] The promissory note at issue is an unconditional promise to pay a fixed amount at a definite time and, as such, is an enforceable negotiable instrument. See, Neb. U.C.C. § 3-104 (Cum. Supp. 2006) (defining negotiable instruments); Neb. U.C.C. § 3-106 (Reissue 2001) (defining unconditional promise). Although the promissory note was executed in the same

timeframe as the settlement agreement, it contains no express conditions of payment and it does not state that it is subject to the settlement agreement or another writing. See § 3-106. The promissory note, therefore, is not conditional, and contrary to Sahs' argument, its viability is not conditioned on the contents of the subsequently executed settlement agreement.

[4,5] Absent a defense, a promissory note is ordinarily a stand-alone, unqualified, enforceable promise to pay. See, *Citicorp Intern. Trading v. Western Oil & Refining*, 790 F. Supp. 428, 434 (S.D.N.Y. 1992) (concluding that note is stand-alone document and that "[p]roof of a note and a failure to make payment theron establishes a *prima facie* case for recovery on that note"); Neb. U.C.C. § 3-308 (Reissue 2001) (stating that if validity of signatures on instrument is admitted, plaintiff producing document is entitled to payment unless defendant proves defense); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992) (holding that when there is no proof that notes in question were paid off or otherwise discharged, notes established indebtedness). Notwithstanding the foregoing, Sahs nevertheless claims that the settlement agreement serves to modify or supplement the contents of the promissory note. We understand this argument to be a claim asserted under Neb. U.C.C. § 3-117 (Reissue 2001), which provides generally that to the extent the obligation under an instrument is modified, supplemented, or nullified by another agreement, such other agreement may serve as a defense to the obligation.

To the extent Sahs is relying on the settlement agreement to modify his obligation under the promissory note, his argument is unavailing as a defense. Even taking the inferences in favor of Sahs, rather than minimizing his $70,000 obligation under the promissory note, the settlement agreement states and the parties agreed that Sahs owed Schuyler $80,000. The settlement agreement as a whole states that Sahs owes Schuyler $80,000, that the parties have agreed that Schuyler will accept $70,000 as reflected in the promissory note as full settlement, but that Schuyler will forgo collecting on the promissory note and accept $53,072.81 if Sahs pays the $53,072.81 in a timely manner. The terms of the settlement agreement do not impact or nullify Sahs' $70,000 obligation

under the preexisting promissory note except to the extent that Schuyler agreed to forbear collecting on the promissory note if Sahs paid timely. The undisputed evidence shows that Sahs failed to pay timely under the settlement agreement. Therefore, Schuyler was relieved of its agreement to forbear collection of the $70,000 promissory note and is entitled to bring this action to collect on the note.

[6] Much discussion was had at the trial level and in the appellate briefs as to whether the $70,000 amount may have been either a penalty provision or a liquidated damage provision purportedly occasioned by Sahs' breach of the settlement agreement. The $70,000 amount is not a damage provision for breach of the settlement agreement, and therefore, a discussion of the distinction between liquidated damages and penalty provisions is unnecessary to our analysis. As we have recently observed, "'[t]he 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.'" *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 431-32, 747 N.W.2d 383, 388 (2008) (quoting *B.F. Saul Real Estate Inv. Trust v. McGovern*, 683 S.W.2d 531 (Tex. App. 1984)). The promissory note at issue here is not a remedial right, but, rather, a separate preexisting obligation to which the parties agreed.

[7,8] As the undisputed facts show, the $70,000 amount is neither a penalty nor a liquidated damages provision, because the $70,000 amount was not to be paid because of a breach of the settlement agreement, but, rather, because it constituted the stating of an account which was previously in dispute. We have cited favorably to cases stating that the execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties. See *Hansen v. Abbott*, 187 Neb. 248, 188 N.W.2d 717 (1971). Such written obligation for the payment of a disputed account is conclusive between the parties and cannot be reopened either at law or at equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment. *Id.* See, similarly, *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

In the instant case, even taking the inferences in favor of Sahs, as we must do on appellate review of a summary judgment, see *County of Hitchcock v. Barger,* 275 Neb. 872, 750 N.W.2d 357 (2008), it is clear from the evidence that the promissory note represented an agreement between Sahs and Schuyler to settle Sahs' $80,000 indebtedness for $70,000. As such, the $70,000 promissory note represented an agreement between the parties that $70,000 would be accepted by Schuyler as full payment and settlement of the account and the $70,000 was not a damage provision in the settlement agreement. The promissory note was an unconditional promise by Sahs to pay Schuyler and was enforceable, as the district court determined.

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. *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008). Schuyler presented uncontroverted evidence that Sahs failed to make his May 2006 payment under the settlement agreement when due on May 1 and that such payment had not been made by May 15. Schuyler was no longer obligated to forbear collection of the promissory note. Schuyler properly filed this action to demand payment of the full amount due under the promissory note, with credit for payments previously received. As the district court correctly concluded, Schuyler was entitled to judgment.

CONCLUSION

The district court correctly determined that the promissory note was enforceable. The district court did not err in denying Sahs' motion for summary judgment and in sustaining Schuyler's motion and entering judgment in favor of Schuyler on the promissory note. We affirm.

AFFIRMED.

HEAVICAN, C.J., and GERRARD, J., not participating.

DANIEL R. TIMMERMAN, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

755 N.W.2d 798

Filed September 19, 2008. No. S-07-648.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Administrative Law: Final Orders: Courts: Appeal and Error.** In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.
3. **Courts: Pleadings: Time: Appeal and Error.** When a district court is functioning as an intermediate court of appeals, a motion to alter or amend a judgment does not toll the time for perfecting an appeal.

Petition for further review from the Court of Appeals, SIEVERS, IRWIN, and CASSEL, Judges, on appeal thereto from the District Court for Valley County, KARIN L. NOAKES, Judge. Judgment of Court of Appeals affirmed.

Gregory G. Jensen, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kevin J. Edwards for appellee.

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

GERRARD, J.

The question presented in this appeal is whether a motion to alter or amend a judgment,[1] filed after a district court's judicial review of an administrative decision under the Administrative Procedure Act (APA),[2] tolls the time for taking an appeal from the district court's order.[3]

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[1] See Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006).

[2] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[3] See Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006).

BACKGROUND

The appellant, Daniel R. Timmerman, was arrested on November 30, 2006, for driving under the influence of alcohol, and he allegedly refused to submit to a chemical test. The Nebraska Department of Motor Vehicles (DMV) revoked Timmerman's operator's license for a period of 1 year. Timmerman filed a petition for judicial review pursuant to the APA.[4] A hearing was held, and on April 24, 2007, the district court entered an order affirming the DMV's decision. On April 30, Timmerman filed a motion to alter or amend the judgment, pursuant to § 25-1329. A hearing was held, and the district court overruled the motion in an order filed on May 31. Timmerman filed a notice of appeal from the district court's order on June 8.[5] The Nebraska Court of Appeals, citing our decision in *Goodman v. City of Omaha*,[6] summarily dismissed Timmerman's appeal as filed out of time. We granted Timmerman's petition for further review.

ASSIGNMENT OF ERROR

Timmerman assigns that the Court of Appeals erred in determining that his motion to alter or amend the judgment, filed in the district court, did not toll the time for taking an appeal from the district court's order.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[7]

ANALYSIS

The question presented in this appeal is whether Timmerman's appeal from the district court was timely. Ordinarily, in order to appeal from a judgment, decree, or final order made by the

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[4] See § 84-917.

[5] See § 84-918(3).

[6] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

[7] *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

district court, the appealing party must file a notice of appeal in the district court within 30 days.[8] But the running of the time for filing a notice of appeal is tolled by filing a timely tolling motion,[9] such as a motion for new trial,[10] motion to alter or amend the judgment,[11] or motion for judgment notwithstanding the verdict.[12] If such a motion is filed, the appealing party may file a notice of appeal within 30 days of the court's order ruling on the motion.[13]

[2] But we have long held that a motion for new trial is improper in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals.[14] And it is equally well established that in reviewing final administrative orders under the APA, the district court functions not as a trial court but as an intermediate court of appeals.[15] Thus, a motion for new trial filed after a district court's judicial review in an APA proceeding is not a proper motion and does not stop the running of time for perfecting an appeal.[16]

[3] We have similarly reasoned that when a district court is functioning as an intermediate court of appeals, a motion to

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[8] § 25-1912(1).

[9] § 25-1912(3).

[10] See Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2006).

[11] See § 25-1329.

[12] See Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2006).

[13] § 25-1912(3).

[14] *Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991). See, e.g., *Goodman, supra* note 6; *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990); *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990); *In re Conservatorship of Mosel*, 234 Neb. 86, 449 N.W.2d 220 (1989); *In re Guardianship and Conservatorship of Sim*, 233 Neb. 825, 448 N.W.2d 406 (1989); *Collection Bureau of Lincoln v. Loos*, 233 Neb. 30, 443 N.W.2d 605 (1989).

[15] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). See, also, *Interstate Printing Co., supra* note 14.

[16] *Interstate Printing Co., supra* note 14.

alter or amend a judgment does not toll the time for perfecting an appeal.[17] In *Goodman v. City of Omaha*, an appeal to the district court from a zoning board of appeals, we held that the district court functioned as an intermediate court of appeals, and rejected the appellants' argument that their motion for new trial tolled the time for taking an appeal. But the appellants had also filed a motion to alter or amend the judgment.

We explained that a "judgment," for purposes of a motion to alter or amend a judgment pursuant to § 25-1329, is "'the final determination of the rights of the parties in an action,'"[18] or "'a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.'"[19] Therefore, because the district court was functioning as an intermediate court of appeals, we determined that "[t]he order issued by the district court was not a judgment, but, rather, was an appellate decision reviewing the judgment rendered by the [zoning] Board."[20] Accordingly, we concluded that the appellants' motion to alter or amend was not an appropriate motion and did not toll the time for filing a notice of appeal.[21]

In this case, Timmerman's notice of appeal was not filed within 30 days of the district court's order affirming the decision of the DMV. Timmerman's motion to alter or amend the judgment did not toll the time for taking an appeal, because the district court in this APA proceeding was acting as an intermediate court of appeals. Therefore, the Court of Appeals correctly concluded that Timmerman's appeal to that court was untimely.

Timmerman contends that *Goodman* is inapplicable to an APA proceeding, and specifically a license revocation proceeding, because the statutes relating to those proceedings refer to

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[17] See *Goodman, supra* note 6.

[18] *Id.* at 544, 742 N.W.2d at 30, quoting Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006).

[19] *Id.*, quoting *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[20] *Id.*

[21] *Id.*

a "judgment." For example, "[a]n aggrieved party may secure a review of any judgment rendered or final order made by the district court under the [APA] by appeal to the Court of Appeals."[22] And when a person appeals from the revocation of his or her operator's license, pursuant to the APA, the appeal "shall suspend the order of revocation until the final judgment of a court finds against the person so appealing."[23] Thus, Timmerman contends that the decision of a district court in a license revocation proceeding must be a "judgment" for purposes of § 25-1329.

Timmerman's argument is not unreasonable. But the word "judgment" refers to different things in different contexts, and is often used generally to refer to the result of any kind of judicial decisionmaking process.[24] In the specific context of § 25-1329, however, we have explained that a "judgment" is the final determination of a trial court, not an appellate court.[25] We do not read the APA, or § 60-498.04, as affecting our long-established rule that the tolling motions listed in § 25-1912(3) are ineffective when a district court is acting as an intermediate court of appeals, or our specific holding that a "judgment," for purposes of § 25-1329, does not include an appellate decision of a district court.[26]

The Court of Appeals correctly applied our decision in *Goodman* and concluded that Timmerman's appeal to that court was untimely. Timmerman's assignment of error is without merit.

CONCLUSION

The decision of the Court of Appeals, dismissing Timmerman's appeal, is affirmed.

AFFIRMED.

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[22] § 84-918.

[23] Neb. Rev. Stat. § 60-498.04 (Reissue 2004).

[24] See, e.g., 8 The Oxford English Dictionary 294-95 (2d ed. 1989).

[25] See *Goodman, supra* note 6.

[26] See *id.*

JOHN M. AHMANN, APPELLEE, V. CORRECTIONAL CENTER LINCOLN AND NEBRASKA DEPARTMENT OF LABOR, APPELLANTS.

755 N.W.2d 608

Filed September 19, 2008. No. S-07-687.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Administrative Law: Judgments: Time: Appeal and Error.** Any aggrieved party seeking judicial review of an administrative decision under the Administrative Procedure Act must file a petition within 30 days after service of that decision, pursuant to Neb. Rev. Stat. § 84-917(2)(a) (Cum. Supp. 2006).

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

John H. Albin, Thomas A. Ukinski, and W. Russell Barger for appellants.

No appearance for appellee.

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

GERRARD, J.

John M. Ahmann, an applicant for unemployment insurance benefits, was penalized 12 weeks of benefits because the Nebraska Appeal Tribunal (the Appeal Tribunal) found he was fired for misconduct. Ahmann petitioned for judicial review. Several months later, Ahmann's employer and the Nebraska Department of Labor sought to amend their answer to Ahmann's petition, arguing that the Appeal Tribunal erred in allowing benefits at all.

The issue presented in this appeal is whether the employer and Department of Labor waived their challenge to the Appeal Tribunal's decision by failing to file their own petition for judicial review. We conclude that under the Administrative

Procedure Act (APA),[1] a party seeking review of an administrative decision must file a petition within 30 days of the decision. Because the employer and Department of Labor did not do so in this case, we affirm the decision of the district court that refused to consider their argument.

BACKGROUND

Under the Employment Security Law,[2] if an employee is discharged for misconduct connected with his or her work, the employee is disqualified for benefits for the week in which the employee was discharged and the 12 weeks that follow.[3] But if the employee's misconduct was "gross, flagrant, and willful, or was unlawful," the employee is totally disqualified from receiving benefits.[4]

Ahmann, an employee of the Nebraska Department of Correctional Services at the Correctional Center Lincoln (CCL), was fired because he tested positive for marijuana. Ahmann claimed unemployment insurance benefits, which were initially awarded without penalty because the adjudicator found that the evidence did "not support a finding of misconduct in connection with the work." CCL appealed that decision to the Appeal Tribunal, contending that Ahmann had been discharged for misconduct. The Appeal Tribunal agreed, finding that Ahmann was discharged for misconduct and was disqualified from receiving benefits for a period of 12 weeks. However, the Appeal Tribunal did not find that Ahmann's misconduct was gross, flagrant, and willful, or was unlawful.

The Appeal Tribunal's decision was filed on September 21, 2006. Ahmann filed a timely petition for judicial review in the district court on October 5. CCL and the Department of Labor filed an answer on November 27, requesting that the district court review and affirm the decision of the Appeal Tribunal.

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[1] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[2] Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 2004, Cum. Supp. 2006 & Supp. 2007).

[3] § 48-628(2).

[4] *Id.*

But on March 13, 2007, CCL and the Department of Labor filed a motion for leave to file an amended answer. The proposed amended answer would have alleged that Ahmann was discharged for misconduct that was gross, flagrant, and willful, or was unlawful, such that Ahmann would be totally disqualified from receiving benefits. The amended answer would have asked the court to modify the finding of the Appeal Tribunal to that effect. But the district court overruled the motion, explaining that "procedurally, if [CCL and the Department of Labor] wanted to address that issue, there were other ways, as opposed to amending [their] answer at this late date." The district court affirmed the decision of the Appeal Tribunal.

ASSIGNMENTS OF ERROR

CCL and the Department of Labor assign, consolidated and restated, that the district court erred in (1) denying their motion for leave to amend their answer and (2) failing to find that Ahmann was terminated for misconduct that was gross, flagrant, and willful, or was unlawful.

STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[5] The meaning of a statute is also a question of law.[6] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[7]

ANALYSIS

This appeal requires us to determine, as an initial matter, what procedure should be followed when more than one party seeks judicial review of an administrative decision. In support of their first assignment of error, CCL and the Department of Labor essentially contend that their amended answer was an

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[5] *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003).

[6] *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007).

[7] *Davis, supra* note 5.

appropriate way to seek judicial review, so the district court erred in refusing to permit it.

Under the APA, any person aggrieved by a final decision in a contested case is entitled to judicial review.[8] And the APA provides that "[p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."[9] The court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.[10] But the APA does not specify whether, after one party has initiated review proceedings by filing a petition, another aggrieved party who wants the court to review the agency's decision must file its own petition within the deadline imposed by the APA.

Courts to have considered similar statutory schemes have concluded that in the absence of a provision expressly extending the time for filing a cross-petition, any aggrieved party seeking judicial review of an administrative decision must file a separate, timely petition for review.[11] In other words, where another deadline is not specified, a cross-petition is subject to the same filing deadline as the original petition.[12] Prompt filing of a petition or cross-petition is important because it is the petition for judicial review that sets forth the reasons for believing

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[8] § 84-917(1).

[9] § 84-917(2)(a).

[10] § 84-917(6)(b).

[11] See, e.g., *Washington Utilities and Transp. Com'n (WUTC) v. F.E.R.C.*, 26 F.3d 935 (9th Cir. 1994); *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir. 1994) (*TII*); *Reich v. Occupational Safety & Health Review Com'n*, 998 F.2d 134 (3d Cir. 1993) (*OSHRC*); *Dole v. Briggs Const. Co., Inc.*, 942 F.2d 318 (6th Cir. 1991); *City of Hiawatha v. City Development Bd.*, 609 N.W.2d 532 (Iowa 2000); *King County v. Cent. Puget Sound Bd.*, 138 Wash. 2d 161, 979 P.2d 374 (1999); *Viktron/Lika Utah v. Labor Com'n.*, 18 P.3d 519 (Utah App. 2001). But see *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428 (Iowa 1984).

[12] *King County, supra* note 11. See, also, *OSHRC, supra* note 11; 16A Charles Alan Wright et al., Federal Practice and Procedure § 3961.4 (1999 & Supp. 2008). Compare, e.g., *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 42 P.3d 268 (2002).

that relief should be granted and specifies the type and extent of the relief requested.[13]

Administrative proceedings can be quite complicated and affect the interests of numerous parties.[14] Even in this relatively simple case, Ahmann was led to believe for several months that he faced only a 12-week suspension of unemployment insurance benefits, before he was notified that CCL and the Department of Labor sought to deprive him of benefits entirely. If cross-petitions could be filed at any time during the pendency of judicial review, then all the issues presented during the administrative proceeding would be subject to appeal during the litigation and no interested party could consider any issue finalized until the completion of the entire judicial review.[15] Applying the same deadline for petitions and cross-petitions serves to ensure that all the parties affected by an administrative decision are aware of any challenge to that decision and receive prompt notice of the issues presented for judicial review.

That having been said, there are also prudential reasons to support an extended deadline for cross-appeals.[16] For example, in this court and the Nebraska Court of Appeals, the parties are permitted by our rules of practice and procedure to assert a cross-appeal in an appellee's brief.[17] But that rule is not applicable to district courts,[18] and there is no basis for extending or applying that rule under these circumstances, because the APA makes no mention of an extended or different deadline for filing a cross-petition in the district court.[19] In the absence

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[13] See § 84-917(2)(b).

[14] See, e.g., *Scofield v. State, ante* p. 215, 753 N.W.2d 345 (2008).

[15] See *King County, supra* note 11.

[16] See, *F.E.R.C., supra* note 11; *TII, supra* note 11; *OSHRC, supra* note 11; *Nicol, supra* note 11.

[17] See Neb. Ct. R. App. P. § 2-101(E).

[18] Cf. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[19] See, *F.E.R.C., supra* note 11; *TII, supra* note 11; *OSHRC, supra* note 11; *Dole, supra* note 11; *King County, supra* note 11; *Viktron/Lika Utah, supra* note 11 (rejecting application of cross-appeal rules of appellate courts to administrative review proceedings). See, also, *City of Hiawatha, supra* note 11. Compare *Civil Serv. Comm'n, supra* note 12.

of such a provision, the plain language of the APA requires that the same deadline be applied to any party seeking judicial review of an administrative decision.

[4] None of this should be read to suggest that the Legislature cannot, or should not, address this issue more directly than it has. The Legislature is welcome to balance the interests of the parties and to provide a specific procedure for cross-petitions, if it so chooses. But in the absence of an express provision excepting cross-petitions from the deadline imposed by the APA, for the reasons explained above, we hold that any aggrieved party seeking judicial review of an administrative decision under the APA must file a petition within 30 days after service of that decision, pursuant to § 84-917(2)(a).

In this case, CCL and the Department of Labor sought to attack the Appeal Tribunal's decision and obtain affirmative relief, instead of protect that decision, so they should have filed a timely petition for review.[20] Because they did not, the district court correctly refused to consider their argument. Their first assignment of error is without merit. And their remaining assignment of error addresses the merits of the argument that, as explained above, they failed to present for judicial review. Therefore, like the district court, we decline to consider it.

CONCLUSION

The district court correctly refused to consider CCL and the Department of Labor's challenge to the Appeal Tribunal's decision, because CCL and the Department of Labor did not file a timely petition for judicial review of that decision. The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

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[20] See *Dole, supra* note 11.

BryanLGH Medical Center, a Nebraska nonprofit corporation, appellee and cross-appellant, v. Nebraska Department of Health and Human Services Regulation and Licensure, an administrative agency of the State of Nebraska, and Joann Schaefer, M.D., director of the Nebraska Department of Health and Human Services Regulation and Licensure, appellees, and Madonna Rehabilitation Hospital, a Nebraska nonprofit corporation, intervenor-appellant and cross-appellee.

755 N.W.2d 807

Filed September 19, 2008. No. S-07-1016.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
3. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
4. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
5. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
6. **Moot Question: Appeal and Error.** When a party or parties are aware that appellate issues have become moot during the pendency of the appeal and such mootness is not reflected in the record, in the interest of judicial economy, a party may file a suggestion of mootness in the Nebraska Supreme Court or Nebraska Court of Appeals as to the issue or issues claimed to be moot.
7. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
8. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
9. ____: ____. The public interest exception to the mootness doctrine requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

Loel P. Brooks, of Brooks, Pansing & Brooks, P.C., L.L.O., and Steven G. Seglin and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for intervenor-appellant.

Kirk S. Blecha, Barbara E. Person, and John A. Sharp, of Baird Holm, L.L.P., for appellee BryanLGH Medical Center.

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

PER CURIAM.

The issue presented by the parties to this appeal involves the statutory criteria for determining whether a certificate of need is required for an increase in the number of rehabilitation beds in a health care facility. But the initial question we must decide is whether this appeal has become moot, due to an intervening change in state law and the approval of the plaintiff's application for Medicare certification of its increased number of rehabilitation beds.

BACKGROUND

The Nebraska Health Care Certificate of Need Act[1] establishes, among other things, the criteria and procedures by which the Nebraska Department of Health and Human Services Regulation and Licensure (Department) issues the certificates of need that permit establishment or expansion of hospital bed capacity. At the time this litigation began, § 71-5829.03(2) provided that a certificate of need was required for "[a]n increase in the long-term care beds or rehabilitation beds of a health care facility by more than ten beds or more than ten percent of the total bed capacity, whichever is less, over a two-year period."

BryanLGH Medical Center (BryanLGH) sought to add 10 rehabilitation beds at its west campus, increasing its number of rehabilitation beds from 20 to 30. BryanLGH's total bed

[1] Neb. Rev. Stat. §§ 71-5801 to 71-5870 (Reissue 2003).

capacity was to remain 290 beds, because BryanLGH intended to seek Medicare certification of 10 of its acute care beds as rehabilitation beds. BryanLGH sought confirmation from the Department that no certificate of need would be required for this increase in its number of rehabilitation beds.

The Department informed BryanLGH that a certificate of need would be required. The Department explained that it interpreted § 71-5829.03(2) as requiring a certificate of need if a facility proposed to increase its number of rehabilitation beds by more than 10 percent of the total *rehabilitation bed* capacity. Because BryanLGH had 20 rehabilitation beds, the Department concluded that BryanLGH could add only 10 percent of that—2 beds—without a certificate of need.

BryanLGH filed a declaratory judgment action in the district court, seeking a declaration that no certificate of need was required. BryanLGH contended that the "total bed capacity," within the meaning of § 71-5829.03(2), referred to the total number of beds of any kind. Thus, BryanLGH concluded that it could add up to 10 rehabilitation beds without a certificate of need, because 10 beds was less than 10 percent of its total bed capacity of 290. The Department denied BryanLGH's contentions, as did Madonna Rehabilitation Hospital (Madonna), which the district court allowed to intervene in support of the Department's position. But the district court ultimately agreed with BryanLGH, and declared that BryanLGH had the right to seek Medicare certification for 10 additional rehabilitation beds without a certificate of need.

Madonna appealed on September 20, 2007, and we granted Madonna's petition to bypass the Nebraska Court of Appeals. While the appeal was progressing, the Legislature turned its attention to § 71-5829.03, in specific response to the district court's decision in this case. As enacted, 2008 Neb. Laws, L.B. 765, expressly provided that a certificate of need is required for, among other things, "[a]n increase in the rehabilitation beds of a health care facility by more than ten rehabilitation beds or more than ten percent of the total rehabilitation bed capacity of such facility, whichever is less, over a two-year period."[2] The

[2] L.B. 765, One Hundredth Legislature, Second Session.

stated purpose of the legislation was to clarify that "a proposed increase in rehabilitation beds will be measured against the current total bed capacity of rehabilitation beds."[3]

But the changes effected by L.B. 765 did not become effective until July 18, 2008.[4] In the meantime, on May 9, the Centers for Medicare and Medicaid Services informed BryanLGH that the 10 additional rehabilitation beds BryanLGH had requested had been approved.

ASSIGNMENTS OF ERROR

Before us now is the appeal taken by Madonna after the district court's declaratory order. Madonna assigns, consolidated, restated, and renumbered, that the district court erred in (1) interpreting the phrase "total bed capacity" in § 71-5829.03(2) and (2) failing to defer to the Department's interpretation of § 71-5829.03(2). On cross-appeal, BryanLGH assigns that the district court erred in finding that (1) Madonna possessed a direct and legal interest in the outcome of the case sufficient to permit it to intervene and (2) the Department could not adequately represent Madonna's interest.

In addition, after L.B. 765 was enacted, we entered a supplemental briefing order, directing the parties to brief the following issues: (1) how the enactment or legislative history of L.B. 765 should inform this court's analysis of the issues presented in this appeal and (2) whether the enactment of L.B. 765 renders any or all of those issues moot.

STANDARD OF REVIEW

[1] Mootness does not prevent appellate jurisdiction.[5] But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions. A jurisdictional question that

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[3] Committee Statement, L.B. 765, Committee on Health and Human Services, 100th Leg., 2d Sess. (Jan. 24, 2008) (emphasis in original).

[4] See, Neb. Const. art. III, § 27; Legislative Journal, 100th Leg., 2d Sess. 1579 (Apr. 17, 2008).

[5] *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[6]

ANALYSIS

[2-5] The first issue we confront in this case is whether the appeal has become moot. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[7] Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.[8] In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[9] Therefore, as a general rule, a moot case is subject to summary dismissal.[10]

[6] BryanLGH has filed a suggestion of mootness in this case, establishing the facts set forth above.[11] At oral argument, counsel for Madonna refused to concede the facts underlying BryanLGH's suggestion of mootness, but counsel did not dispute them either. Instead, counsel essentially questioned BryanLGH's provision of proof that its additional rehabilitation beds had been Medicare certified. But it is well established that when a party or parties are aware that appellate issues have become moot during the pendency of the appeal and such mootness is not reflected in the record, in the interest of judicial economy, a party may file a suggestion of mootness in the

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[6] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[7] *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

[8] *Id.*

[9] *In re Applications of Koch*, 274 Neb. 96, 736 N.W.2d 716 (2007).

[10] *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[11] See *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999).

Nebraska Supreme Court or Court of Appeals as to the issue or issues claimed to be moot.[12]

Essentially, the suggestion of mootness is a motion filed *in an appellate court*, asking that court to dismiss the appeal and including evidence to substantiate its underlying allegations. Madonna resists BryanLGH's suggestion of mootness, but has not alleged facts, or presented evidence, to contradict the allegations and evidence submitted by BryanLGH. Nor do we have any reason to believe that BryanLGH has submitted evidence in bad faith. Based on BryanLGH's suggestion of mootness, and in the absence of any credible suggestion to the contrary, we find that the facts alleged in BryanLGH's suggestion of mootness have been sufficiently established.

Based on those facts, BryanLGH argues that the case is moot because the relief provided by the district court is complete. We agree. The district court's order simply allowed BryanLGH to seek Medicare certification of 10 additional rehabilitation beds without a certificate of need. BryanLGH has completed that certification process. Therefore, reversing the court's order would have no practical effect.

Nor is there anything in the pleadings or transcript to suggest that Madonna or the Department asked the district court to provide any relief against BryanLGH. They simply asked the court to deny BryanLGH's claim for relief—a request that is no longer meaningful. In other words, even if there is some mechanism by which the court could order BryanLGH to "undo" what it has done, there is no claim before us in this appeal that would support the provision of such relief. BryanLGH obtained the only relief it sought, and no other party asked the district court to do anything else.

[7] We are aware that engaging in conduct that requires a certificate of need without obtaining a certificate of need is subject to civil and criminal penalties.[13] But again, there is nothing in the record to suggest that BryanLGH is, or will be,

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[12] *Id.* See, also, *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Beachy v. Becerra*, 259 Neb. 299, 609 N.W.2d 648 (2000); *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

[13] See §§ 71-5869 and 71-5870.

subject to such penalties. A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[14]

[8,9] We have held that an appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[15] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[16] But in this case, L.B. 765 precludes application of the public interest exception. This would be a case of last impression, and in the absence of a party whose rights are presently at issue, there is no need for an authoritative construction of statutory language that no longer exists. The public interest exception to the mootness doctrine is not applicable here.

CONCLUSION

Given the record before us, and the uncontested facts established by BryanLGH's suggestion of mootness, we conclude that this appeal is moot and that the public interest exception to the mootness doctrine is not applicable. Madonna's appeal and BryanLGH's cross-appeal are dismissed.

APPEAL DISMISSED.

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[14] *In re Applications of Koch, supra* note 9.

[15] *Id.*

[16] *Id.*

STATE OF NEBRASKA, APPELLANT, V. STEVEN J. LARKINS, APPELLEE.

755 N.W.2d 813

Filed September 19, 2008. No. S-07-1069.

1. **Criminal Law: Intent: Appeal and Error.** The purpose of a prosecutorial appeal brought under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006) is to provide an authoritative exposition of the law to serve as precedent in future cases.
2. **Criminal Law: Appeal and Error.** Under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006), an appellate court determines whether authoritative exposition of the law is needed based upon the prosecuting attorney's application for leave to docket an appeal.
3. ____: ____. The scope of an appellate court's review under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006) is limited to providing an authoritative exposition of the law to serve as precedent in future cases.

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

Gary E. Lacey, Lancaster County Attorney, and Daniel D. Packard for appellant.

Joel G. Lonowski, of Morrow, Poppe, Otte & Watermeier, P.C., L.L.O., for appellee.

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

GERRARD, J.

Steven J. Larkins was charged with tampering with a witness[1] after an altercation with his estranged wife. Larkins' wife called police after the altercation, and Larkins asked her to call back and tell the police not to come. Larkins was holding a gun at the time, but he neither pointed the gun at his wife nor expressly threatened her in any way. The district court found this to be insufficient evidence of tampering with a witness and dismissed that charge and a related firearms charge.

The Lancaster County Attorney filed a notice of intent to appeal that judgment of dismissal.[2] The county attorney's

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[1] See Neb. Rev. Stat. § 28-919(1)(a) (Reissue 1995).

[2] See Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006).

application for leave to docket an appeal was signed by the district court and filed in the Nebraska Court of Appeals. The Court of Appeals sustained the county attorney's application, and the appeal was later moved to our docket.

[1-3] After considering the facts and argument in this case, we conclude that the county attorney's application for leave to docket an appeal should not have been sustained. The purpose of a prosecutorial appeal brought under § 29-2315.01 is to provide an authoritative exposition of the law to serve as precedent in future cases.[3] Thus, under § 29-2315.01, an appellate court determines whether authoritative exposition of the law is needed based upon the prosecuting attorney's application for leave to docket an appeal.[4] And the scope of an appellate court's review under § 29-2315.01 is limited to providing such an exposition.[5]

Here, an authoritative exposition of the law is neither required nor readily discernable from the asserted issue in this case. It is not disputed that Larkins was placed legally in jeopardy before the district court dismissed the charges at issue, so a decision in this error proceeding would not affect the judgment of the district court.[6] And the county attorney's sole assignment of error is that the court erred in sustaining Larkins' motion to dismiss, based on the failure to prove a prima facie case. When the county attorney's arguments are evaluated, it is clear that the only issue presented in this case is whether the inferences that could reasonably be drawn from the evidence would have been sufficient to sustain a conviction. In other words, the issue presented is limited to the facts of this case. No issue of statutory interpretation is presented, nor does any other issue appear on which a decision would be helpful in future cases. It is not the proper function of § 29-2315.01 to have an appellate court render an advisory opinion on narrow factual issues regardless

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[3] *State v. Hall*, 269 Neb. 228, 691 N.W.2d 518 (2005); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

[4] *Hall, supra* note 3.

[5] See, *id.*; *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976).

[6] See Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2006).

of whether the opinion may, or may not, have some marginal precedential value in the future.

In short, the county attorney's application does not present us with an opportunity to provide an authoritative exposition of the law that would be sufficiently useful as precedent. Because the scope of our review is limited to providing such an exposition, we dismiss this appeal.

APPEAL DISMISSED.

MARILYNN EHLERS, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
756 N.W.2d 152

Filed September 26, 2008. No. S-07-732.

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 was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty.
5. ____. There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection.
6. ____. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

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

Michael J. Elsken, of Nebraska Advocacy Services, Inc., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellee.

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

WRIGHT, J.

NATURE OF CASE

Marilynn Ehlers was a resident of the Hastings Regional Center (HRC), which is operated by the Nebraska Department of Health and Human Services. Ehlers was physically assaulted by another resident and sustained injuries to her left hand and right knee. She sued the State of Nebraska for negligence pursuant to the State Tort Claims Act, see Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003, Cum. Supp. 2006 & Supp. 2007). The Adams County District Court sustained the State's motion for summary judgment. Ehlers appeals, asserting that the assault was foreseeable.

SCOPE OF REVIEW

[1] 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. *Gavin v. Rogers Tech. Servs., ante* p. 437, 755 N.W.2d 47 (2008).

[2] In reviewing a summary judgment, an appellate court views the evidence in a 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. *Id.*

FACTS

On March 30, 2003, Ehlers, who has limited mobility due to polio, was a resident of HRC. She alleged that she was standing by a counter at the nurses' station when another resident, "L.S.," became agitated. L.S. stated, "'Dan [an HRC employee] is staring at me.'" L.S. then allegedly pushed Ehlers to the floor and into a wall. Ehlers fractured her left hand and injured her right knee.

Ehlers filed a claim with the State Claims Board, which disallowed the claim. She then filed a complaint against the State, alleging that the State and its employees had been warned about the physically inappropriate actions of L.S. toward other HRC residents, but that the State and its employees failed to take reasonable actions to protect Ehlers. She alleged that the State knew or should have known L.S. posed an imminent threat of harm and that the State failed to protect Ehlers.

The State claimed immunity from suits arising out of assault or battery and alleged that any damages suffered were the result of the intervening criminal or negligent act of a third party. The State moved for summary judgment.

At a hearing, the State offered into evidence three affidavits. Carolyn Johnson worked as a psychiatric technician at HRC. She was overseeing breakfast in the day hall on the day of the incident. Her description of the incident differs from that of Ehlers, in that Johnson stated that Ehlers and L.S. were seated across the table from each other when Johnson observed a quick exchange of words between the two women. Johnson could not hear what was said, but she reported that "[s]uddenly, and without warning, L.S. got up and pushed [Ehlers] out of her chair, knocking her against the wall behind her and to the floor . . . ." Johnson said that she immediately restrained L.S., as she had been trained to do, and that L.S. was placed in restraints and sent into seclusion.

Johnson stated that although L.S. had a history of "aggressive, assaultive behavior," she had been controlled and did not appear to be upset or agitated that morning, and that L.S. was entitled to have breakfast with the other patients. If L.S. had exhibited upset or agitated behavior, she would have been given breakfast away from the other patients. According to Johnson, "[t]he suddenness of the push and lack of any forewarning made any prevention of the assault by L.S. on [Ehlers] by HRC staff impossible."

The facility operating officer at HRC submitted an affidavit accompanied by a copy of HRC policies regarding patient restraint and seclusion that were in effect on the date of the incident.

A psychologist at HRC reviewed the records of L.S. from her admission on March 26, 2003, to the date of the assault, March 30. The psychologist found no evidence of behavior that would indicate imminent dangerousness which would warrant the use of seclusion and/or restraints prior to the incident.

Ehlers offered her own affidavit, in which she stated that she was committed to HRC by a mental health board. She stated that the individuals working on her ward knew or should have known that she had a history of polio and had limited mobility. Ehlers said that on the day of the incident, she entered the common area at 7:55 a.m. In contrast to Johnson's affidavit, Ehlers stated that there was a counter at the nurses' station where coffee was provided and that L.S. was at the counter. At the time, there were between four and eight residents sitting in the day hall awaiting their breakfast trays.

Ehlers stated that Johnson was on duty with "Dan," whose last name is unknown. Dan ordinarily worked on another ward. He was at the desk at the entrance of the day hall, about 10 to 12 feet from where L.S. was standing. Neither Johnson nor Dan warned Ehlers about L.S.' exhibiting any aggressive or unusual behavior. While Ehlers was standing at the counter, L.S. began to show signs of agitation and said, "'Dan is staring at me.'" Ehlers alleged that Dan should have heard the comment and that Johnson may have heard it. The record does not reflect that Dan was ever identified or asked to provide an affidavit about the incident.

Ehlers said that staff failed to take action to redirect L.S. after she became visibly agitated and that staff did not protect Ehlers. Ehlers said she did not hear L.S. being redirected and was not herself directed away from L.S. When Ehlers responded to L.S., she was physically assaulted by L.S. Again in contrast to Johnson's affidavit, Ehlers stated that Dan physically restrained L.S. immediately after the assault and that Johnson went to Ehlers and told her not to move from where she had fallen on the floor.

Ehlers claimed that Dan had an opportunity to prevent the assault by intervention short of physical restraint or seclusion and that HRC staff could have reasonably protected her from assault by L.S., but failed to do so.

The district court sustained the State's motion for summary judgment, and Ehlers appeals.

ASSIGNMENT OF ERROR

Ehlers argues that the district court erred in finding that the evidence did not support her claim that the assault was foreseeable.

ANALYSIS

[3] In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003). There is no dispute that the State owed a duty to Ehlers, who was in the State's custody. The issue before us therefore is whether the State breached its duty to protect Ehlers and should therefore be held liable for her injuries.

[4] In the case at bar, the alleged negligence by the State was the failure to control the actions of another HRC resident. The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty. *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007). The common law has traditionally imposed liability only if the defendant bears some special relationship to the potential victim.

[5] This court has adopted Restatement (Second) of Torts § 315 at 122 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See *Bartunek v. State, supra*. See, also, *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

[6] In *Bartunek*, we noted that the parameters of § 315(a) are further defined by Restatement (Second) of Torts § 319 at 129 (1965), which provides that "[o]ne who takes charge of a third

person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." We stated that the illustrations provided in the Restatement "make plain that the phrase 'takes charge' is intended to refer to a custodial relationship." *Bartunek v. State*, 266 Neb. at 462, 666 N.W.2d at 441.

At the time of her injuries, Ehlers was a resident of HRC, a state-operated institution. In its answer, the State admitted that Ehlers was in its custody at HRC. Thus, there is no dispute that there was a custodial relationship. The State does not contest that, as the custodian of patients at HRC, it owed a duty of ordinary care to protect patients and to prevent them from assaulting each other. However, the State argues that the scope of the State's duty is limited to any risks that are foreseeable and that it properly discharged its duty.

Restatement (Second) of Torts § 320 at 130 (1965) provides:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

In a comment to § 320, the Restatement notes that the rule applies to "officials in charge of a state asylum or hospital for the criminally insane." *Id.*, comment *a.* at 130. Thus, State employees at HRC have a duty to exercise reasonable care to control the conduct of third parties to prevent them from harming another resident if the employees know or should know of the need to exercise such control.

Ehlers alleged that she had limited mobility and was in the custodial care of the State's agents and employees. While

standing by a counter at the nurses' station at HRC, L.S., another resident, allegedly began to show signs of agitation and stated, "'Dan is staring at me.'" L.S. then allegedly pushed Ehlers to the floor and into a wall. Ehlers alleged that the State's employees had been warned about physically inappropriate actions taken toward HRC residents, but that the employees allegedly failed to take reasonable actions to protect Ehlers. She also alleged that the State's agents and employees knew or should have known that L.S. posed an imminent threat of harm to Ehlers, but failed to act to protect her.

In reviewing a summary judgment, an appellate court views the evidence in a 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. *Gavin v. Rogers Tech. Servs., ante* p. 437, 755 N.W.2d 47 (2008). This court must decide whether the evidence presented was sufficient to establish a material issue of fact whether HRC staff knew or should have known L.S. was agitated to the extent that the State should have acted to protect Ehlers.

Viewed in the light most favorable to Ehlers and giving her the benefit of all reasonable inferences deducible from the evidence, we conclude that there is not a genuine issue of material fact in dispute. The evidence is insufficient to show that the State breached its duty to protect Ehlers from the actions of L.S. The affidavit of Ehlers is not sufficient to establish that HRC staff knew or should have known that L.S. was about to harm Ehlers and therefore should have immediately taken action to protect Ehlers from L.S. The person referred to as "Dan" in Ehlers' affidavit is not identified by full name, job title, training, or scope of responsibility. Without such information, a trier of fact could not reasonably conclude that "Dan," as an employee of HRC, saw or heard something which would have alerted him to the impending assault in time to prevent it.

CONCLUSION

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. *Id.* Giving Ehlers the benefit of all reasonable inferences deducible from the evidence, we conclude no genuine issue of material fact exists whether the State knew or should have known that L.S. was about to attack Ehlers and therefore breached its duty to protect Ehlers. The district court did not err in granting summary judgment, and its decision is affirmed.

AFFIRMED.

UPPER BIG BLUE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA DEPARTMENT OF NATURAL RESOURCES, AN EXECUTIVE DEPARTMENT AND AGENCY OF THE STATE OF NEBRASKA, AND ANN S. BLEED, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES, APPELLEES AND CROSS-APPELLANTS.

UPPER BIG BLUE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA DEPARTMENT OF NATURAL RESOURCES, AN EXECUTIVE DEPARTMENT AND AGENCY OF THE STATE OF NEBRASKA, AND ANN S. BLEED, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES, APPELLEES AND CROSS-APPELLANTS, AND LITTLE BLUE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

756 N.W.2d 145

Filed September 26, 2008. Nos. S-07-905, S-07-906.

1. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Statutes.** The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.

3. ____: ____. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
4. **Administrative Law: Appeal and Error.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.

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

Steven G. Seglin and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for appellant.

Jon Bruning, Attorney General, David D. Cookson, and Justin D. Lavene for appellees Department of Natural Resources and Ann S. Bleed.

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

HEAVICAN, C.J.

INTRODUCTION

The primary issue presented by these consolidated appeals is whether the Nebraska Ground Water Management and Protection Act (Act),[1] provides the Department of Natural Resources (DNR) with the authority to consider a geographic area located in one river basin but hydrologically connected to a second basin when determining that the second basin is fully appropriated.

FACTUAL BACKGROUND

Under the Act, specifically §§ 46-713 and 46-714, the DNR has the authority to determine whether any river basin, subbasin, or reach is fully appropriated. On December 30, 2005, the DNR made a preliminary determination that the Upper Platte River Basin was fully appropriated. In making such a determination with respect to the Upper Platte River Basin, the DNR included a small geographic area located in the Big Blue River Basin.

[1] Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2004, Cum. Supp. 2006 & Supp. 2007).

Pursuant to the requirements of § 46-714(4), the DNR then held a series of public hearings regarding this preliminary determination. Following those hearings, the DNR issued an "Order of Final Determination of River Basins, Subbasins, or Reaches as Fully Appropriated, and Describing Hydrologically Connected Geographic Areas." In this order, dated April 21, 2006, the DNR again concluded that the Upper Platte River Basin was fully appropriated, again including in its determination a small geographic area located in the Big Blue River Basin. This inclusion was based on a DNR determination that the surface water from the Upper Platte River Basin was hydrologically connected to ground water located in the Big Blue River Basin. The geographic area located in the Big Blue River Basin is within the boundaries of the Upper Big Blue Natural Resources District (District).

The District filed suit against the DNR in district court. Though the District brought two actions—one a declaratory judgment, the other an action under the Administrative Procedure Act (APA)[2]—each made the same allegations: (1) The DNR exceeded its statutory authority under the Act by considering a geographic area located in the Big Blue River Basin when making its determination that the Upper Platte River Basin was fully appropriated, and (2) the DNR exceeded its statutory authority by promulgating 457 Neb. Admin. Code, ch. 24, § 001.02 (2006).

The district court found that the DNR had not exceeded its authority in promulgating 457 Neb. Admin. Code, ch. 24, § 001.02, and also affirmed the actions of the DNR and its director in including the disputed geographic area in making its determination that the Upper Platte River Basin was fully appropriated. The District appealed. We granted bypass of the Court of Appeals and affirm.

ASSIGNMENT OF ERROR

On appeal in each of these actions, the District assigns two assignments of error, which can be consolidated and restated

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[2] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

as one: The district court erred in finding that the DNR and its director did not exceed their statutory authority by promulgating and interpreting 457 Neb. Admin. Code, ch. 24.

The DNR cross-appeals and argues that the district court lacked jurisdiction over the District's APA petition for review because this is not a "contested case" under the APA.

STANDARD OF REVIEW

[1] To the extent the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

ANALYSIS

Relevant Statutory Provisions

In order to fully understand and analyze the DNR's argument, it is necessary to set forth the statutory provisions relevant to the issues presented by this appeal. Section 46-713(1)(a) requires the DNR to

> complete an evaluation of the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new ground water uses in each of the state's river basins and shall issue a report that describes the results of the evaluation. . . . For each river basin, subbasin, or reach evaluated, the report shall describe (i) the nature and extent of use of both surface water and ground water in each river basin, subbasin, or reach, (ii) the geographic area within which the department preliminarily considers surface water and ground water to be hydrologically connected and the criteria used for that determination, and (iii) the extent to which the then-current uses affect available near-term and long-term water supplies.

Subsection (1)(b) further provides that "[b]ased on the information reviewed in the evaluation process, the department shall

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[3] *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

arrive at a preliminary conclusion for each river basin, subbasin, and reach evaluated as to whether such river basin, subbasin, or reach presently is fully appropriated without the initiation of additional uses."

Section 46-713(1)(d) requires in part that the DNR,

> [i]n preparing the report [required under subsection (1)(a),] shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the report are reliable. In its report, the department shall provide sufficient documentation to allow these data, information, methodologies, and conclusions to be independently replicated and assessed.

In addition to the substantive provisions of the Act, the findings of the Legislature were also codified and are instructive:

> (1) The management, conservation, and beneficial use of hydrologically connected ground water and surface water are essential to the continued economic prosperity and well-being of the state, including the present and future development of agriculture in the state;
>
> (2) Hydrologically connected ground water and surface water may need to be managed differently from unconnected ground water and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated ground water and surface water supplies;
>
> (3) Natural resources districts already have significant legal authority to regulate activities which contribute to declines in ground water levels and to nonpoint source contamination of ground water and are the preferred entities to regulate, through ground water management areas, ground water related activities which are contributing to or are, in the reasonably foreseeable future, likely to contribute to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins, subbasins, or reaches;
>
> (4) The Legislature recognizes that ground water use or surface water use in one natural resources district may

have adverse affects on water supplies in another district or in an adjoining state. The Legislature intends and expects that each natural resources district within which water use is causing external impacts will accept responsibility for ground water management in accordance with the Nebraska Ground Water Management and Protection Act in the same manner and to the same extent as if the impacts were contained within that district;

(5) The Department of Natural Resources is responsible for regulation of surface water resources and local surface water project sponsors are responsible for much of the structured irrigation utilizing surface water supplies, and these entities should be responsible for regulation of surface water related activities which contribute to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins, subbasins, or reaches;

(6) All involved natural resources districts, the department, and surface water project sponsors should cooperate and collaborate on the identification and implementation of management solutions to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins, subbasins, and reaches[.][4]

Whether DNR Exceeded Its Authority by Enacting Disputed Regulation

The District assigns that the DNR exceeded its statutory authority when promulgating 457 Neb. Admin. Code, ch. 24, § 001.02, of the DNR's rules and regulations.

[2-4] The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.[5] However, an administrative agency is limited in its rulemaking authority to powers granted to the

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[4] § 46-703.

[5] *Scofield v. State, ante* p. 215, 753 N.W.2d 345 (2008); *DLH, Inc., supra* note 3.

agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.[6] Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.[7]

Section 46-748 authorizes the DNR to "adopt and promulgate . . . such rules and regulations as are necessary to the discharge of duties assigned to the director or the Department . . . by the . . . Act." And the last sentence of § 46-713(1)(d) directs the DNR, in connection with the preparation of its report regarding the appropriated status of a river basin, to "specify by rule and regulation the types of scientific data and other information that will be considered for making the preliminary determinations required by this section."

Under this rulemaking authority, the DNR enacted 457 Neb. Admin. Code, ch. 24. At particular issue in this case is § 001.02, which provides:

> The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed in Section 46-713(3) is the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10 percent of the amount pumped in that time.

The parties appear to agree that there is no language in 457 Neb. Admin. Code, ch. 24, § 001.02, which precludes surface water and ground water that is geographically located in different natural resources districts from being hydrologically connected within the meaning of the regulation. Nor do the parties dispute that applying the regulation resulted in the DNR's conclusion that ground water geographically located in the Big Blue River Basin was hydrologically connected to surface water in the Upper Platte River Basin. Finally, there is no dispute that the result of the application of this regulation in this case was that a geographic area located in the Big Blue River Basin was included in the DNR's order finding that the Upper Platte River

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[6] *Id.*

[7] *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

Basin was fully appropriated. Such a determination imposes certain restrictions with respect to the use of surface water and ground water in the affected geographic area.

In support of its contention that the DNR exceeded its authority, the District notes there is nothing in the language of the relevant statutes which permits the DNR to cross natural resources district boundary lines when making determinations regarding the appropriated status of river basins, subbasins, and reaches. The District further argues that language in § 46-713 expressly provides that the hydrological connection should be evaluated "in *each* of the state's river basins" (emphasis supplied), and that such language implies areas outside a river basin cannot be considered in determining appropriated status. We disagree with the District's interpretation.

An examination of the findings of the Legislature with respect to the passage of the Act demonstrates that the Legislature was fully aware of the hydrological connection often existing between surface water and ground water[8] and was interested in protecting those resources.[9] The findings also indicate that the Legislature recognized these hydrological connections sometimes affect more than one natural resources district[10] and that it was the expectation of the Legislature that all interested parties would cooperate in the management of the State's hydrologically connected water resources.[11] This expectation of cooperation was also expressed in § 46-715, which provides for the cooperation of the DNR and any affected natural resources districts in preparing an integrated management plan upon a DNR determination that a river basin is fully appropriated or overappropriated.

In addition to recognizing this connection in its findings, the Legislature explicitly required that these areas of hydrological connection be considered by the DNR in making its determinations under the Act. In particular, § 46-713(1)(a) provides that

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[8] § 46-703(2).

[9] § 46-703(1).

[10] § 46-703(4).

[11] § 46-703(6).

the DNR's report with respect to its preliminary determination as to the appropriated status of a river basin "shall describe . . . the geographic area within which the department preliminarily considers surface water and ground water to be hydrologically connected and the criteria used for that determination." Moreover, the DNR is required to set forth by regulation the scientific data and information it utilizes in determining this hydrological connection.[12]

Thus, the Act explicitly requires consideration of hydrological connections in determining the appropriated status of a river basin. What the Act does not do is set forth any limitations on the DNR's ability to define that connection. Given the detail of the Act and its focus on the hydrological connection between surface water and ground water, we find this omission telling. We agree with the DNR that the District's interpretation would

> require the Department to completely ignore the real-world hydrologic interconnections between surface water and ground water, and said connections' effect on a "basin." In addition, such a requirement would set an arbitrary standard for managing the State's interconnected water resources, which simply goes against the intent of the Act.
>
> [T]he intent of the Act is . . . to integrate the management of surface water and ground water . . . ."[13]

We therefore conclude that 457 Neb. Admin. Code, ch. 24, § 001.02, was authorized by its enabling legislation and that the DNR did not exceed its statutory authority in enacting it. The District's assignment of error is without merit.

DNR's Cross-Appeal

On cross-appeal, the DNR assigns that the district court lacked jurisdiction over the APA action because the DNR's order did not fall within any of the three categories that may be

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[12] § 46-713(1)(d).

[13] Brief for appellees at 36.

appealed under the APA.[14] In particular, the DNR contends that we are not presented with a contested case under the APA.

We conclude, however, that even assuming the April 21, 2006, order was not part of a contested case and is not appealable under the APA, we nevertheless have jurisdiction to decide the issue of whether the DNR exceeded its authority in enacting 457 Neb. Admin. Code, ch. 24, § 001.02.

Section 84-911(1) provides:

> The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.

In fact, the District did file a declaratory judgment action against the DNR questioning the validity of the regulation. Accordingly, the district court, and now this court, had jurisdiction to determine whether the DNR exceeded its authority by enacting the regulation in question. We need not further address the DNR's cross-appeal.

CONCLUSION

We conclude that 457 Neb. Admin. Code, ch. 24, § 001.02, was authorized by enabling legislation. As such, the DNR did not exceed its authority in enacting the regulation. We therefore affirm the decision of the district court in these consolidated appeals.

AFFIRMED.

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[14] See §§ 84-902 to 84-917.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. GLOVER, APPELLANT.
756 N.W.2d 157

Filed September 26, 2008. No. S-07-1108.

1. **Postconviction: Proof: Appeal and Error.** In a postconviction proceeding, an appellate court reviews for an abuse of discretion the procedures a district court uses to determine whether the prisoner's allegations sufficiently establish a basis for relief and whether the files and records of the case affirmatively show that the prisoner is entitled to no relief.
2. **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.
3. **Judgments.** A trial court abuses its discretion when its decision incorrectly applies or fails to comply with specific procedural rules governing the action.
4. **Postconviction.** Under Neb. Rev. Stat. § 29-3001 (Reissue 1995), a district court need not conduct an evidentiary hearing in the following circumstances: (1) when the prisoner alleges only conclusions of law or facts; and (2) when the files and records of the case affirmatively show that the prisoner is entitled to no relief.
5. ____. A district court has discretion to adopt reasonable procedures for determining what files and records it should review before granting a full evidentiary hearing.
6. **Postconviction: Records: Words and Phrases.** The phrase "files and records of the case" in Neb. Rev. Stat. § 29-3001 (Reissue 1995) refers to existing files and records of the case before the prisoner filed a postconviction proceeding—not to testimony taken for the postconviction proceeding.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded for further proceedings.

Thomas J. Garvey for appellant.

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

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

CONNOLLY, J.

SUMMARY

Michael J. Glover argues that the district court erred in denying his petition for postconviction relief without an evidentiary

hearing. At a hearing on the State's motion to deny an evidentiary hearing, Glover offered and the court received his trial counsel's deposition. Glover's postconviction counsel offered the deposition to resist the State's motion. Relying on the deposition, the court decided factual questions and overruled Glover's claims of ineffective assistance of counsel at trial and on appeal.

We conclude that the court erred in relying on Glover's trial counsel's deposition that was not part of the case records and files. Because the case records and files fail to show that Glover is not entitled to relief for any of his claims, we remand for an evidentiary hearing.

BACKGROUND

In 2003, the State filed an information alleging that Glover had deliberately, or during an attempted robbery, killed Jesus Covarrubias. The State originally charged Glover with first degree murder and use of a deadly weapon to commit a felony. But in June 2004, under a plea agreement, Glover pleaded no contest to three charges: second degree murder, use of a deadly weapon to commit a felony, and robbery.

Glover's Pleas

In June 2004, the district court found that Glover had voluntarily pleaded no contest to the charges in the amended information and found him guilty. The prosecutor offered the following factual basis for the pleas: Glover and his codefendant, Damien Watkins, decided to rob Covarrubias, and "a gun was drawn" as they approached him. The prosecutor stated that the evidence showed Glover had drawn the gun. Although she acknowledged that Glover contested this fact, she stated that both defendants were presumed to be involved in the shooting under an aiding and abetting theory. She further stated that after Covarrubias displayed a knife, Glover shot him in the chest, killing him.

Before accepting Glover's pleas, the court asked him if he understood the maximum penalties that each offense carried. The court also stated that if it imposed consecutive sentences, it could sentence him to life plus 100 years' imprisonment.

Glover's trial counsel asked the court to clarify that a second degree murder conviction carried a minimum sentence of 20 years' imprisonment. Counsel also asked the court to clarify that a sentence for use of a deadly weapon must run consecutive to the murder sentence. The court verified that Glover's counsel had explained this to Glover and that he understood. The court did not explain the minimum sentences for the offenses of use of a deadly weapon or robbery. It did, however, ensure that Glover understood that he could appeal if he went to trial but that he could not necessarily appeal from a no contest plea. Glover stated that his counsel had explained these facts and that he understood.

When asked whether he was satisfied with his attorneys, Glover responded, "Not really." When asked why, he stated, "Because I just don't feel that they do their best to defend me." The court responded that it would not accept his plea and that the case would go to trial. Glover then stated that he would stand by his no contest plea because he did not want an automatic life sentence.

Glover's Sentencing

In April 2005, the court sentenced Glover to the following terms of imprisonment, with credit for time served: 40 years to life for the second degree murder conviction; 10 to 20 years for the use of a deadly weapon conviction, to run consecutive to his first sentence; and 15 to 20 years for the robbery conviction, to run concurrent with his first sentence.

Glover's Direct Appeal

Glover limited his appeal to an excessive sentence claim. The public defender's office represented Glover at trial and on appeal, our case No. S-05-528. This court granted the State's motion for summary affirmance.

Glover's Postconviction Proceeding

Glover's first petition for postconviction relief is not part of this record. But in May 2007, after Glover had filed his postconviction proceeding, the State deposed Glover's trial counsel. In June, with different counsel, Glover filed his amended petition. He alleged that his trial counsel provided ineffective

assistance at trial. He alleged that his counsel failed to obtain or investigate a recantation statement that Watkins had made in an April 2004 affidavit—before Glover pleaded no contest. Glover attached Watkins' affidavit to his postconviction petition. In the affidavit, Watkins averred that he had not murdered anyone and that he had fabricated his earlier statement that Glover had committed the murder, explaining that "[j]ust for notoriety, reputation, and teenage kicks, we both, myself and my co-defendant, made up the whole thing not knowing the full extent of the outcome."

Glover claimed that if his trial counsel had obtained the statement, his counsel could have developed a defense or negotiated a more favorable plea agreement. Glover further claimed that his trial counsel was ineffective in failing to (1) advise him of the penalties for his no contest pleas, (2) advise him of the effect his no contest plea would have on his right to appeal, and (3) move for withdrawal of Glover's pleas before sentencing, despite Glover's numerous requests. Glover claimed that the third failure deprived him of an appeal regarding withdrawal for his counsel's failure to visit with Watkins regarding exculpatory information.

Glover alleged that his appellate counsel was ineffective because he failed to assign as error the court's failure to advise Glover of his right to counsel. He claimed this failure foreclosed him from raising his trial counsel's failure to investigate Watkins' recantation. He also alleged that his appellate counsel failed to raise the court's failure to advise Glover of the minimum sentences for use of a deadly weapon to commit a felony and robbery.

Proceedings to Determine Whether an Evidentiary Hearing Was Required

Glover sought an evidentiary hearing. The State moved to deny Glover's petition without an evidentiary hearing. The State alleged that Glover's trial counsel was not ineffective, based largely on his counsel's deposition testimony regarding his actions in the case. At the hearing, the deputy county attorney offered the bill of exceptions from Glover's plea and sentencing hearings. He stated that Glover would be offering the deposition

of his trial counsel. The records submitted by the State do not include the plea agreement or presentence investigation report.[1] When the court asked Glover's postconviction counsel if he were offering anything to resist the State's motion, he offered the deposition. He argued that Glover's trial counsel admitted in the deposition that he did not interview Watkins.

Like the State's motion, the court's order dismissing Glover's petition without an evidentiary hearing includes many factual statements from trial counsel's deposition that are not in the records submitted by the State. The court concluded that Glover's claims that his counsel was ineffective, both at trial and on appeal, had no merit.

ASSIGNMENTS OF ERROR

Glover assigns that the district court erred in denying his request for an evidentiary hearing and in dismissing his motion for postconviction relief.

STANDARD OF REVIEW

[1] In a postconviction proceeding, we review for an abuse of discretion the procedures a district court uses to determine whether the prisoner's allegations sufficiently establish a basis for relief and whether the files and records of the case affirmatively show that the prisoner is entitled to no relief.[2]

[2,3] 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] A trial court abuses its discretion when its decision incorrectly applies or fails to comply with specific procedural rules governing the action.[4]

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[1] See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[2] See, *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007), citing *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[3] See *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[4] See, *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). Compare, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 105 N.W.2d 721 (1960).

ANALYSIS

The main issue presented by this appeal is procedural. Although the district court's rationales appear facially reasonable, it has created a procedural snarl. Glover argues that by denying him an evidentiary hearing after receiving his trial counsel's deposition, the court effectively allowed only his counsel to testify. He argues that by following that procedure, the court cut off his right to testify.

The State argues that the court relied on the deposition of Glover's trial counsel because Glover offered it at the hearing on the State's motion to deny an evidentiary hearing. It contends that Glover cannot complain of error it invited the court to make. The State makes two alternative arguments: (1) Glover alleged only conclusions of law or fact; and (2) the records and files of the case affirmatively showed that Glover was not entitled to relief based on his allegations.

We conclude that the district court's failure to comply with the specific procedural requirements of Neb. Rev. Stat. § 29-3001 (Reissue 1995) is dispositive. That section mandates the following procedure for postconviction proceedings when a prisoner claims in a verified motion that a constitutional violation renders the judgment void or voidable:

> 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.[5]

[4] Under this statute, we have recognized two exceptions to a district court's duty to grant an evidentiary hearing when the prisoner's factual allegations, if proved, show a violation of the prisoner's constitutional rights.[6] We have stated that a district court need not conduct an evidentiary hearing in the following circumstances: (1) when the prisoner alleges only conclusions of law or facts, and (2) when the files and records

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[5] § 29-3001.

[6] See, e.g., *State v. Jim, supra* note 2.

of the case affirmatively show that the prisoner is entitled to no relief.[7]

[5] We have further held that a district court has discretion to adopt reasonable procedures for determining what files and records it should review before granting a full evidentiary hearing.[8] In general, we have allowed the court to (1) order the State to respond to a prisoner's postconviction motion or to show cause why an evidentiary hearing should not be held, (2) allow the State to file a motion to deny an evidentiary hearing, and (3) hold a "records" hearing for receiving into evidence the relevant files and records that the court may need to review in considering whether to grant or deny an evidentiary hearing.[9] And if a court does not receive into evidence the relevant case records and files at a records hearing, the court should certify and include in the transcript the files and records it considered in denying relief.[10] But the district court's discretion must comport with the specific procedural rules mandated by § 29-3001. In the cited cases, the files and records that the district court received at the records hearings were limited to the prisoner's trial files and records.

[6] The phrase "files and records of the case" in § 29-3001 refers to existing files and records of the case before the prisoner filed a postconviction proceeding—not to testimony taken for the postconviction proceeding. In *State v. Flye*,[11] we held that the district court did not err in overruling the prisoner's postconviction motion based on the files and records of the case it received in a records hearing. We stated:

> Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, *the taking of oral testimony on the motion could not add*

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[7] See *id.*

[8] See, *McLeod, supra* note 2; *Dean, supra* note 2.

[9] See, *McLeod, supra* note 2; *Dean, supra* note 2; *State v. Flye*, 201 Neb. 115, 266 N.W.2d 237 (1978).

[10] See, *Dean, supra* note 2; *State v. Fugate*, 180 Neb. 701, 144 N.W.2d 412 (1966).

[11] *State v. Flye, supra* note 9.

> *to or detract from the information shown by the court's files and records*, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.[12]

Our earlier case law shows that we have required a district court to consider the files and records of the case without the benefit of additional testimony taken as evidence for the postconviction proceeding. We believe receiving new evidence at a records hearing would create chaos. Either the State or the prisoner could be unprepared to respond to new evidence. That unpreparedness could result in unnecessary due process challenges from prisoners. And appellate courts would constantly have to backtrack and consider whether an evidentiary hearing was warranted based solely on the allegations and the information contained in the case records and files—a question that the district court should initially address.

But the State argues that in *State v. Bazer*,[13] we recently affirmed the denial of an evidentiary hearing when the district court received into evidence at a records hearing the deposition of the prisoner and his trial counsel. There, however, both the district court and this court relied solely on the trial records and files to conclude that the prisoner was not entitled to postconviction relief. So while we do not approve of the court's admission of the depositions in *Bazer*, we had no need to reach the procedural issue there. In contrast, the court here relied on Glover's trial counsel's deposition to conclude that several of Glover's claims were without merit.

Would the court have reached that same result without the benefit of the deposition? We believe not. We are unable to conclude from our review of Glover's case records and files that Glover is not entitled to postconviction relief for any of his claims. This is not surprising. In postconviction proceedings based on plea-based convictions, much of the needed information is not contained in the record. We remand for an evidentiary

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[12] *Id.* at 119, 266 N.W.2d at 240 (emphasis supplied), citing *State v. Woods*, 180 Neb. 282, 142 N.W.2d 339 (1966).

[13] *State v. Bazer, ante* p. 7, 751 N.W.2d 619 (2008).

hearing for those claims that the district court denied relief by relying on the deposition of Glover's counsel.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
RANDY L. CLAUSSEN, APPELLANT.
756 N.W.2d 163

Filed October 3, 2008. No. S-07-1141.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.
5. **Arrests: Motor Vehicles: Proof.** An attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required.
6. **Arrests: Motor Vehicles: Evidence.** In a prosecution for felony operation of a motor vehicle to avoid arrest under Neb. Rev. Stat. § 28-905(2) (Cum. Supp. 2006), there must be some articulable evidence that the underlying violation for which the motorist was fleeing to avoid arrest constituted a felony.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Thomas J. Garvey for appellant.

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

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

STEPHAN, J.

This appeal requires an examination of the proof required to establish the offense of operating a motor vehicle in an effort to avoid arrest for a felony. We conclude that the fact that a defendant is never formally charged with the offense for which an arrest is attempted does not bar the prosecution.

BACKGROUND

In two separate prosecutions in the district court for Douglas County, Randy L. Claussen entered pleas of no contest and was found guilty of three felony offenses, including unlawful possession of a controlled substance, theft by receiving stolen property, and unlawful possession of a controlled substance with intent to deliver. He failed to appear on the date set for sentencing on the three charges. In each case, the court ordered issuance of a capias for Claussen's arrest.

On April 9, 2007, law enforcement deputies learned that Claussen was planning to meet a woman in the parking lot of an Omaha restaurant later that day. Deputies in at least two unmarked vehicles went to the parking lot and waited for Claussen. When he arrived, the deputies attempted to block his vehicle in order to arrest him, and Claussen drove out of the parking lot at a high rate of speed. Deputies initially pursued Claussen, but stopped after Claussen ran several stop signs at speeds of 50 to 60 m.p.h. in a residential neighborhood near a school and a childcare center.

Claussen was apprehended several days later in Iowa. After waiving extradition, he was returned to Douglas County and was charged with operating a motor vehicle "to flee in such vehicle in an effort to avoid arrest for violation of a law constituting a felony, to wit, outstanding warrants for the following felony charges[:] Possession of Controlled Substance, Theft by Receiving Stolen Property, Unlawful Possession with Intent to Deliver Controlled Substance." Claussen was also charged with being a habitual criminal.

Claussen waived his right to a jury trial, and the court conducted a stipulated bench trial at which it received documentary evidence regarding Claussen's prior convictions, the issuance of the two capiases, and the attempted arrest. The parties

also stipulated (1) that if called to testify, the deputies would identify Claussen as the operator of the vehicle at the time of the attempted arrest; (2) that at the time of the attempted arrest, Claussen had not been charged with failure to appear at the March 27, 2007, sentencing hearing; (3) that there were no other outstanding felony charges; and (4) that the attempted arrest was solely pursuant to the capias.

Based upon this stipulated evidence, the district court found Claussen guilty of operating a motor vehicle to avoid arrest and, after conducting an enhancement hearing, determined that he was a habitual criminal. The court sentenced Claussen to a term of imprisonment of 10 years to 10 years, with credit for time served. Claussen timely appealed, and we moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Claussen assigns that the district court erred in finding him guilty of felony flight to avoid arrest without a predicate felony.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law.[2] On a question of law, we reach a conclusion independent of the court below.[3]

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

[3] *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[4] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

ANALYSIS

[4] In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.[5] The statute defining the offense for which Claussen was convicted is Neb. Rev. Stat. § 28-905(2) (Cum. Supp. 2006). It provides: "Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest for the violation of any law of the State of Nebraska constituting a felony commits the offense of felony operation of a motor vehicle to avoid arrest."

This court has not previously discussed the proof necessary to establish the statutory elements set forth in § 28-905(2). But under a prior statute which made it unlawful "for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law . . . in this state,"[6] we held that the State was not required to prove that the defendant had actually violated the law for which the arrest was attempted.[7] The defendant in *State v. Clifford*[8] fled after being stopped for driving while intoxicated. He was subsequently apprehended and charged with driving under the influence and operating a motor vehicle to avoid arrest. He was acquitted on the first charge but convicted on the second. In affirming the conviction, this court wrote:

> The offense of fleeing in a motor vehicle to avoid arrest is separate and distinct from any offense for which law enforcement officers were attempting to make the arrest. The two offenses are not interdependent, nor is proof of the commission of one offense an essential element of proof of the other offense. Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed

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[5] *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[6] Neb. Rev. Stat. § 60-430.07 (Reissue 1978).

[7] *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

[8] *Id.*

> the law violation for which the arrest was attempted is not required.[9]

[5,6] The Nebraska Court of Appeals has applied the principles stated in *Clifford* to determine the proof required by § 28-905. That court has held that an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required.[10] The Court of Appeals has also held that in a prosecution for felony operation of a motor vehicle to avoid arrest under § 28-905(2), there must be some articulable evidence that the underlying violation for which the motorist was fleeing to avoid arrest constituted a felony.[11] We agree with these holdings.

The evidence in this case establishes that at the time of Claussen's attempted arrest, he was the subject of two pending criminal prosecutions in which he had been convicted of three felony offenses. He had been released on bond and failed to appear for sentencing. A capias was issued in each case "for the arrest of Randy L. Claussen for failure to appear." Neb. Rev. Stat. § 29-908 (Reissue 1995) provides in relevant part:

> Whoever is charged with a felony and is released from custody under bail, recognizance, or a conditioned release and willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter, shall be guilty of a Class IV felony, in addition to any other penalties or forfeitures provided by law.

Thus, the record clearly establishes that deputies attempted to arrest Claussen for conduct which constitutes a felony and that Claussen operated a motor vehicle to avoid such arrest. The fact that Claussen was never formally charged with failure to appear is immaterial.

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[9] *Id.* at 46, 281 N.W.2d at 226.

[10] *State v. Ellingson*, 13 Neb. App. 931, 703 N.W.2d 273 (2005); *State v. Taylor*, 12 Neb. App. 58, 666 N.W.2d 753 (2003); *State v. Carman*, 10 Neb. App. 373, 631 N.W.2d 531 (2001).

[11] *State v. Taylor, supra* note 10.

CONCLUSION

For the reasons discussed, we affirm the conviction and sentence.

AFFIRMED.

IN RE INTEREST OF DUSTIN S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DUSTIN S., APPELLANT.

756 N.W.2d 277

Filed October 3, 2008. No. S-07-1222.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Juvenile Courts: Evidence: Appeal and Error.** If an appellate court adjudges a juvenile to meet the criteria of Neb. Rev. Stat. § 43-247(1) through (4) (Cum. Supp. 2006), the appellate court shall affirm the disposition made by the county court unless it is shown by clear and convincing evidence that the disposition is not in the best interests of the juvenile.
3. **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.
4. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
5. **Juvenile Courts.** Pursuant to Neb. Rev. Stat. § 43-286 (Reissue 2004), a juvenile court has broad discretion as to the disposition of a child found to be delinquent.

Appeal from the County Court for Wayne County: DONNA F. TAYLOR, Judge. Affirmed as modified.

Mandy R. Burkett for appellant.

Amy K. Wiebelhaus, Deputy Wayne County Attorney, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Dustin S., a juvenile, admitted to placing a video camera in his neighbor's bedroom closet to record a minor child in a state of undress. The county court for Wayne County, sitting as a juvenile court, ordered him to complete 6 months' probation with a condition that he spend 6 days in a juvenile detention center at Madison, Nebraska. Dustin appeals the portion of the order requiring him to spend 6 days in detention as a part of his probation.

SCOPE OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[2] If an appellate court adjudges a juvenile to meet the criteria of Neb. Rev. Stat. § 43-247(1) through (4) (Cum. Supp. 2006), the appellate court shall affirm the disposition made by the county court unless it is shown by clear and convincing evidence that the disposition is not in the best interests of the juvenile. Neb. Rev. Stat. § 43-2,106 (Reissue 2004).

[3] 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. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

FACTS

In August 2006, Dustin placed a video camera in the bedroom closet of his neighbor, a minor child, to record the child in a state of undress. He showed the video to a friend and then destroyed it. The friend told the victim about the video. Subsequently, Dustin was charged in juvenile court with this unlawful conduct.

When Dustin appeared in juvenile court with his parents, the court advised him of the potential penalties for his acts:

> If you were older you would be subject to a jail sentence and a fine. Since you're in juvenile court you can't be fined and you can't be sent to an adult prison facility. But

> there's a range of consequences available to the court if this is true . . . . It may be that because of this offense along with other things going on in your life that it's not appropriate for you to remain at home. And in that case you can be removed and placed in a suitable foster home, group home or other institution including the Youth Rehabilitation and Treatment Center at Kearney.

Dustin admitted the allegations, and the court found the admission to be freely, intelligently, and voluntarily made. It ordered a predispositional investigation, to be conducted by the probation office.

At the dispositional hearing, the juvenile court stated that the purpose of the hearing was to rehabilitate Dustin and to provide relief to the victim. The victim had stated in a letter that she experienced bad dreams and could no longer sleep in her bedroom. She slept on the floor in her parents' room. The victim felt that Dustin acted like nothing had happened, and she did not believe he felt remorse.

The juvenile court ordered Dustin to complete 6 months of probation. The conditions of probation included that he obey a curfew, perform 80 hours of community service, and spend 6 days in a juvenile detention center, commencing December 26, 2007. Regarding the detention, the court stated:

> At least you'll be able to look at [the victim] and say hey, I didn't just get off scott free [sic]. I had to spend my Christmas vacation in detention. And that — then you can feel like you've made it right and she can't say that you got off with nothing.

Dustin appeals.

ASSIGNMENT OF ERROR

Dustin assigns as error the juvenile court's order of 6 days in a juvenile detention center as a condition of probation, alleging that such detention is not a disposition allowed by Neb. Rev. Stat. § 43-286(1) (Reissue 2004).

ANALYSIS

The issue is whether a court may order a juvenile as described in § 43-247(1) to serve 6 days in a juvenile detention center as a condition of probation ordered pursuant to § 43-286(1).

[4] Juvenile courts have original jurisdiction over individuals age 17 or younger who have committed acts considered to be misdemeanors under Nebraska state law pursuant to § 43-247(1). Dustin was 15 years old when the charges at issue were filed, and his act of recording a minor child while undressing would constitute a Class II misdemeanor under Neb. Rev. Stat. § 28-311.08 (Cum. Supp. 2006). Therefore, Dustin is a juvenile as described in § 43-247(1), and the court properly exercised jurisdiction. As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

Section 43-286(1)(a) permits a juvenile court to order restitution, require community service, place the juvenile on probation, or "[c]ause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer." Dustin argues that as a statutorily created court, the juvenile court is limited to the specific dispositions named in the statute and that 6 days in a juvenile detention center is not one of those authorized dispositions. We agree.

[5] Pursuant to § 43-286, the juvenile court has "'broad discretion as to the disposition of a child found to be delinquent.'" *In re Interest of J.M.*, 223 Neb. 609, 614, 391 N.W.2d 146, 150 (1986). This discretion specifically includes placing a juvenile in a suitable institution. See *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). However, we conclude that detention as a part of an order of probation is not provided by the juvenile statutes.

Whether the juvenile court may subject a juvenile to detention as part of the disposition of probation has not previously been addressed by this court. Detention in the juvenile setting is not analogous to confinement within the scope of the criminal code. While both may serve similar purposes, such as rehabilitation, the purpose of punishment is not considered to be the goal of the juvenile code. Thus, while confinement is permitted under the juvenile code, we conclude that in the absence of specific direction by the Legislature, confinement cannot be used as a part of the disposition of probation.

A similar, but not identical, issue was addressed in *People, Int. of A.F.*, 192 Colo. 207, 557 P.2d 418 (1976). The petitioner sought review of a Colorado Court of Appeals decision that reversed the juvenile court's ruling that respondents, both juveniles, serve weekend jail sentences as a condition of probation. The Colorado Supreme Court affirmed. The supreme court recognized that juvenile courts had authority to commit adjudicated delinquents to juvenile group care facilities or training schools under the supervision of the department of institutions. *Id*. The issue was whether a juvenile court had the statutory authority to impose a limited or partial confinement in the county jail as a condition of probation for a juvenile under 18 years of age. The supreme court held the juvenile court did not have such authority.

A distinguishing factor in *People, Int. of A.F.* was that the juvenile court had imposed a jail sentence when it had no authority to do so. However, the supreme court also noted that the power of a court to impose conditions of probation must be strictly construed from the applicable statutes and that the court must therefore defer to the legislature. It is that reasoning which we find applicable to the case at bar.

We do not construe § 43-286 as providing specific authority to the juvenile court to mix and match a disposition of confinement with one of probation. Dustin was ordered to spend 6 days in a juvenile detention center. Whether this center is a suitable institution pursuant to § 43-286 is not the issue, but, rather, it is whether the juvenile court has the authority to impose confinement as part of an order of probation.

CONCLUSION

We conclude that absent specific authority under the juvenile code, the juvenile courts of this state do not have the authority to order the confinement of a juvenile as a condition of probation in the dispositional portion of the proceeding.

We therefore vacate that portion of the juvenile court's order which required that Dustin spend 6 days in a juvenile detention center. The order of the juvenile court is in all other respects affirmed.

AFFIRMED AS MODIFIED.

BECTON, DICKINSON AND COMPANY, A NEW JERSEY CORPORATION, AND BECTON DICKINSON INFUSION THERAPY SYSTEMS, INC., A DELAWARE CORPORATION, APPELLANTS, V. NEBRASKA DEPARTMENT OF REVENUE ET AL., APPELLEES.

756 N.W.2d 280

Filed October 10, 2008. No. S-07-844.

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. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
4. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

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

Nicholas K. Niemann, Thomas O. Kelley, and Matthew R. Ottemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

STEPHAN, J.

Becton, Dickinson and Company and Becton Dickinson Infusion Therapy Systems, Inc., which we shall refer to jointly

as "Becton," appeal from an order of the district court for Lancaster County affirming the state Tax Commissioner's denial of a claim for a refund of sales and use taxes under Nebraska's Employment and Investment Growth Act,[1] commonly referred to as "L.B. 775."[2] The claim was denied as time barred because it was filed beyond the limitations period specified in Neb. Rev. Stat. § 77-2708(2)(b) (Reissue 2003), as extended by agreement of the parties. The primary issue in this appeal is whether the late filing can be excused on equitable grounds.

BACKGROUND

L.B. 775 grants various tax benefits to qualified businesses meeting certain new job and new investment thresholds in Nebraska. A business that creates at least 30 new jobs and invests at least $3 million within Nebraska may receive a refund of Nebraska income or sales and use taxes paid on qualified property purchased for use at the L.B. 775 project site.[3] A business that invests at least $10 million in qualified property and creates at least 100 new jobs is eligible to receive those same benefits, plus a 15-year exemption from personal property tax on certain classes of personal property.[4]

In its L.B. 775 application, Becton indicated its intent to qualify for L.B. 775 incentives based on the investment of $10 million in qualified property and the hiring of at least 100 new employees by September 30, 2006. L.B. 775 requires a party applying for incentives to enter into a written agreement with the Tax Commissioner setting forth the specific terms of the incentive plan.[5] Becton and the Tax Commissioner entered into such an agreement on February 21, 2001. The agreement stated that it was the intent of Becton to complete the project as it was described in the application, i.e., to invest $10 million and

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[1] Neb. Rev. Stat. §§ 77-4101 to 77-4112 (Reissue 2003 & Cum. Supp. 2004).

[2] See 1987 Neb. Laws, L.B. 775.

[3] See §§ 77-4104 through 77-4106.

[4] See § 77-4105.

[5] § 77-4104(4).

create 100 new jobs. The agreement also stated, however, that the required levels of investing were

> the hiring of at least thirty (30) new employees in Nebraska and the investment in qualified property in Nebraska of at least $3,000,000 for all incentives herein, except they shall be one hundred (100) new employees and $10,000,000 of investment for the personal property tax exemption incentive. These levels must be met prior to September 30, 2006.

The agreement required Becton to provide specific documentation demonstrating that it had met the requirements of L.B. 775. The agreement stated that the Nebraska Department of Revenue (Department) would review the documentation in order to verify that Becton had met the minimum employment and investment levels. The parties generally refer to this review as the "qualification audit." The agreement also specifically provided that when the qualification audit satisfied the Department that Becton had met the minimum employment and investment levels required by L.B. 775, the Department would issue a letter to Becton acknowledging its attainment of the required levels. The agreement stated that a copy of this letter "must accompany" any claim Becton made for incentives allowed under L.B. 775.

In May 2001, the Department notified Becton that it would commence the qualification audit in October. The audit began at approximately that time, and the record reflects voluminous e-mail correspondence between the parties regarding the audit process. Becton contends that it had invested over $3 million and created 30 new jobs by September 30, 2000, and that it had provided sufficient documentation to the Department to demonstrate it had met these thresholds by November 14, 2002. Becton did not request a qualification letter at that time, however, and the Department continued its audit until it had verified that Becton met the $10-million and 100-job thresholds. The Department issued a qualification letter to Becton on July 20, 2005, stating that Becton had attained the "minimum levels of $10,000,000 in investment and an increase of 100 full time equivalent employees in the tax year ended September 30, 2000 as required by [L.B. 775]."

L.B. 775 provides that "[n]o refund claims [for sales and use tax] shall be filed until after the required levels of employment and investment have been met."[6] Claims for sales and use tax refunds under L.B. 775 must be filed "within three calendar years from the end of the year the required levels of employment and investment are met or within the period set forth in section 77-2708."[7] Section 77-2708(2)(b) provides:

> No refund shall be allowed unless a claim therefor is filed with the Tax Commissioner by the person who made the overpayment or his or her attorney, executor, or administrator within three years from the required filing date following the close of the period for which the overpayment was made, within six months after any determination becomes final under section 77-2709, or within six months from the date of overpayment with respect to such determinations, whichever of these three periods expires later, unless the credit relates to a period for which a waiver has been given. Failure to file a claim within the time prescribed in this subsection shall constitute a waiver of any demand against the state on account of overpayment.

Between September 18, 2001, and July 28, 2005, the Department and Becton entered into 14 written agreements to extend the limitations period for filing Becton's claims for refund of sales and use taxes under L.B. 775, utilizing a standard form furnished by the Department and signed by representatives of the Department and Becton. The final extension agreement, executed on July 28, 2005, extended the limitations period from that date until September 15, 2005. In an exchange of e-mail correspondence on August 24, 2005, Becton verified with the Department that the statute of limitations for filing its refund claims had been extended until September 15. On September 7, the Department asked if Becton would require another extension, and a representative of Becton replied that it would not.

On November 29, 2005, approximately 2½ months after the extended limitations period had expired, Becton filed 14

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[6] § 77-4106(2)(a).

[7] § 77-4106(2)(d).

sales and use tax refund claims for the period of October 2001 to September 2002. The total amount of the claims was $2,370,840.91. The claims were submitted on forms created and provided by the Department. None of the claims included a request for an administrative hearing.

On February 10, 2006, the Tax Commissioner summarily denied the claims because the statute of limitations for filing them had expired on September 15, 2005, the date specified in the most recent extension agreement. The Tax Commissioner did not address the substantive merits of the claims.

Pursuant to the Administrative Procedure Act (APA),[8] Becton filed a petition in the district court for Lancaster County against the Department, the Tax Commissioner, and the State of Nebraska (collectively appellees) for review of the Tax Commissioner's decision. Then, before the district court acted, Becton filed a motion requesting that it remand the case back to the Tax Commissioner for a formal administrative hearing. The district court refused to remand the action, and ultimately, it determined that the Tax Commissioner correctly found that Becton's refund claims were barred by the statute of limitations.

Becton filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[9]

ASSIGNMENTS OF ERROR

Becton assigns, renumbered and restated, that the district court erred in (1) ruling that the statute of limitations was not tolled during the qualification audit; (2) not ruling that the Department was estopped from asserting the statute of limitations because it should have issued Becton a qualification letter within the original limitations period; (3) failing to remand the case to the Department for a formal administrative hearing; and (4) ruling that exhibit 10, the Department's instructions for filing refund claims, was not properly received into evidence.

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[8] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[9] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

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.[10] 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.[11]

ANALYSIS

Equitable Tolling

Becton contends that it could not file its refund claims until the Tax Commissioner completed the qualification audit and issued a qualification letter, that the Tax Commissioner was lax in conducting the audit and issuing the letter, and that the limitations period should therefore be deemed tolled until the issuance of the qualification letter on July 20, 2005. Becton argues that it should have 3 years from that date in which to file its claims. The district court rejected this argument, reasoning that "[e]quitable tolling . . . is neither consistent with the statutory scheme nor with the action of the parties in entering into agreements extending the statute of limitations for definite periods of time." Relying upon the decision of the U.S. Supreme Court in *United States v. Brockamp*,[12] the appellees argue that equitable tolling can never be employed to extend a statute of limitation for the filing of tax refund claims. Alternatively, the appellees argue that the district court correctly determined that the doctrine of equitable tolling could not be applied to the facts of this case.

Becton's equitable tolling argument is based upon the principle that a statute of limitations can be equitably tolled when a paramount authority prevents the claimant from filing a

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[10] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008); *Farmland Foods v. State*, 273 Neb. 262, 729 N.W.2d 73 (2007).

[11] *Id.*

[12] *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997).

claim.[13] But the cases upon which it relies involve circumstances which are distinguishable from the facts of this case. For example, in *Lincoln Joint Stock Land Bank v. Barnes*,[14] an appeal from a mortgage foreclosure, this court rejected an argument that the claim was time barred. For approximately 9 years, the plaintiff was subject to a restraining order issued by a federal court which enjoined prosecution of the foreclosure action. This court noted the general rule that "'during [a] period of . . . restraint, incident to other legal proceedings which are of such a character that the law forbids one of the parties to exercise a legal remedy against another, the running of the statute of limitations is postponed, or, if it has commenced to run, is suspended.'"[15] The opinion also noted the holding of other courts that "'[w]henever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right.'"[16] The instant case differs significantly from *Lincoln Joint Stock Land Bank* in that no judicial action prevented the filing of Becton's refund claim. Rather, the parties contractually agreed that no tax refund claim would be filed until the Department had completed its qualification audit and that the limitations period would be extended for a specific period of time after the audit was completed and the qualification letter was issued.

Becton also relies upon *Bauers v. City of Lincoln.*[17] In that case, former Lincoln firefighters filed an action against the city seeking reimbursement for amounts paid to pension funds,

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[13] See, *Yoder v. Nu-Enamel Corporation*, 145 F.2d 420 (8th Cir. 1944); *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943).

[14] *Lincoln Joint Stock Land Bank v. Barnes, supra* note 13.

[15] *Id.* at 64, 8 N.W.2d at 551, quoting 34 Am. Jur. *Limitation of Actions* § 237 (1941).

[16] *Id.* at 65, 8 N.W.2d at 551, quoting *St. Paul, Minneapolis & Manitoba Ry. C. v. Olson*, 87 Minn. 117, 91 N.W. 294 (1902). Accord *Johnson v. Johnson*, 182 Okla. 293, 77 P.2d 745 (1938).

[17] *Bauers v. City of Lincoln, supra* note 13.

recovery of deductions made because of workers' compensation payments, and compensation for claims of federal civil rights violations. We held that the first two claims had to be filed with the city within 1 year of accrual pursuant to Neb. Rev. Stat. § 15-840 (Reissue 1991). Because the firefighters had missed that deadline, those claims were barred. We noted, however, that the federal civil rights claims under 42 U.S.C. § 1983 (1988) were not subject to the notice and time limitations of § 15-840. Reasoning that if the city had honored the claims the federal action would not have been necessary, we held that the 4-year statute of limitations for filing the § 1983 actions was tolled during the time those claims were pending before the city pursuant to § 15-840 and that thus, the civil rights claims were timely asserted. *Bauers* did not involve the circumstance presented in this case where the parties agreed in writing to a specific extension of the statute of limitations as a result of protracted administrative proceedings.

Becton's reliance upon *Yoder v. Nu-Enamel Corporation*[18] is likewise misplaced. In that case, the plaintiffs brought a cause of action based upon fraud. The defendant removed the case to federal court and then sought to have the action dismissed because it had ceased to do business in Nebraska. Based on a controlling Nebraska Supreme Court case, the Eighth Circuit Court of Appeals dismissed the action. The plaintiffs returned to state court and succeeded in persuading this court to overrule the controlling case. The plaintiffs then refiled the fraud action in federal court. By that time, however, the statute of limitations on the claim had run. Based upon the general principles cited by this court in *Lincoln Joint Stock Land Bank*, the Eighth Circuit held that because the plaintiffs' ability to resort to the courts had been taken away, the statute of limitations was tolled during the time period between the dismissal of their first action and the overruling of the controlling case by the Nebraska Supreme Court.

The key factor distinguishing *Yoder*, *Bauers*, and *Lincoln Joint Stock Land Bank* from this case is the fact that Becton was not prevented by any paramount governmental authority

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[18] *Yoder v. Nu-Enamel Corporation, supra* note 13.

from asserting its refund claim in a timely manner. To the contrary, Becton's ability to do so was specifically preserved by the parties' multiple written agreements to extend the limitations period. After the Department issued its qualification letter on July 20, 2005, Becton had until the agreed upon date of September 15, 2005, to file its claim, but it did not do so. The record even reflects that the Department inquired whether Becton would need an additional extension, and Becton replied that it would not.

These circumstances are analogous to the facts of two cases in which we have held the doctrine of equitable tolling to be inapplicable. In *Brodine v. Blue Cross Blue Shield*,[19] an insured was denied coverage in July 1999 for services provided during the previous months of January through May. She filed suit against her insurer in federal court in April 2002, seeking recovery under the Employee Retirement Income Security Act of 1974. That action was dismissed in November 2002. On December 22, 2003, she filed suit against the insurer in state court, alleging breach of contract. Because the insurance contract contained a 3-year statute of limitations for such claims, the insurer moved for and was granted summary judgment. On appeal, the insured argued that the statute of limitations was tolled during the pendency of her federal lawsuit, based upon equitable principles. We rejected this argument, reasoning that the state court action was not dependent upon the resolution of any issues in the federal lawsuit and that the federal court did not enjoin or restrain her from proceeding further against the insurer. We also stated: "More important, the limitations period had not run by the time the federal action was dismissed. Rather . . . more than 11 months remained still to run on the limitations period."[20]

Also pertinent is our decision in *National Bank of Commerce v. Ham.*[21] There, a borrower defaulted in 1989 on a promissory

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[19] *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

[20] *Id.* at 724, 724 N.W.2d at 329.

[21] *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999).

note issued by a bank. The borrower then filed for bankruptcy, and the bank was subject to an automatic stay enjoining it from commencing any lawsuit on the note. On December 28, 1994, the bankruptcy petition was dismissed and the stay lifted. On July 14, 1995, the bank sued, seeking to recover on the note. The district court found in favor of the bank. In doing so, it reasoned that the 5-year statute of limitations for suit on a contract was tolled by the 774 days during which the bank was subject to the bankruptcy stay. Reversing that determination, this court relied on a bankruptcy statute[22] which provided that if a statute of limitations ran during the time of a bankruptcy stay, the creditor had 30 days after notice of the termination of the bankruptcy to file its action. We noted that the common-law doctrine of tolling was based in equity and that there was no inequity in limiting the bank's right to file suit to 30 days after the termination of the bankruptcy stay, especially when there was no evidence that the debtor was responsible for the bank's late filing. We specifically held:

> [W]e find no inequity in requiring [the bank] to commence its action within 30 days following the termination or dismissal of the bankruptcy. Unlike situations which might require an equitable tolling of the statute of limitations, such as fraudulent concealment or equitable estoppel, the creditor subject to the bankruptcy stay is, by definition, aware of its potential claim against the debtor. At the very least, the creditor can prepare to file the suit during the pendency of the stay.[23]

In this case, Becton knew and agreed that it could not file its refund claims until after receiving the qualification letter from the Department. After receipt of the letter dated July 20, 2005, Becton knew and agreed that it had until September 15 to file its claims, but it failed to do so. On these facts, the district court did not err in concluding that the doctrine of equitable tolling was inapplicable. We need not and, therefore, do not

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[22] 11 U.S.C. § 108(c) (1994).

[23] *National Bank of Commerce v. Ham, supra* note 21, 256 Neb. at 691, 592 N.W.2d at 484.

reach the appellees' contention that the doctrine could never apply to a tax refund claim.

Equitable Estoppel

In a somewhat related equitable argument, Becton contends that by November 14, 2002, it had provided the Department with sufficient data to prove that Becton had met the $3-million and 30-job thresholds. Becton thus contends that the Department could have issued a qualification letter at that time. All of the refunds Becton seeks in this action are incentives based on the $3-million and 30-job requirements. Becton contends that if the qualification letter had issued in November 2002, then it could have timely filed its claims within the general 3-year statute of limitations set forth in § 77-4106(2)(d). Becton asserts that because the Department failed to issue the qualification letter in November 2002, the Department now should be equitably estopped from asserting the statute of limitations as a defense.

[3] Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.[24]

The record simply does not support these elements. Pursuant to the terms of its agreement with the Department, Becton was aware that no qualification letter would be issued until the entire audit was complete. There is no showing of any false

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[24] *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

representation or concealment of material facts on the part of the Department or the Tax Commissioner. The record reflects that Becton was fully aware of the audit process and of the agreements to extend the limitations period. Indeed, by executing the extension agreements and verifying the final extension date in subsequent correspondence with the Department, Becton demonstrated its knowledge that the limitations period was running.

We note the appellees' argument that equitable estoppel can never be applied in tax refund cases under *Brockamp*.[25] Because we conclude that the elements of equitable estoppel are not established on the facts of this case, we do not reach this broader issue.

Denial of Motion to Remand and Rejection of Exhibit 10

[4] Becton contends that the district court erred in denying its motion to remand the case to the Department for a formal administrative hearing prior to reaching the merits. A regulation promulgated by the Department states in relevant part that

> [a] claim for refund . . . shall not be presumed to be a request for an oral hearing. The Tax Commissioner shall grant a taxpayer or his authorized representative an opportunity for an oral hearing if the taxpayer so requests. In this latter case, the request for an oral hearing should be made at the time of filing the claim . . . .[26]

Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[27] Becton was therefore on notice of the regulatory requirement.

Becton acknowledges that it did not request an oral hearing when it filed its refund claims. However, it argues that its failure to do so was the result of the Department's failure to explain, in the filing instructions for a refund claim, that an oral hearing must be specifically requested. Becton further argues that the Department was required to do so by

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[25] *United States v. Brockamp, supra* note 12.

[26] 316 Neb. Admin. Code, ch. 33, § 003.01A (1986).

[27] *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

§ 84-909(2), which states: "To assist interested persons dealing with it, each [state] agency shall so far as deemed practicable supplement its rules and regulations with descriptive statements of its procedures." The Department's instructions for filing refund claims are not included in the record transmitted by the Department to the district court. The instructions are included in exhibit 10 offered by Becton, which the district court first received but then rejected based upon our holding in *Wolgamott v. Abramson*,[28] that in reviewing a final decision of an administrative agency in a contested case pursuant to the Administrative Procedure Act, a court may not take judicial notice of the adjudicative fact which was not presented to the agency, because the taking of such evidence would impermissibly expand the court's statutory scope of review de novo on the record of the agency. Becton also assigns error with respect to this ruling.

We need not decide whether the district court erred in not receiving exhibit 10 or whether § 84-909(2) required the Department to inform taxpayers of the requirement to request an administrative hearing. Becton argues that the remedy for any error would be a remand for an administrative hearing so that it could present evidence "demonstrating how the Department's mismanagement of the L.B. 775 program was the cause of the present case."[29] Such a hearing would serve no purpose. Regardless of what evidence of "mismanagement" Becton might present at an administrative hearing, it could not change three basic facts which are undisputed from the record: (1) Becton knew and agreed that it could not submit refund claims until it received a letter from the Department certifying that it had met the investment and employment thresholds of L.B. 775, (2) after Becton received the Department's letter to this effect dated July 20, 2005, it knew and agreed that the limitations period for filing its refund claims was extended to September 15, 2005, and (3) Becton did not file its refund claims until November 29, 2005. As we have noted, these straightforward facts preclude any equitable grounds for

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[28] *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

[29] Brief for appellants at 30.

avoiding the bar of the statute of limitations. Accordingly, we conclude that the district court did not err in denying Becton's motion for remand.

CONCLUSION

For the reasons discussed, we conclude that the order of the district court affirming the decision of the Tax Commissioner conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. We affirm.

AFFIRMED.

KELLI M. FARNSWORTH, APPELLEE, V. THOMAS D. FARNSWORTH, APPELLANT, AND TIM MCQUEEN AND KARLA MCQUEEN, INTERVENORS-APPELLEES.

756 N.W.2d 522

Filed October 17, 2008. No. S-07-1094.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.
4. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
5. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for that right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
6. **Child Custody: Parental Rights.** The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
7. ____: ____. Allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.

8. **Child Custody: Parental Rights: Proof.** Clear and convincing evidence of substantial, continuous, and repeated neglect of a child must be shown in order to overcome the parent's superior right.

Appeal from the District Court for Perkins County: DONALD E. ROWLANDS, Judge. Reversed.

J. Leef, of Sonntag, Goodwin & Leef, P.C., for appellant.

Lori A. Zeilinger and George M. Zeilinger for intervenors-appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Thomas D. Farnsworth appeals the decision of the Perkins County District Court allowing the parents of his deceased ex-wife, Tim McQueen and Karla McQueen, to retain custody of his two sons. After determining that the original custody agreement granted custody to the McQueens, the district court concluded that while Farnsworth had shown a material change of circumstances, the best interests of the minor children required custody to remain with the McQueens. We reverse the decision of the district court.

BACKGROUND

Farnsworth married Kelli M. McQueen (Kelli) on June 19, 1993, and they had two sons. During the course of the marriage, the Farnsworths twice resided with the McQueens for an extended period of time. Karla provided daycare for the boys while the Farnsworths lived with the McQueens. When Farnsworth and Kelli separated, Kelli and the boys moved in with the McQueens.

Farnsworth and Kelli divorced in 2006, and their custody agreement granted custody of their children to the McQueens. As stated in the district court's order, "'[t]he permanent care, custody and control of the minor children shall be awarded to [Kelli's] parents . . . subject to [Farnsworth's] rights of reasonable visitation.'" The custody agreement also stated that

Farnsworth and Kelli would execute a power of attorney every 6 months, reaffirming that the McQueens had custody of the two boys.

At the divorce hearing, Farnsworth stated that he had agreed to give custody to the McQueens because "[m]y job, the way it is set up right now, I'm out the door early in the morning, I'm home late at night, and it would be better for the kids" to be with their grandparents, the McQueens. No other evidence as to the best interests of the children was presented. The district court stated that while the custody agreement was unusual, it found the arrangement to be in the best interests of the children and granted custody to the McQueens.

After the divorce was finalized, Kelli moved to St. Louis, Missouri, but moved back to Nebraska shortly thereafter. Kelli died January 12, 2007. After her death, Farnsworth moved to reopen the divorce decree to regain custody of the children. At the hearing on this action, Farnsworth testified that from his discussions with Kelli, it had been his understanding that the McQueens would be given temporary custody of the boys until Kelli was prepared to take custody again. However, Karla testified that it was her understanding that the McQueens would be given custody of the children but that she had never discussed it with Farnsworth.

Evidence presented at the hearing showed that both boys, then ages 13 and 11, had special needs. The testimony of Karla and the guardian ad litem indicated that the boys required a great deal of structure in order to do well in school. The guardian ad litem recommended that the boys remain with the McQueens, because the McQueens imposed the necessary structure, but she further recommended that Farnsworth's visitation be increased. During a meeting in chambers, the district court asked both boys if they had a preference, and both stated that they would like to live with Farnsworth.

The district court found the facts demonstrated that Farnsworth loved his children and had consistently exercised his visitation rights since the divorce. The district court also found, however, that in several respects, Farnsworth's testimony at the hearing "materially differed" from his deposition taken in anticipation of trial. The discrepancies included Farnsworth's changing his

testimony about plans to marry his girlfriend, statements about why he had been dismissed from a job, and claims about being denied access to his sons' schools and records.

Also of concern to the district court was the fact that Farnsworth had "admitted that he had held 21 different jobs since his marriage to [Kelli] in 1993" and that "[t]he house which [Farnsworth] occupies in Big Springs[, Nebraska,] is not owned by him, but is owned by [his girlfriend]." The district court stated that although both boys expressed a desire to live with their father, they were of insufficient age and maturity to render an informed opinion. The district court, however, made no finding that Farnsworth was an unfit parent.

The district court determined the custody agreement signed by the Farnsworths upon their divorce was part of the divorce decree and applied the standards for modification of a custody agreement. After determining that the death of Kelli constituted a material change of circumstances, the district court addressed whether granting custody to Farnsworth would be in the children's best interests. The district court found that Farnsworth's employment and housing situation was in "a state of flux" and that it was in the best interests of the children to remain with the McQueens. Farnsworth appeals that decision. We reverse.

ASSIGNMENT OF ERROR

Farnsworth assigns, restated and renumbered, that the district court erred when it applied the standards for modification of a custody agreement and failed to properly consider Farnsworth's parental preference.

STANDARD OF REVIEW

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.[1] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly

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[1] *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

untenable, unfairly depriving a litigant of a substantial right and a just result.[2]

ANALYSIS

[3] The primary issue presented in this appeal is whether the parental preference principle was applicable to Farnsworth's situation. Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.[3] Although the question present in every child custody case is the best interests of the child, a court cannot overlook or disregard that the best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected.[4] The U.S. Supreme Court has held that due process of law requires a parent to be granted a hearing on his or her fitness as a parent before being deprived of custody.[5] And the right of a parent to the care, custody, and management of his or her children is considered one of the most basic rights of man.[6] Farnsworth argues that the district court erred in not considering his superior right. We agree.

[4-6] Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.[7] Absent circumstances which terminate a parent's constitutionally protected right to care for his or her

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[2] *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[3] *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). See, also, *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980).

[4] *Uhing, supra* note 3.

[5] *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

[6] *Id.*

[7] See *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

child, due regard for that right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.[8] The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.[9]

Farnsworth's situation is somewhat unique in that he and Kelli agreed to the placement of the children with the McQueens through the custody agreement at the time of their divorce. Although Farnsworth argues that the custody agreement was invalid because it was based on a stipulation by the parties and not on a finding of the children's best interests, we need not address this issue here. As discussed below, the law clearly requires that a parent's right to the care and custody of his or her children be given due consideration, which the district court failed to do.

Several cases indicate that the district court erred in not considering Farnsworth's superior rights. In *Stuhr v. Stuhr*,[10] the district court in its divorce decree granted custody of the minor child to Galen Stuhr. Galen was neither the biological nor the adoptive father of the child. Four years later, the mother, Catherine Myers, petitioned for a change in the custody agreement, alleging there had been a material change in circumstances. Although Catherine had been undergoing treatment for alcohol and chemical dependency at the time of the divorce, she had since completed treatment and had remarried. The district court found that there had been a material change in circumstances, but that it was in the best interests of the child to remain with Galen. Catherine appealed.

Galen contended that Catherine had waived her parental rights by agreeing to the custody arrangement incorporated into the dissolution decree and therefore had lost her superior parental right to custody. After addressing the fact that parties to a dissolution decree cannot control the disposition of minor children by agreement, the court stated that

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[8] *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005).

[9] *Nielsen, supra* note 3.

[10] *Stuhr, supra* note 3.

> [i]n the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.[11]

Evidence presented at the hearing indicated that Catherine was a fit parent and that she had nurtured a beneficial relationship with her son. This court then held that the district court had abused its discretion by not considering Catherine's superior right to custody.

Three additional cases addressing the right of a parent to terminate a formal guardianship agreement utilized much the same reasoning.[12] This court pointed out that terminating a guardianship involves two principles that sometimes come into conflict in child custody issues.[13] On the one hand, a court must consider the best interests of the child, but on the other hand, there is the constitutionally protected right of a parent to the care and custody of his or her child.[14] In each case, a mother had left her child in the care of relatives and had instituted a formal guardianship. And, in each case, the mother later sought to terminate the guardianship and regain custody.

This court applied the parental preference principle in those cases.[15] A parent's superior right to the custody of his or her child "is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care."[16] As a result, the parent-child relationship will be protected, absent parental unfitness.[17] "Morever, the fact that . . . one outside

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[11] *Id.* at 245, 481 N.W.2d at 216.

[12] *In re Guardianship of Robert D., supra* note 8; *In re Guardianship of D.J., supra* note 3; *Uhing, supra* note 3.

[13] *In re Guardianship of D.J., supra* note 3.

[14] *Id.*

[15] See, *In re Guardianship of Robert D., supra* note 8; *In re Guardianship of D.J., supra* note 3; *Uhing, supra* note 3.

[16] *Uhing, supra* note 3, 241 Neb. at 374, 488 N.W.2d at 371.

[17] *Id.*

the immediate family relationship . . . may be able to provide greater or better financial care or assistance for a child than can a parent is an insufficient basis to deprive a parent of the right to child custody."[18]

[7,8] Allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.[19] Although length of guardianship may be considered by a court when determining whether a parent has waived his or her superior rights, it is not dispositive. Clear and convincing evidence of substantial, continuous, and repeated neglect of a child must be shown in order to overcome the parent's superior right.[20] No such showing was made here. Indeed, in the district court's order, it did not even mention the superior right of a biological parent to the care and custody of his or her child as against a third party.

The record clearly establishes, and the district court made a specific finding of fact, that Farnsworth cares for his sons and has consistently exercised his visitation rights. While there are facts that indicate that the boys might have more stability if they remain with the McQueens, such a finding alone is not enough to overcome the superior rights of a biological parent. Courts apply the parental preference principle "because the best interests standard, taken to its logical conclusion, would place the minor children of all but the 'worthiest' members of society in jeopardy of a custody challenge."[21] Given our standard of review and applying the parental preference rule in this case, and noting there is no evidence in the record that would indicate Farnsworth is an unfit parent, we reverse the decision of the district court and grant custody of the two minor children to Farnsworth.

CONCLUSION

The district court abused its discretion by granting custody to the McQueens. Rather than focusing solely on the best interests

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[18] *Id.* at 377, 488 N.W.2d at 373.

[19] See *In re Guardianship of Robert D., supra* note 8.

[20] See *id.*

[21] *In re Guardianship of D.J.*, 268 Neb. at 247, 682 N.W.2d at 245.

of the children, the district court should have also considered the superior interests of Farnsworth, the biological parent. We therefore reverse the decision of the district court and award custody of the two minor children to Farnsworth.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN PARKER, APPELLANT.
757 N.W.2d 7

Filed October 24, 2008. No. S-06-1442.

1. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **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 discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
5. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
6. **Constitutional Law: Trial.** The right to a fair trial is a fundamental liberty secured by the 14th Amendment.
7. **Constitutional Law: Criminal Law: Trial.** Whatever the status of a defendant in a criminal case may be and whatever be the nature of the crime with which he or she is charged, each and all are entitled to the same fair trial guaranteed by the U.S. Constitution.
8. **Trial: Presumptions.** One of the essential safeguards of a fair trial is the benefit of the presumption of innocence.
9. **Criminal Law: Presumptions.** The presumption of innocence is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.
10. **Trial: Evidence: Presumptions: Proof.** Under the presumption of innocence, guilt is to be established by the State solely through the probative evidence introduced at trial and shall not be founded on official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

11. **Trial: Evidence: Verdicts.** A fair trial implies a trial with sympathy for one party or hostility toward the other being kept at a minimum at all stages so that the verdict rendered is based on a dispassionate consideration of the evidence.
12. **Trial: Courts.** Courts must carefully guard against dilution of the right to a fair trial and stay alert to factors that may undermine the fairness of the factfinding process. The practice calls for close judicial scrutiny where reason, principle, and common human experience indicate a probability of deleterious effects on fundamental rights.
13. **Trial: Juries: Words and Phrases.** A practice is inherently prejudicial to the defendant's right to a fair trial when it presents an unacceptable likelihood of impermissible factors coming into play in the jury's determination of guilt.
14. **Trial.** If a practice is inherently prejudicial, it can only pass close scrutiny if justified by an essential state interest specific to that trial.
15. **Due Process: Convictions: Proof: Appeal and Error.** If an inherently prejudicial practice is not justified by an essential state interest, then the defendant need not demonstrate actual prejudice in order to make out a due process violation warranting a reversal of his or her conviction; it is the State that must prove beyond a reasonable doubt that the error did not contribute to the verdict.
16. **Trial.** Not every practice tending to single out the accused from everyone else in the courtroom must be struck down.
17. **Trial: Jurors.** The chief feature that distinguishes practices that are not inherently prejudicial from those that are is the wider range of inferences that a juror might reasonably draw from the practice.
18. **Minors.** The protection of children from physical as well as psychological harm is a compelling state interest.
19. **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.
20. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
21. **Rules of Evidence: Hearsay: Words and Phrases.** A written assertion offered to prove the truth of the matter asserted is a hearsay statement under Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 1995), unless it falls within an exception or exclusion under the hearsay rules.
22. **Double Jeopardy: Appeal and Error.** Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.
23. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded for a new trial.

Robert B. Creager, of Anderson, Creager & Wittstruck, 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

The defendant, Steven Parker, was found guilty of first degree sexual assault[1] and was sentenced to 10 to 16 years' imprisonment. During the testimony of the alleged victim, S.M., the court placed a large screen in the courtroom to block Parker and S.M. from seeing one another. We conclude that the screen unduly compromised the presumption of innocence fundamental to the right to a fair trial. The presence of the screen in the courtroom, in an obvious and peculiar departure from common practice, could have suggested to the jury that the court believed S.M. and endorsed her credibility, in violation of Parker's right to a fair trial. Because other means were available that would have protected S.M. without depriving Parker of his right to a fair trial, the screen was not justifiable. Because we cannot discount the effect the screen had on the jury's verdict, we reverse Parker's conviction.

BACKGROUND

Parker was charged with first degree assault of S.M. in relation to an incident occurring in June 2003. Prior to trial, the State requested that the court allow S.M. to testify in chambers rather than in the courtroom. Nebraska law[2] provides that, upon a showing of compelling need, in lieu of normal courtroom testimony, the court may allow videotaped pretrial deposition testimony, in camera closed-circuit testimony, or any other accommodation of a child victim or child witness to a felony.

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[1] See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995).

[2] Neb. Rev. Stat. § 29-1926 (Cum. Supp. 2004).

A pretrial hearing was conducted to determine whether there was such a compelling need in this case. Testimony was admitted at the hearing describing S.M.'s fear of Parker and her past psychological difficulties based on that fear, including posttraumatic stress disorder. S.M.'s treating psychologist, a specialist in child abuse, stated her concern that if S.M. were to be placed face-to-face with Parker at trial, she would reexperience the trauma of the abuse and suffer a debilitating relapse of posttraumatic stress.

The court found that some accommodation was necessary to protect S.M. from the psychological trauma that could result from a face-to-face confrontation with Parker. The trial court did not, however, grant the prosecution's request for in camera testimony. Instead, it found that "a less substantial digression from normal trial procedure is possible to safeguard the child's interest short of the procedure requested." The procedure the court decided upon involved the use of a screen in the courtroom during S.M.'s testimony that would block her view of Parker.

The courtroom in which Parker was tried is small. From the point of view of the parties, the defense table is on the right, and the prosecution table is on the left. The witness box is located on the right side of the room, in front of and slightly to the right of the defense table. The jury box is on the opposite side of the courtroom, and the witness box is oriented diagonally so that a witness is seated close to the wall, facing the bench and jury box, and facing away from the defense table.

As a result of this configuration, it was possible to place a screen perpendicular to the right wall of the courtroom, and extend the screen into the courtroom between the defense table and the witness box. The screen appears, from the photographs in the record, to have been a panel of the kind commonly used as an office partition. When the edge of the panel was against the right wall, the panel would stop just a few feet short of the edge of the defense table.

Because of the way the witness box was angled away from the defense table, it was apparently the trial court's original intent to keep the panel in this position, with the edge touching

the wall, during the entire trial. In this way, the screen would never have been placed directly in front of Parker and, arguably, the jury would not have been aware that because of the angle of the witness box, Parker was shielded from S.M.'s view. It was apparently discovered that the panel in this position would not be far enough over to sufficiently block S.M.'s view of Parker, and a new plan was devised that involved moving the panel before S.M.'s testimony.

After having the edge of the screen touching the wall during other witnesses' testimony, the judge dismissed the jury on break while S.M. entered the witness box. As S.M. walked into the room, Parker was seated with the panel and an additional blackboard fully blocking any view of him. Once S.M. had sat down, the blackboard was removed. However, the panel remained behind—now located several feet into the courtroom and no longer sitting with one edge against the wall. The parties stayed seated as the jury reentered. The jurors could clearly observe that the panel was now situated so it completely covered the right half of the defense table where Parker was sitting. It was equally clear from the jury's vantage point that this panel was blocking S.M.'s view of Parker and Parker's view of her.

S.M. testified about the details of the abuse that occurred one night when Parker was visiting her home. S.M. also explained in detail how, after the incident, she became extremely afraid of Parker. For this reason, and also because she felt ashamed, S.M. explained that she did not tell anyone about the incident for a long time.

S.M. testified without objection that eventually, during the following school year, she told her best friend, Kellie P., about how Parker had touched her. S.M. described how, in June 2005, Kellie finally convinced S.M. to tell S.M.'s mother what had happened. S.M. said that after she told her parents, she felt very relieved that her parents were not mad at her.

At the same time, S.M.'s fear of Parker was heightened by the prospect that her parents would confront Parker and that he might retaliate against her or her family. S.M. testified that at one point after learning that she would likely be forced to see Parker in court, "I didn't want to see him so I just — I just told

[my mother] that it never happened." The next day, however, S.M. explained to her mother that she had recanted only "so I wouldn't have to see him in court." Before S.M. testified, S.M.'s parents and her treating psychologist testified about the trauma S.M. had suffered and how fearful she was of Parker. S.M.'s parents specifically recounted for the jury how afraid S.M. would become whenever she was forced to contemplate facing Parker at trial.

Following S.M.'s testimony, the screen was moved back to its original position with one edge touching the wall. The jury found Parker guilty of the charge filed, and Parker appeals the conviction.

ASSIGNMENTS OF ERROR

Parker asserts, restated, that (1) the trial court's actions in erecting a screen between S.M. and Parker were unauthorized by § 29-1926; (2) § 29-1926 is unconstitutionally vague and overbroad on its face; (3) the screen violated Parker's rights under the Confrontation Clause; (4) the screen violated Parker's rights to a fair trial under the Due Process Clause; (5) the trial court erred in admitting Kellie's hearsay testimony; (6) the trial court erred in failing to grant a motion for mistrial for prosecutorial misconduct during closing arguments; and (7) trial counsel, who is different from appellate counsel, was ineffective for failing to make a timely motion for mistrial based on prosecutorial misconduct during closing arguments.

STANDARD OF REVIEW

[1,2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[4]

[3-5] 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

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[3] *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002).

[4] *Id.*

discretion a factor in determining admissibility.[5] When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.[6] A trial judge does not have discretion to admit inadmissible hearsay statements.[7] Therefore, apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.[8]

ANALYSIS

Courtroom Screen and Right to Fair Trial

[6,7] The first issue we address, because we find it to be dispositive, is whether the use of a courtroom screen violated Parker's due process right to a fair trial. The right to a fair trial is a fundamental liberty secured by the 14th Amendment.[9] "'Whatever the status of a defendant in a criminal case may be and whatever be the nature of the crime with which he is charged, each and all are entitled to the same fair trial guaranteed by our Constitution.'"[10]

[8,9] One of the essential safeguards of a fair trial is the benefit of the presumption of innocence.[11] The presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[12]

[10,11] Under this presumption of innocence, guilt is to be established by the State solely through the probative evidence

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[5] *State v. Draganescu, ante* p. 448, 755 N.W.2d 57 (2008).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

[10] *Wamsley v. State*, 171 Neb. 197, 211, 106 N.W.2d 22, 30 (1960).

[11] *Estelle v. Williams, supra* note 9.

[12] *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

introduced at trial.[13] Guilt shall not be founded on "'official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'"[14] A fair trial implies a trial "with sympathy for one party or hostility toward the other being kept at a minimum at all stages"[15] so that the "verdict rendered is based on a dispassionate consideration of the evidence."[16]

[12] The U.S. Supreme Court has mandated that courts "carefully guard against dilution"[17] of these principles of a fair trial and stay "alert to factors that may undermine the fairness of the fact-finding process."[18] While the Court has acknowledged the difficulty in determining the actual impact of a particular trial procedure on the judgment of the jury, it has explained that where "reason, principle, and common human experience"[19] indicate a "probability of deleterious effects on fundamental rights," then the procedure "calls for close judicial scrutiny."[20]

[13] The U.S. Supreme Court has considered certain procedures, such as compelling the defendant to attend trial in visible shackles, gagged, or in recognizable prison clothing, and determined them to be "inherently prejudicial" to the defendant's right to a fair trial and, thus, subject to close scrutiny.[21] In these cases, the scene presented to the jurors simply posed

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[13] *Id.*

[14] *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). See, also, *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986).

[15] *Wamsley v. State, supra* note 10, 171 Neb. at 210, 106 N.W.2d at 30.

[16] *Id.* at 208, 106 N.W.2d at 29.

[17] *Estelle v. Williams, supra* note 9, 425 U.S. at 503.

[18] *Id.*

[19] *Id.*, 425 U.S. at 504.

[20] *Id.*

[21] See, *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); *Holbrook v. Flynn, supra* note 14; *Estelle v. Williams, supra* note 9; *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Compare, *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Sorich*, 226 Neb. 547, 412 N.W.2d 484 (1987). See, also, *State v. Daniels*, 40 P.3d 611 (Utah 2002).

an unacceptable threat of "'impermissible factors coming into play'" in the jury's determination of guilt.[22]

[14,15] If a practice is inherently prejudicial, it can only pass close scrutiny if justified by an essential state interest specific to that trial.[23] If the practice is not justified by an essential state interest, then the defendant need not demonstrate actual prejudice in order to make out a due process violation warranting a reversal of his or her conviction.[24] Instead, in such circumstances, it is the State that must prove beyond a reasonable doubt that the error did not contribute to the verdict.[25]

In *Deck v. Missouri*,[26] the U.S. Supreme Court reasoned that it was inherently prejudicial to force the defendant to appear before the jury in visible shackles, because the shackles "suggest[ed] to the jury that the justice system itself s[aw] a 'need to separate a defendant from the community at large.'" The Court further explained how the shackles were marks of public shame and disgrace. And the Court concluded that the use of shackles "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community."[27] It could not discount the improper influence that this implication could have on the jury's verdict.

In *Illinois v. Allen*,[28] the Court similarly explained:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

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[22] *Holbrook v. Flynn, supra* note 14, 475 U.S. at 570. Accord *Estelle v. Williams, supra* note 9.

[23] *Holbrook v. Flynn, supra* note 14.

[24] *Deck v. Missouri, supra* note 21.

[25] *Id.*

[26] *Id.*, 544 U.S. at 630.

[27] *Id.*, 544 U.S. at 633.

[28] *Illinois v. Allen, supra* note 21, 397 U.S. at 344.

In *Estelle v. Williams*,[29] the Court likewise reasoned that when the defendant is forced to wear identifiable prison clothing in front of the jury, there was an inherent risk from this "constant reminder of the accused's condition."

[16] The U.S. Supreme Court has said that not every practice tending to single out the accused from everyone else in the courtroom must be struck down.[30] "[J]urors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance."[31] Thus, the Court has "never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct."[32]

In *Holbrook v. Flynn*,[33] the Court accordingly held that extra security employed during trial was not inherently prejudicial to the defendant's presumption of innocence. The trial court had seated four uniformed state troopers in the front row of the joint trial of six defendants. There were eight other law enforcement officers throughout the courtroom. With the caveat that in a different case, it did not wish to "minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial,"[34] the Court found that in this case, the practice was not "inherently prejudicial." Even if the jurors had known the use of troopers was not common practice, this would not have necessarily been interpreted "as a sign that [the defendants] were particularly dangerous or culpable."[35]

[17] Instead, the Court explained, the jurors could have "just as easily believe[d]" that the officers were there to guard against outside disruptions; ensure peaceable resolution of any

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[29] *Estelle v. Williams, supra* note 9, 425 U.S. at 504.

[30] *Holbrook v. Flynn, supra* note 14; *State v. Mata, supra* note 21.

[31] *Holbrook v. Flynn, supra* note 14, 475 U.S. at 567.

[32] *Id.*

[33] *Id.*

[34] *Id.*, 475 U.S. at 570-71.

[35] *Id.*, 475 U.S. at 569.

tense courtroom exchanges; or think nothing at all, given the presence of armed guards in most public places.[36] Unlike other practices struck down as inherently prejudicial, the troopers in this case did not brand the defendant with an "unmistakable mark of guilt"[37] or with "unmistakable indications of the need to separate a defendant from the community at large."[38] The Court summarized: "The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence."[39]

We are unaware of a case in which any court has directly addressed the impact of a courtroom screening device upon the defendant's right to a fair trial. This appears to be largely due to the fact that, in contrast to the use of closed-circuit or videotaped testimony, screens are rarely used as an accommodation of child witnesses. Nevertheless, we find the case of *Romero v. State*,[40] a case where a witness was allowed to wear a noticeable disguise, to be illustrative of the inherent prejudice resulting from the jury's awareness of an officially sanctioned protection from the defendant.

In *Romero*, the State's witness was allowed to testify wearing the "disguise" of dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar. Only the witness' ears, the tops of his cheeks, and the bridge of his nose were visible. The witness had refused to testify without this disguise because, while not the victim, he was generally fearful of the defendant's capacity for retribution.

On appeal, the court reversed the defendant's conviction because of the prejudicial nature of allowing such a disguise. The court explained that it improperly communicated to the

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[36] *Id.*

[37] *Estelle v. Williams, supra* note 9, 425 U.S. at 518. See, also, *Holbrook v. Flynn, supra* note 14.

[38] *Holbrook v. Flynn, supra* note 14, 475 U.S. at 569.

[39] *Id.*

[40] *Romero v. State*, 136 S.W.3d 680 (Tex. App. 2004), *affirmed* 173 S.W.3d 502 (Tex. Crim. App. 2005).

jury that the defendant was dangerous or culpable. In addition, the disguise added "an unnecessary element of drama [and] placed unwarranted emphasis on [the defendant's] testimony."[41] While the court confessed it would be impossible to determine the weight individual jurors may have attributed to the disguise, it concluded that the practice posed an unacceptable threat to the defendant's right to a fair trial.[42]

In this case, the threat to Parker's right to a fair trial was even more apparent than the practice found impermissible in *Romero*. From the beginning of the trial, as witnesses described in great detail how fearful S.M. was of facing Parker, a large opaque screen jutted curiously into the room with one edge touching the wall and the other edge approaching the corner of Parker's table. Then, the jury was dismissed, and when it came back, it found that S.M. was sitting in the witness box and the screen had been moved to stand squarely between her and Parker.

The screen remained a constant presence during S.M.'s testimony. The screen stood there protecting S.M. as she told the jury how fearful she was of Parker. The screen was, in effect, a judicially sanctioned prop that lent credence to the witness' claims. Not until S.M. left the courtroom was the screen replaced to its original awkward position against the wall.

While the court surely placed the screen in the room out of genuine concern for S.M., that concern is precisely the threat to Parker's right to a fair trial. Whether S.M. really had reason to fear Parker, because he had abused her, was the essential subject that the jury had to determine—based solely on the evidence properly adduced at trial. The insertion of the screen into the courtroom created a risk that this did not occur. It would have been a matter of common sense for the jurors to conclude that the court had placed the screen for S.M.'s protection because the court believed her accusations were true. We find it hard to imagine a practice more damaging to the presumption of innocence than one from which the

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[41] *Id.* at 690.

[42] *Id.*

jury may infer the court's official sanction of the truth of the accuser's testimony.

And even discounting such an explicit connection, there were no other innocuous inferences the jury would have been likely to derive from the screen. This is unlike the extra security that the jurors in *Holbrook* could have thought was due merely to the number of defendants or outside disturbances or that they could have barely noticed because of the common presence of security in similar public places. Instead, more akin to prison garb or shackles, the screen acted as a dramatic reminder of Parker's position as the accused at trial. The scene presented of the jurors watching Parker as he was forced to look onto a large panel instead of his accuser makes palpable the marks of shame and guilt caused by this looming presence in the courtroom. Nor can we ignore, like *Romero*, the dramatic emphasis placed by the screen upon the State's key witness. In a case such as this, where the jury's assessment of the credibility of the accuser is so crucial, the risk of these impermissible factors simply cannot be overlooked. We conclude that the screen was inherently prejudicial to Parker's right to a fair trial.

[18] Having determined that the screen was inherently prejudicial, we subject the procedure to close judicial scrutiny and consider whether it was justified by an essential state interest specific to this trial.[43] We agree with the State's contention that the protection of children from physical as well as psychological harm is a compelling state interest.[44] In this case, there was testimony that S.M. could suffer serious psychological harm if forced to view Parker face-to-face. In addition, there was evidence that S.M. would be unable to testify completely and accurately under such duress, and this implicated the State's essential interest in the fairness and accuracy of the trial process.[45]

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[43] *Holbrook v. Flynn, supra* note 14.

[44] See, e.g., *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

[45] See, *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *Deck v. Missouri, supra* note 21.

Nevertheless, we conclude that the inherently prejudicial practice in this case cannot pass close scrutiny, because the court had available another equally effective method of protecting S.M. while procuring her testimony that would not have been inherently prejudicial to Parker's due process rights. Section 29-1926 specifically provides for various means of obtaining the victim's testimony through pretrial videotaping or closed-circuit video from another room. It does not, actually, make any reference to using a screen in the courtroom. The U.S. Supreme Court, while not addressing the Due Process Clause, has specifically sanctioned the use of one-way closed-circuit television as a justified infringement upon the defendant's confrontation rights when a specific showing of necessity is made.[46] And at least one state court has addressed the television procedure in a challenge based upon the defendant's right to a fair trial, finding it acceptable.

In *Marx v. State*,[47] the court held that a closed-circuit in camera procedure was not inherently prejudicial to the defendant's right to a fair trial. The trial court, after considering specific evidence and finding that the victim and another child witness would be traumatized by being required to testify in the defendant's presence, had allowed the children to testify from another room through two-way closed-circuit television. The jury was instructed by the court that such procedure was authorized by statute "'in these types of cases.'"[48]

On appeal, the court in *Marx* rejected the defendant's contention that the use of closed-circuit television impaired his presumption of innocence. The court explained that the instruction likely conveyed to the jury the state's general desire to protect children from the intimidating courtroom environment rather than from the defendant specifically. Even in the absence of the instruction, the court opined that the closed-circuit procedure would probably be viewed by the jury as suggesting that the witness was "'fearful of testifying in the courtroom setting

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[46] *Maryland v. Craig, supra* note 44.

[47] *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

[48] *Id.* at 580.

rather than fearful of testifying while looking at the defendant.'"[49] As such, the court concluded that it was unlikely the procedure would have an impermissible subconscious effect on the jury's attitude toward the defendant.

We agree that in videotaped or closed-circuit television procedures, the jury would not usually be specifically aware that the child was being shielded from the defendant. Instead, the jury could easily infer that the accommodation was standard procedure for children who, as common sense dictates, may be intimidated by the courtroom environment. The trial court in this case indicated that it preferred that the jury see S.M.'s testimony in person rather than through a television screen. While this is generally preferable, the court lost sight of the effect the screen would have on the presumption of Parker's innocence. The State has made no attempt to prove that this inherently prejudicial practice did not actually attribute to the jury's verdict, and so we are obliged to reverse, and remand for a new trial.

Hearsay Objection

[19] Having determined that a new trial is warranted by the screen's prejudice to Parker's due process rights, we need not address his remaining assignments of error. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[50] We find that such an issue exists with respect to Kellie's alleged hearsay testimony.

As previously noted, S.M. testified that she had confided in her best friend, Kellie, about the alleged sexual assault. Kellie testified as the last witness for the State's case in chief. When the prosecution began to ask Kellie about the conversation she had with S.M., Parker's counsel objected on the grounds of hearsay. The prosecution responded that it was not offering S.M.'s statement for the truth of the matter asserted, but

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[49] *Id.* at 581, quoting Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 24.3 at 1015 (2d ed. 1992).

[50] *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

"simply to show that a promise was made; consequently, that — the effect on what that had on Kellie." The court allowed the testimony to continue, and Kellie testified that S.M. had told her that Parker "molested her or she said touched her in her private parts." The court then immediately instructed the jury:

> I will allow you to hear that evidence only for the purpose of — that that was what was said, not for the truth of the statement. So you can consider that statement only for the purpose that that is what [S.M.] told Kellie but not for the purposes of whether that statement is true or not.

Kellie continued to testify that S.M. had made her "pinky swear" not to tell anyone about it, and so she did not. Kellie also testified about how she eventually convinced S.M. to report the abuse to S.M.'s mother.

[20,21] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[51] If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.[52] But a statement or assertion offered to prove the truth of the matter asserted is a hearsay statement under Neb. Evid. R. 801(3)[53] unless it falls within an exception or exclusion under the hearsay rules.[54]

We agree with Parker that the State's explanation that the statement was relevant to show that "a promise was made" was insufficient to overcome Parker's hearsay objection. Neither the prosecution nor the trial court clearly explained how the fact that the statement was made was relevant to an issue in the case. In particular, it was not explained how the effect of the statement on Kellie was relevant to an issue in the case. And the State did not argue below or on appeal that any statutory exception to the hearsay rule, such as responding to a charge of recent fabrication, was applicable. Therefore, on

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[51] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[52] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[53] Neb. Rev. Stat. § 27-801(3) (Reissue 1995).

[54] *State v. Draganescu, supra* note 5.

the record and legal theory presently before us, the trial court erred in admitting the statement.[55]

CONCLUSION

It is our duty to uphold that "axiomatic and elementary"[56] aspect of the due process right to a fair trial—the presumption of innocence. We would be derelict in that duty if we ignored the significance of a large screen intruding into the courtroom, obviously intended to shield Parker from S.M. as she testifies how the alleged crime has caused her to fear him. We cannot conclude that the jury's determination of the credibility of S.M. was not influenced by the resulting drama, indignity, and implicit endorsement of S.M.'s testimony.

[22,23] Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.[57] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[58] Parker does not argue that principles of double jeopardy would be offended by retrying him, and our review of the record does not suggest that the evidence was legally insufficient. Therefore, Parker's conviction is reversed and the cause is remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[55] See, e.g., *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004). See, also, *U.S. v. Paulino*, 445 F.3d 211 (2d Cir. 2006); *U.S. v. Huguez-Ibarra*, 954 F.2d 546 (9th Cir. 1992).

[56] See *Coffin v. United States, supra* note 12, 156 U.S. at 453.

[57] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch, supra* note 52.

[58] *State v. McCulloch, supra* note 52.

GERRARD, J., concurring.

I fully join the court's opinion. I agree that the presence of a barrier in the courtroom, placed in front of the witness

box during the testimony of a single witness, compromised Parker's right to a fair trial. I write briefly to comment on the issue presented by Kellie's testimony about S.M.'s hearsay statement.

I agree that the record in this case does not support the trial court's decision to permit the disputed testimony. Neither the State's argument at trial nor the trial court's reasoning when allowing the testimony was sufficient to explain why the testimony was relevant for a purpose other than the truth of the matter asserted.

But I want to emphasize that our conclusion *on this record* does not preclude the possibility that similar testimony may be relevant and admissible for a nonhearsay purpose. Statements that are relevant because of their impact on the hearer are not hearsay.[1] This may include statements relevant to explain the course of a series of events or to otherwise provide context to the evidence presented.[2]

But admitting evidence on such a basis requires a clear understanding of why the evidence was relevant for a nonhearsay purpose. In other words, context is everything. And in this case, neither the State nor the trial court persuasively explained how the effect of S.M.'s hearsay statement on Kellie was relevant. Appellate evaluation of this sort of issue is difficult when the independent relevance of the evidence is not clearly articulated on the record.[3] Therefore, I agree that the explanations proffered in this case were insufficient to justify admission of the disputed evidence, and I join the court's opinion.

HEAVICAN, C.J., joins in this concurrence.

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[1] See, e.g., *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977). See, generally, R. Collin Mangrum, Mangrum on Nebraska Evidence 638 (2008).

[2] See, e.g., *U.S. v. Eberhart*, 467 F.3d 659 (7th Cir. 2006); *U.S. v. Macari*, 453 F.3d 926 (7th Cir. 2006); *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980); *United States v. Gonzales,* 606 F.2d 70 (5th Cir. 1979); *Burgess v. U.S.*, 786 A.2d 561 (D.C. 2001); *Bear Runner, supra* note 1.

[3] Cf. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

IN RE INTEREST OF TAYLOR W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TAYLOR W., APPELLEE, AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF JUVENILE SERVICES, APPELLANT.

IN RE INTEREST OF LEVI C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LEVI C., APPELLEE, AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF JUVENILE SERVICES, APPELLANT.

757 N.W.2d 1

Filed October 24, 2008. Nos. S-08-026, S-08-074.

1. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction, but because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
4. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Juvenile Courts: Final Orders.** Orders determining where a juvenile will be placed are dispositional in nature.
6. **Juvenile Courts: Final Orders: Appeal and Error.** Dispositional orders are final and appealable.
7. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
8. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeals from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Appeals dismissed.

Jon Bruning, Attorney General, B. Gail Steen, Special Assistant Attorney General, and Jodi M. Fenner for appellant.

Gary E. Lacey, Lancaster County Attorney, Barbara J. Armstead, Shellie Sabata, and Richard C. Grabow, Senior Certified Law Student, for appellee State of Nebraska.

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

HEAVICAN, C.J.

FACTUAL BACKGROUND

Taylor W. and Levi C., the minors in these two cases which were consolidated for briefing and oral argument, were adjudicated under Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006) (misdemeanor law violation). Both Taylor and Levi were "committed" by the separate juvenile court of Lancaster County into the custody of the Office of Juvenile Services (OJS), an office of the Department of Health and Human Services (collectively DHHS). The "commitment" was for purposes of an evaluation pending the disposition of petitions filed against each juvenile. We interpret the juvenile court's use of the word "committed" to mean "placed" in accordance with Neb. Rev. Stat. § 43-413(1) (Reissue 2004), which provides that a court may "place a juvenile" with OJS or the Department of Health and Human Services for "an evaluation to aid the court in the disposition." In addition to ordering the evaluations, the juvenile court further ordered that both Taylor and Levi be detained at the Lancaster County Youth Services Center for purposes of their respective evaluations.

Following the entry of the order placing Levi at the Lancaster County Youth Services Center, DHHS filed a motion to remove him from detention. DHHS argued that the juvenile court exceeded its statutory authority in ordering a specific placement for Levi during his evaluation. The motion was denied. No such motion was filed with respect to Taylor. DHHS then filed these timely appeals from the placement orders in each case. We moved these cases to our docket pursuant to our

authority to regulate the dockets of this court and the Court of Appeals.[1]

ASSIGNMENT OF ERROR

On appeal, DHHS assigns that the juvenile court exceeded its statutory authority in ordering specific placements for Taylor and Levi.

STANDARD OF REVIEW

[1,2] Mootness does not prevent appellate jurisdiction, but because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions.[2] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[3]

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[4]

[4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5]

ANALYSIS

Final Order.

The first issue presented by these appeals is whether the juvenile court's orders were final.

[5,6] We have previously held that orders determining where a juvenile will be placed are dispositional in nature.[6] And we

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

[3] *Id.*

[4] See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[5] *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

[6] See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

have further concluded that dispositional orders are final and appealable.[7] As such, the juvenile court's placement orders in these cases are final and appealable.

Mootness.

[7,8] We are next asked to decide whether these appeals are moot. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.[8] However, an appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[9]

The parties are in agreement that the evaluations of Taylor and Levi have been completed, and thus judicial relief is unavailable. However, DHHS and the county attorney disagree on whether the public interest exception should apply to allow this court to review the issues presented on appeal. DHHS argues that "[i]t would be virtually impossible for a case raising the issue of placement during [a Department of Health and Human Services]/OJS evaluation to be heard at the appellate level before the underlying case reached disposition, given that the statutory scheme anticipates the evaluation to be completed within thirty days."[10] DHHS further notes that this problem is likely to recur. The county attorney, however, contends that each of these cases "require[s a] case-by-case

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[7] See *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). See, also, *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[8] *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

[9] *In re Applications of Koch*, 274 Neb. 96, 736 N.W.2d 716 (2007).

[10] Brief for appellant at 13.

analysis, and a ruling on either would not be instructive to the courts for future proceedings."[11]

We disagree with the county attorney's characterization of these cases as requiring a "case-by-case analysis." Rather, the issue presented by these appeals is a purely legal one—whether the juvenile court has the authority to order a specific placement under these circumstances. It is apparent that this issue is capable of recurring, because we are now presented with two cases raising the same legal issue and the Court of Appeals has previously been presented with this same issue on at least one occasion.[12] Because of the nature of juvenile cases, this action is essentially unreviewable without the application of the public interest exception. We therefore conclude that this issue merits review under the public interest exception to the mootness doctrine in order to provide guidance to the juvenile court, DHHS, county attorneys, and other interested parties.

Authority of Juvenile Court to Order Specific Placement.

We now turn to DHHS' sole assignment of error: that the juvenile court exceeded its statutory authority in ordering a specific placement for Taylor and Levi.

The juvenile court may place a juvenile with DHHS for purposes of an evaluation as set forth in Neb. Rev. Stat. § 43-281 (Reissue 2004) and § 43-413. Section 43-281 provides that "[f]ollowing an adjudication of jurisdiction and prior to final disposition, the court may place the juvenile with [OJS] or the Department of Health and Human Services for evaluation. The office or department shall make arrangements for an appropriate evaluation." Section 43-413(1) states that "[a] court may, pursuant to section 43-281, place a juvenile with [OJS] or the Department of Health and Human Services for an evaluation to aid the court in the disposition." Section 43-413(3) further provides that "[a]ll juveniles shall be evaluated prior to commitment to [OJS]. The office may place a juvenile in residential or nonresidential community-based evaluation services

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[11] Brief for appellee at 9.

[12] *In re Interest of Ashley D.*, Nos. A-01-111, A-01-250, 2002 WL 798653 (Neb. App. Apr. 30, 2002) (not designated for permanent publication).

for purposes of evaluation to assist the court in determining the initial level of treatment for the juvenile."

Neb. Rev. Stat. § 43-414 (Reissue 2004) further sets forth OJS' role in the evaluation process: "Each juvenile placed for evaluation with [OJS] shall be subjected to medical examination and evaluation as directed by the office." And Neb. Rev. Stat. § 43-415 (Reissue 2004) provides that "[a] juvenile placed for evaluation with [OJS] shall be returned to the court upon the completion of the evaluation or at the end of thirty days, whichever comes first." This section also grants to the juvenile court the authority to extend this 30-day time period.

The county attorney argues that nothing in the language of §§ 43-281, 43-413, and 43-414 "specifically limits the discretion of the juvenile court in ordering the continued detention of a juvenile at a specific detention facility during the pendency of an OJS evaluation."[13] Instead, he cites to Neb. Rev. Stat. §§ 43-253, 43-284, and 43-289 (Reissue 2004) in support of his contention that "[t]he juvenile court has authority to determine a juvenile's placement and care pending the adjudication of a case, at adjudication (pending disposition), and post-disposition."[14] The county attorney further contends that "[i]n light of the juvenile court's authority to determine placement and care at each step of a juvenile's interaction with the juvenile court, it would be inconsistent to read . . . § 43-413 as cutting the juvenile court out of the decision making regarding the placement of a juvenile for evaluation."[15]

We have examined the cited statutes and conclude that the statutes do not provide the overarching authority of the juvenile court suggested by the county attorney.

Section 43-253 is primarily concerned with the authority of a probation officer to take a juvenile into temporary custody: the only authority given to the juvenile court in this section is the ability to "admit such juvenile to bail by bond." This section provides no authority to the juvenile court to make specific placements.

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[13] Brief for appellee at 11.

[14] *Id.*

[15] *Id.*

The other two statutes cited by the county attorney—§§ 43-284 and 43-289—do arguably grant the juvenile court authority to specifically place a juvenile, but only under circumstances which are not presented by these cases. Section 43-284 provides the juvenile court the authority to make a placement of juveniles adjudicated under § 43-247(3) (abuse and neglect), (4) (traffic infractions), and (9) (guardianships). But in these cases, both Taylor and Levi were adjudicated under § 43-247(1). And § 43-289 authorizes the juvenile court to make a placement only in the limited instance where it is necessary to admit a juvenile into a hospital, a situation not presented by these cases.

We note that Neb. Rev. Stat. §§ 43-254 and 43-258 (Reissue 2004), which were not cited by the county attorney in support of his argument, do grant to the juvenile court the power to make a specific placement prior to adjudication. These provisions are, of course, inapplicable in this case, because both Taylor and Levi have been adjudicated. But beyond this, we conclude that these statutes, even considered along with §§ 43-284 and 43-289, are insufficient to support the "authority to determine placement and care at each step of a juvenile's interaction with the juvenile court," which authority the county attorney contends the juvenile court has. Our review of the applicable statutes has revealed no such authority. Indeed, our review suggests the opposite: the fact that the ability to order a specific placement is provided for some of the time suggests that it was not intended to be provided in other instances.

Other than the power to order an evaluation and to extend the time in which to complete an evaluation, there is no statutory authority granting the juvenile court any control over the evaluation. However, as is demonstrated above, there is plainly discretion given to OJS in the performance of these court-ordered evaluations. In particular, § 43-281 provides that OJS or the Department of Health and Human Services "shall make arrangements for an appropriate evaluation," while § 43-414 notes that juveniles placed with OJS are subject to examination and evaluation "as directed by the office." And § 43-413(3) specifically permits OJS, not the juvenile

court, to place juveniles in residential or nonresidential evaluation services.

We conclude that DHHS, and not the juvenile court, has the authority to direct the performance of an evaluation under §§ 43-281 and 43-413. This authority includes the ability to place the juvenile during the performance of the evaluation. The juvenile court therefore exceeded its authority in ordering specific placements in these cases.

CONCLUSION

The juvenile court acted in excess of its statutory authority when it ordered specific placements for Taylor and Levi. However, because the instant appeals are moot, and our conclusion reached under the public interest exception to the mootness doctrine, we dismiss the present appeals.

APPEALS DISMISSED.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLEE, V. GILBANE BUILDING COMPANY, A RHODE ISLAND CORPORATION, APPELLANT.

757 N.W.2d 194

Filed October 31, 2008. No. S-07-805.

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. **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: 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.
4. **Contracts: Principal and Surety: Words and Phrases.** Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal.

5. **Principal and Surety.** A surety on a performance bond is bound in the manner and to the extent provided in the obligation.
6. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.
7. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.
8. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
9. **Statutes: Legislature: Intent.** Where the Legislature does not enact an exception to a statutory rule, a court must assume that the Legislature intended to do what it did.
10. **Summary Judgment.** Unsworn summaries of facts or arguments and of statements which would be inadmissible in evidence are of no effect in a motion for summary judgment.
11. ____. As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert F. Craig and Jenna B. Taub, of Robert F. Craig, P.C., for appellant.

Michael S. Degan and Theresa D. Koller, of Blackwell Sanders, L.L.P., and Robert L. Nefsky of Rembolt Ludtke, L.L.P., for appellee.

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

STEPHAN, J.

Amwest Surety Insurance Company (Amwest) was declared insolvent on June 7, 2001, and is the subject of a liquidation order entered pursuant to the Nebraska Insurers Supervision,

Rehabilitation, and Liquidation Act (NISRLA).[1] The question presented in this appeal is whether the district court for Lancaster County erred in determining as a matter of law that four payments made by Amwest to Gilbane Building Company (Gilbane), the obligee on a performance bond, were preferences avoidable by the liquidator pursuant to § 44-4828. We affirm the judgment of the district court as to three of the payments. We reverse, and remand for further proceedings with respect to the remaining payment, which was made more than 4 months prior to the filing of the petition for liquidation, because there is a genuine issue of material fact as to whether Amwest was insolvent at the time of the payment.

BACKGROUND

In 1997, Gilbane entered into a subcontract with Crane Plumbing & Heating Co., Inc. (Crane), under which Crane was to perform plumbing work on a construction project in Cambridge, Massachusetts. Pursuant to the subcontract, Crane obtained a "Labor and Material Payment Bond" and a "Performance Bond." Both bonds were issued by Amwest, as surety, on or about December 17, 1997. Gilbane was named as the obligee on each bond.

In January 2000, Crane abandoned the project and defaulted on its subcontract. Gilbane notified Amwest of the default and demanded that it complete Crane's portion of the project pursuant to the performance bond. Amwest subsequently made payments to Gilbane for costs associated with completion of Crane's contractual obligations. The first payment was made on January 5, 2001, when Amwest issued a check in the amount of $357,779.69 to Gilbane. Gilbane deposited the check on January 12. The second payment, a check in the amount of $26,150.23, was issued by Amwest to Gilbane on April 9 and deposited in Gilbane's account on or about April 10. The third payment, a check in the amount of $215,292.12, was issued by Amwest to Gilbane on April 13 and deposited in Gilbane's account on April 17. The final payment, a check in the amount

[1] Neb. Rev. Stat. §§ 44-4801 to 44-4862 (Reissue 1998).

of $4,222.04, was issued by Amwest on May 21 and deposited in Gilbane's account on May 24.

Amwest obtained a replacement subcontract for completion of the project. On March 28, 2001, Amwest and Gilbane entered into a release of the performance bond relating to the original subcontract with Crane, but not related to the replacement subcontract.

A petition to place Amwest in liquidation was filed on June 6, 2001, and Amwest was declared insolvent in an order entered on the following day. Subsequently, the Nebraska Director of Insurance, in his capacity as liquidator, filed a complaint alleging that the four payments made by Amwest to Gilbane in 2001 were preferential transfers voidable under § 44-4828 and seeking recovery in a total amount of $603,444.08 from Gilbane. Gilbane filed an answer denying the claims and setting forth several affirmative defenses. The parties filed cross-motions for summary judgment.

The district court entered summary judgment in favor of the liquidator and overruled Gilbane's motion. The court determined that the second, third, and fourth payments from Amwest to Gilbane were made within 4 months before the filing of the petition for liquidation and were therefore voidable as preferences.[2] The court further determined that there was no issue of material fact as to the insolvency of Amwest at the time of the first payment in January 2001. The court determined that all four payments were made by Amwest to Gilbane on account of an antecedent debt and that such payments allowed Gilbane to obtain a greater percentage of such debt than another creditor in the same class would receive. The court rejected Gilbane's contention that it was a mere conduit for another party and not an actual creditor responsible for a voidable preference. The district court also rejected Gilbane's contention that the transfers were made for a current expense in the ordinary course of business and, thus, not in satisfaction of an antecedent debt. Based upon these findings, the district court entered judgment in favor of the liquidator and against Gilbane in the amount of $603,444.08.

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[2] See § 44-4828(1)(b)(ii).

Gilbane filed this timely appeal, and we moved it to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENTS OF ERROR

Quoted verbatim, Gilbane's brief assigns the following errors:

> (1) The District Court erred in granting [the liquidator's] Motion for Summary Judgment because the [liquidator] failed to prove the statutory elements of a preference.
>
> (2) The District Court erred in denying [Gilbane's] Motion for Partial Summary Judgment regarding affirmative defenses for preference actions.
>
> (3) The District Court erred in overruling [Gilbane's] Motion for Summary Judgment.

The liquidator argues that these assignments are generalized and vague and should be disregarded by this court.

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]

[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.[5] 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.[6]

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[4] *State v. Hense, ante* p. 313, 753 N.W.2d 832 (2008); *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

[5] *Marcovitz v. Rogers, ante* p. 199, 752 N.W.2d 605 (2008); *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

[6] *Id.*

ANALYSIS

As a threshold matter, we agree that Gilbane's assignments of error are broadly stated. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[7] Accordingly, we consider the assignments of error only insofar as they are narrowed by the specific arguments asserted in Gilbane's brief.[8]

Controlling Principles

The issues presented in this appeal are governed by the provisions of NISRLA. NISRLA authorizes a liquidator to avoid certain transfers by the insolvent insurer, including those which constitute a preference.[9] A "preference" is defined by NISRLA as

> a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the insurer within one year before the filing of a successful petition for liquidation under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act the effect of which transfer may be to enable the creditor to obtain a greater percentage of such debt than another creditor of the same class would receive.[10]

A preference may be avoided by the liquidator if the insurer was (1) insolvent at the time of the transfer; (2) the transfer was made within 4 months before the filing of the successful petition for liquidation; (3) the recipient or its agent had reasonable cause to believe the insurer was insolvent or was about to become insolvent at the time the transfer was made; or (4) the creditor receiving the transfer was a person with whom the insurer did not deal at arm's length, for example,

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[7] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

[8] See *Trieweiler v. Sears, supra* note 7.

[9] §§ 44-4821(u) and 44-4828(b).

[10] § 44-4828(1)(a).

an employee or attorney.[11] The term "[c]reditor" is defined by NISRLA as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, or absolute, fixed, or contingent."[12] When a preference is voidable, the liquidator may recover the transferred property from the person who received it, subject to certain rights of bona fide purchasers.[13]

Was Gilbane Creditor of Amwest?

Gilbane argues that the liquidator sued the wrong entity. It contends that it was not a creditor of Amwest potentially liable for a voidable preference, but was rather a "mere conduit" through which the payments made by Amwest passed en route to the owner of the construction project.[14] In rejecting this argument, the district court determined that Gilbane was the "general contractor on the project and, as such, was responsible to the owner for [its] completion." Gilbane describes its role in the project as a "construction manager" responsible for managing the project and administering payments on behalf of the owner and subcontractors.[15]

Whether Gilbane was the "general contractor" or "construction manager" does not matter. The relationship of the parties at the time of the transfers in question was defined by the performance bond, which stated that Crane as *principal* and Amwest as *surety* were "held and firmly bound unto GILBANE . . . as *Obligee*" (emphasis supplied) in the amount of $2,120,000 "for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents." The bond further recites that Crane and Gilbane had entered into a contract for certain construction work on the Cambridge project and that the bond was given to secure performance of Crane's contractual obligations to Gilbane.

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[11] § 44-4828(b)(i) to (iv).

[12] § 44-4803(2).

[13] § 44-4828(1)(c).

[14] Brief for appellant at 9.

[15] *Id.*

[4,5] Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal.[16] A surety on a performance bond is bound in the manner and to the extent provided in the obligation.[17] The performance bond at issue in this case bound Amwest to fulfill Crane's contractual obligations to Gilbane in the event of Crane's default. When Crane defaulted, Gilbane asserted a claim that Amwest fulfill its obligations under the bond, and Amwest made payments directly to Gilbane pursuant to that obligation. Amwest and Gilbane were the only parties to the agreement to release of the performance bond.

These facts are clearly distinguishable from *In re FSC Corp.*,[18] the bankruptcy case upon which Gilbane relies. In that case, a corporation entered into an indenture agreement with a bank which was designated as the indenture trustee. The agreement was intended to facilitate a series of loans to the corporation made by investors who held debentures. The indenture agreement provided that the corporation would send semiannual interest payments to the bank for transmittal to debenture holders. While insolvent, and within 90 days prior to filing its petition in bankruptcy, the corporation made an interest payment to the bank, which transmitted the funds to debenture holders pursuant to the indenture agreement. The bankruptcy court held that while the corporation's transfer constituted a preference, the bank had no liability because it acted solely as the agent for its principals, the debenture holders.

In this case, Gilbane was the sole obligee named in the performance bond. It was not identified as an agent for a disclosed principal, as it now contends. The fact that Gilbane used the funds it received from Amwest to pay a replacement subcontractor demonstrates that the transfers were both to and for the benefit of Gilbane, in that they permitted the completion of

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[16] See, *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003); *Sawyer v. State Surety Co.*, 251 Neb. 440, 558 N.W.2d 43 (1997).

[17] See *School Dist. No. 65R v. Universal Surety Co.*, 178 Neb. 746, 135 N.W.2d 232 (1965).

[18] *In re FSC Corp.*, 64 B.R. 770 (W.D. Pa. 1986).

Crane's original contractual obligation to Gilbane. There is no merit to Gilbane's argument that it was a "mere conduit" of the funds it received from Amwest.

Can Payments Made in Ordinary Course of Business Constitute Voidable Preferences Under NISRLA?

Gilbane argues that because Amwest made the payments at issue in the ordinary course of its business as a surety, the payments cannot constitute voidable preferences. The federal Bankruptcy Code in effect in 2001 specifically provided that to the extent that a transfer was in payment of a debt incurred by the debtor "in the ordinary course of business or financial affairs of the debtor and the transferee" and the transfer was "made in the ordinary course of business or financial affairs of the debtor and the transferee" or "made according to ordinary business terms," it could not be avoided as a preference.[19] Although NISRLA contains no similar provision, Gilbane invites us to read an "ordinary course of business" exception into the statute, following the lead of an Ohio appellate court in an unpublished opinion.[20]

[6-9] We decline the invitation. As we noted at the outset, the law applicable to this case is statutory. It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[21] The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.[22] As we have long held:

> A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to

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[19] 11 U.S.C. § 547(c)(2) (2000).

[20] *Covington v. HKM Direct Market Communications, Inc.*, No. 03AP-52, 2003 WL 22784378 at *2 (Ohio App. Nov. 25, 2003) (unpublished opinion).

[21] *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[22] *Id.*, citing *Ludwig v. Board of County Commissioners*, 170 Neb. 600, 103 N.W.2d 838 (1960).

> ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.[23]

Where the Legislature does not enact an exception to a statutory rule, this court "must assume that the Legislature intended to do what it did."[24]

The ordinary course of business exception was codified in the federal Bankruptcy Code before the Nebraska Legislature enacted NISRLA in 1989.[25] Although the Legislature specifically exempted certain transfers from being considered as avoidable preferences,[26] it did not enact an ordinary course of business exception. As noted, it is not our function to create exceptions to statutory rules.[27] We agree with the district court that Amwest's obligation to Gilbane under the performance bond at the time of the principal's default was an "antecedent debt" for which the four challenged payments were made.

Do "Net Result Rule" and § 44-4828(9) Apply?

Gilbane argues that the district court erred in not applying the "net result rule," a principle once applied under the federal Bankruptcy Act of 1898 to claims for balances due on an open account.[28] The majority of courts have held that the net result rule is no longer viable, given subsequent amendments to the

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[23] *Bachus v. Swanson*, 179 Neb. 1, 4, 136 N.W.2d 189, 192 (1965).

[24] *Loewenstein v. Amateur Softball Assn.*, 227 Neb. 454, 458, 418 N.W.2d 231, 234 (1988).

[25] See, 11 U.S.C. § 547; §§ 44-4801 to 44-4862. See, also, *In re Paris Industries Corp.*, 130 B.R. 1 (D. Me. 1991); *In re Cook United, Inc.*, 117 B.R. 884 (N.D. Ohio 1990).

[26] See § 44-4828(4) and (9).

[27] See, e.g., *Stewart v. Bennett, supra* note 21; *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 701 N.W.2d 368 (2005); *Loewenstein v. Amateur Softball Assn., supra* note 24; *Bachus v. Swanson, supra* note 23.

[28] Brief for appellant at 16. See, *Yaple v. Dahl-Millikan Grocery Co.*, 193 U.S. 526, 24 S. Ct. 552, 48 L. Ed. 776 (1904); *Jaquith v. Alden*, 189 U.S. 78, 23 S. Ct. 649, 47 L. Ed. 717 (1903).

1898 act.[29] More importantly, the net result rule is not included in NISRLA, so we need not discuss it further.

Gilbane makes a related argument that the district court erred in not applying § 44-4828(9), which provides:

> If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from him or her.

Gilbane's brief lacks any clear explanation of how this defense applies in this case, and we perceive none. Gilbane did not advance credit to Amwest, and there is no claim of setoff. Section 44-4828(9) does not apply to this case.

Was Amwest Insolvent at Time of Transfers to Gilbane?

The second, third, and fourth transfers from Amwest to Gilbane occurred within the 4-month period before Amwest filed its petition under NISRLA. Under § 44-4828(1)(b)(ii), the liquidator could avoid these transfers without proving that Amwest was insolvent at the time of the transfer. We conclude that the district court did not err in granting the liquidator's motion for summary judgment as to these transfers, totaling $245,664.39.

The transfer in January 2001 is more problematic. Because it occurred outside the 4-month period, the liquidator alleged and was obligated under § 44-4828(1)(b)(i) to prove that Amwest was insolvent at the time of the transfer. An insurer is considered "insolvent" under NISRLA if it is "unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of: (i) Any capital and surplus required by law to be maintained; or

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[29] *In re Frigitemp Corp.*, 753 F.2d 230 (2d Cir. 1985); *In re Wadsworth Bldg. Components, Inc.*, 711 F.2d 122 (9th Cir. 1983); *In re Fulghum Const. Corp.*, 706 F.2d 171 (6th Cir. 1983); *In re Swallen's, Inc.*, 266 B.R. 807 (S.D. Ohio 2000).

(ii) The total par or stated value of its authorized and issued capital stock."[30] As the party moving for summary judgment, the liquidator had the initial burden to show that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law.[31] Thus, the liquidator was required to produce evidence which, if uncontroverted, would establish that Amwest was insolvent at the time of the January 2001 payment to Gilbane.

In preference cases arising under federal bankruptcy law, courts have held that the testimony of an accountant or other financial expert is generally necessary to prove insolvency at the time of a challenged transfer.[32] Michael James Fitzgibbons, an accountant who served as special deputy receiver for Amwest, testified that Joseph J. DeVito was retained to review certain financial records which Fitzgibbons and others under his supervision had prepared to show the financial condition of Amwest as of June 30, 2000, and to determine whether Amwest was insolvent as of that date. Fitzgibbons acknowledged that he had not made any determination that Amwest was insolvent as of January 5, 2001, the date of the initial transfer to Gilbane, but, rather, drew the conclusion that Amwest was continually insolvent after June 30, 2000. The record includes reports purportedly authored by DeVito, one dated February 28, 2006, and the second dated June 28, 2006. Both reports are attached to the affidavit of an attorney representing the liquidator, which merely indicates that the reports are true and correct copies. The reports set forth DeVito's opinion regarding the insolvency of Amwest as of June 30, 2000, and subsequent to that date. Gilbane objected to "the relevancy, materiality and competency" of the DeVito reports. The district court took the

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[30] § 44-4803(14)(b).

[31] See, *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008); *Malolepszy v. State*, 273 Neb. 313, 729 N.W.2d 669 (2007); *Lovette v. Stonebridge Life Ins. Co.*, 272 Neb. 1, 716 N.W.2d 743 (2006).

[32] See, *In re Roblin Industries, Inc.*, 78 F.3d 30 (2d Cir. 1996); *In re Prime Realty, Inc.*, 380 B.R. 529 (8th Cir. B.A.P. 2007); *In re Doctors Hosp. of Hyde Park, Inc.*, 360 B.R. 787 (N.D. Ill. 2007); *In re Indus. Ceramics, Inc.*, 253 B.R. 323 (W.D.N.Y. 2000).

objection under advisement and overruled it in its final order. For the sake of completeness, we note that while Gilbane's counsel stated during a November 25, 2005, hearing that DeVito's deposition was taken, the deposition is not included in our record.

[10] Although Gilbane did not assign error with respect to the court's ruling on its objections to the DeVito reports, it argues on appeal that the reports do not support the liquidator's contention that Amwest was insolvent as of the January 2001 payment to Gilbane. We agree, although for a different, more basic reason than that advanced by Gilbane. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2006) provides that the "evidence that may be received on a motion for summary judgment includes . . . affidavits." Such affidavits, however,

> 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.[33]

The affidavit of counsel identifying the attached "true and correct" copies of DeVito's reports does not convert such reports into affidavits. The reports themselves are not sworn and do not meet the statutory definition of an affidavit.[34] Unsworn summaries of facts or arguments and of statements which would be inadmissible in evidence are of no effect in a motion for summary judgment.[35] Accordingly, we do not consider the DeVito reports on the question of whether Amwest's insolvency at the time of the first transfer was established as a matter of law.

This leaves only the "conclusion" drawn by Fitzgibbons from "operational results of Amwest . . . subsequent to June 30th of 2000" that Amwest was insolvent at all times subsequent to that date. The record does not reflect whether or not

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[33] Neb. Rev. Stat. § 25-1334 (Reissue 1995).

[34] Neb. Rev. Stat. § 25-1241 (Reissue 1995).

[35] *Kulhanek v. Union Pacific RR.*, 8 Neb. App. 564, 598 N.W.2d 67 (1999). See *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988).

Fitzgibbons was "qualified as an expert by knowledge, skill, experience, training, or education"[36] to make this determination, or the methodology he utilized in doing so. Fitzgibbons' testimony is insufficient to meet the liquidator's prima facie burden on the issue of insolvency.

[11] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.[37] On this record, we simply cannot conclude as a matter of law that Amwest was insolvent within the meaning of NISRLA at the time of its initial payment to Gilbane in January 2001.

CONCLUSION

The district court correctly determined that the liquidator was entitled to summary judgment with respect to its claims that the three payments made by Amwest to Gilbane within 4 months prior to the filing of Amwest's petition for liquidation were voidable preferences for which Gilbane is liable to the liquidator. However, for the reasons discussed, we conclude that the district court erred in granting summary judgment with respect to the initial payment made in January 2001, more than 4 months before the filing of the petition. On that issue, we reverse, and remand for further proceedings consistent with this opinion.

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

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[36] See Neb. Rev. Stat. § 27-702 (Reissue 1995).

[37] *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000); *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996).

ARAMARK UNIFORM & CAREER APPAREL, INC., APPELLANT, V. HUNAN, INC., DOING BUSINESS AS HUNAN RESTAURANT, APPELLEE.

757 N.W.2d 205

Filed October 31, 2008. No. S-07-881.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling regarding questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **Arbitration and Award: Federal Acts: Contracts.** Arbitration in Nebraska is governed by the Uniform Arbitration Act as enacted in Nebraska. But if arbitration arises from a contract involving interstate commerce, it is governed by the Federal Arbitration Act.
3. ____: ____: ____. State laws regarding the general validity, revocability, and enforceability of contracts may be applied to invalidate an arbitration agreement governed by the Federal Arbitration Act without conflicting with federal law. Courts may not invalidate arbitration agreements governed by the Federal Arbitration Act under state laws applicable *only* to arbitration provisions.
4. **Arbitration and Award: Federal Acts: Contracts: Notice.** When a contract is governed by the Federal Arbitration Act, the state notice requirement is preempted by the Federal Arbitration Act.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

Damien J. Wright, of Welch Law Firm, P.C., 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.

CONNOLLY, J.

I. SUMMARY

This appeal arises from a contract dispute between Aramark Uniform & Career Apparel, Inc. (Aramark), a Delaware corporation, and Hunan, Inc., a Nebraska corporation doing business as Hunan Restaurant. Aramark filed a demand for arbitration

under the parties' arbitration agreement. Hunan, however, objected to arbitration, asserting that the parties' arbitration agreement was unenforceable because it did not comply with a notice provision under Nebraska's Uniform Arbitration Act (UAA).[1] The arbitrator agreed with Aramark's position. He determined that the Federal Arbitration Act (FAA) governed the agreement and that compliance with the UAA was irrelevant because the FAA preempted the UAA's notice provision.[2] The arbitration went forward, but Hunan refused to participate. The arbitrator awarded Aramark $13,144.54.

Aramark petitioned the district court for Douglas County to affirm the arbitration award. Hunan responded with a motion to vacate the award under § 25-2613 of the UAA. The district court found that the contract did not involve interstate commerce and vacated the arbitration award under § 25-2613(3) and (4). We reverse because we conclude that the contract does involve interstate commerce. Therefore, the FAA governs the contract. Because the UAA's notice provision directly conflicts with the FAA, federal law preempts it.

II. BACKGROUND

Aramark contracted to rent Hunan aprons, tablecloths, napkins, bar mops, laundry bags, and other products. The contract contained the following arbitration provision: "Any controversy or claim arising out of or relating to this Agreement shall be settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

In September 2006, Aramark filed its demand for arbitration with the American Arbitration Association, alleging that Hunan had breached the contract. The arbitration association notified Hunan of the demand, and Hunan responded by objecting to arbitration. In a letter to the arbitration association, Hunan asserted that the arbitration provision contained in

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[1] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp. 2006).

[2] Compare § 25-2602.02 and 9 U.S.C. § 2 (2006).

the parties' agreement was invalid because it did not comply with a notice requirement of the UAA. Specifically, Hunan claimed that the arbitration provision was invalid because it failed to contain language required by § 25-2602.02, which provides: "The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

Aramark responded that the arbitration provision was valid and enforceable. Aramark asserted that the FAA preempted the UAA because the parties' contract involved interstate commerce. The arbitrator determined that Aramark's position was correct and that the arbitration should proceed. The arbitrator held a hearing on Aramark's claim in Omaha, Nebraska. Aramark appeared and adduced testimony and evidence, but Hunan did not appear. Neither party sought a court order to stay or compel the arbitration proceedings.[3] The arbitrator awarded Aramark $13,144.54. The award included $11,044.54 as damages and $2,100 as expenses.

After the arbitration, Aramark filed both a motion and a petition to confirm the arbitration award in the Douglas County District Court. In response, Hunan requested that the court vacate the arbitration award. Hunan claimed that no valid arbitration agreement existed between the parties because the agreement failed to comply with § 25-2602.02. It also claimed the arbitrator exceeded his power by conducting the hearing in an improper venue under § 25-2606(c). Hunan also moved to transfer the case to the Hall County District Court.

The Douglas County District Court held a telephonic hearing regarding the motion to transfer. The parties briefly discussed Hunan's claim that the arbitration agreement was nonbinding because it failed to comply with § 25-2602.02. The parties did not discuss whether their contract implicated interstate commerce.

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[3] See § 25-2603.

After the hearing, the district court entered an order vacating the arbitration award. The court determined that the FAA did not preempt the UAA because "there [was] nothing to suggest that the agreement in question was in interstate commerce or affected by interstate commerce." Because Nebraska law applied, the court declared the agreement was invalid because it did not contain the language required by § 25-2602.02. The court granted Hunan's motion to vacate the arbitration award under § 25-2613(a)(3) and (4).

III. ASSIGNMENTS OF ERROR

Aramark assigns, consolidated and restated, that the district court erred in concluding that (1) the contract was not one within or affecting interstate commerce and (2) the UAA governed the agreement.

IV. STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's UAA, an appellate court is obligated to reach a conclusion independent of the trial court's ruling regarding questions of law.[4] However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[5]

V. ANALYSIS

1. Preemption Under FAA

[2] Arbitration in Nebraska is governed by the UAA as enacted in Nebraska. But if arbitration arises from a contract involving interstate commerce, it is governed by the FAA. Under the FAA, written provisions for arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6] Nebraska law, in contrast, requires that when arbitration is the sole remedy for dispute resolution of a contract,

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[4] See, *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003); *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001).

[5] *Id.*

[6] 9 U.S.C. § 2.

the following statement "shall appear in capitalized, underlined type adjoining the signature block[:] THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."[7] The failure to include this statement renders the arbitration agreement unenforceable under Nebraska law.[8]

Nebraska law is not unique in requiring a contract with an arbitration clause to contain a special notice of the clause.[9] But the U.S. Supreme Court has held that if a contract containing an arbitration clause involves interstate commerce, the FAA governs the contract. In that circumstance, the FAA preempts state law requirements that apply solely to arbitration agreements.[10] The Court has stated that if a state law notice requirement governs "not [just] 'any contract,' but specifically and solely contracts 'subject to arbitration,'" such requirement "conflicts with the FAA and is therefore displaced by the federal measure."[11]

Under this analytical framework, the initial question is whether the parties' contract "evidenc[es] a transaction involving commerce" as defined by the FAA.[12] If the contract does involve interstate commerce, thereby invoking the FAA, then the FAA preempts the Nebraska notice requirement. Thus, if the notice requirement is preempted, the lack of the statutorily required notice does not render the arbitration agreement unenforceable.[13]

(a) The Scope of the FAA

The U.S. Supreme Court has held that the FAA is substantive law under Congress' Commerce Clause authority and that it

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[7] § 25-2602.02.

[8] See *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006).

[9] See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

[10] *Id.*

[11] See *id.*, 517 U.S. at 683.

[12] 9 U.S.C. § 2.

[13] See *Doctor's Associates, Inc., supra* note 9.

applies in state and federal court.[14] Section 2 of the act extends FAA jurisdiction over arbitration agreements contained within "contract[s] evidencing a transaction involving commerce."[15] The Supreme Court has given this jurisdictional phrase a broad interpretation to give expansive scope to the FAA.[16] Giving the FAA an expansive scope allows the Court "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."[17] The Court has further stated that Congress' use of "the word 'involving,' like [its use of the word] 'affecting,' signals an intent to exercise Congress' commerce power to the full."[18] Thus, the enactment of the FAA signals intent by Congress to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[19]

Under the Commerce Clause, Congress has power "to regulate those activities having a substantial relation to interstate commerce, . . . *i. e.*, those activities that substantially affect interstate commerce."[20] Thus, Congress' Commerce Clause authority is the prism through which we view the scope of the FAA. "Commerce" is defined in the FAA to include "commerce among the several States."[21]

The Court has generally interpreted Congress' Commerce Clause power broadly[22]:

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[14] *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), citing *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

[15] 9 U.S.C. § 2. See *Southland Corp., supra* note 14.

[16] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

[17] *Good Samaritan Coffee Co. v. LaRue Distributing*, 275 Neb. 674, 678, 748 N.W.2d 367, 371 (2008), citing *Allied-Bruce Terminix Cos., supra* note 16.

[18] See *Allied-Bruce Terminix Cos., supra* note 16, 513 U.S. at 277.

[19] See *Southland Corp., supra* note 14, 465 U.S. at 16.

[20] *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

[21] 9 U.S.C. § 1 (2006).

[22] See, *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 3d 658 (2000); *Lopez, supra* note 20.

> [It has] upheld a wide variety of congressional Acts regulating intrastate economic activity where [it has] concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining[,] intrastate extortionate credit transactions, . . . restaurants utilizing substantial interstate supplies, . . . inns and hotels catering to interstate guests, . . . and production and consumption of homegrown wheat.[23]

In sum, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[24] Consistently with this broad power, the Court has concluded that the FAA's reach is as broad as Congress' Commerce Clause authority.[25]

(b) The Parties' Arbitration Agreement Affects Interstate Commerce

As we know, courts have given Congress an expansive power over economic and commercial activities. So, it is difficult to imagine an economic or commercial activity that would be outside the scope of the Commerce Clause and, by extension, the FAA.[26]

We have previously determined that transactions involving commerce include contracts for services between parties of different states.[27] Similarly, the transaction underlying the contract between Aramark and Hunan, a contract for renting goods, is a contract for services that is unquestionably commercial. Also, both parties to the contract are incorporated in different states. Aramark is a Delaware corporation engaged nationwide in renting linen supplies. Hunan, a Nebraska corporation, has engaged Aramark's services by renting linen supplies for use

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[23] *Lopez, supra* note 20, 514 U.S. at 559-60 (citations omitted).

[24] *Id.*, 514 U.S. at 560.

[25] *Allied-Bruce Terminix Cos., supra* note 16.

[26] See *Service Corp. Intern. v. Fulmer*, 883 So. 2d 621 (2003).

[27] See, *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998). See, also, *Comanche Indian Tribe of Oklahoma v. 49, L.L.C.*, 391 F.3d 1129 (10th Cir. 2004).

in the operation of its restaurant. Thus, a commercial service contract exists between two corporations incorporated in different states for the renting of linen supplies. The contract between Aramark and Hunan clearly involves "commerce," which is defined in the FAA to include "commerce among the several states."[28]

2. Nebraska's UAA's Notice Provision Is Preempted

[3] Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract."[29] Under this section, the Supreme Court has declared that state contract law applies to contracts with arbitration agreements governed by the FAA. State contract law can determine "'the validity, revocability, and enforceability of contracts generally.' . . . Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements" governed by federal law without conflicting with § 2.[30]

The Court has made clear, however, that courts may not invalidate arbitration agreements governed by the FAA under state laws applicable *only* to arbitration provisions.[31] "Congress [has] precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[32]

[4] The Court has considered a similar notice requirement in a Montana statute. That statute required any contract containing an arbitration provision to provide special notice in capitalized, underlined letters on the front page of the contract.[33] The Court held that the notice provision was unenforceable because

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[28] 9 U.S.C. § 1.

[29] 9 U.S.C. § 2 (emphasis supplied).

[30] *Doctor's Associates, Inc., supra* note 9, 517 U.S. at 687, citing *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

[31] *Doctor's Associates, Inc., supra* note 9.

[32] *Id.*, 517 U.S. at 687. Accord *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974).

[33] Mont. Code Ann. § 27-5-114(4) (1995).

the FAA governed the contract. The Court concluded that the notice statute directly conflicted with § 2 of the FAA. The statute "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."[34] Because the FAA is substantive law, it preempted the Montana statute regarding arbitration agreements governed by the FAA.[35] Thus, when a contract is governed by the FAA, the state notice requirements are preempted by the FAA.

The Montana statute analyzed in *Doctor's Associates, Inc. v. Casarotto*[36] is similar to the Nebraska statute. Like the Montana statute, Nebraska's notice requirement in § 25-2602.02 applies only to arbitration provisions and renders the arbitration clause unenforceable upon failure to provide the notice requirement. Just like the Montana statute in *Doctor's Associates, Inc.*, § 25-2602.02 places arbitration agreements "in a class apart from 'any contract,' and singularly limits their validity."[37] Because the FAA governs the service contract, we must yield to the precedent set by the Court's holding in *Doctor's Associates, Inc*. We hold that the FAA preempts § 25-2602.02 for the contract. We reverse the district court's judgment and remand the cause with directions to confirm the arbitration award.

REVERSED AND REMANDED WITH DIRECTIONS.

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[34] *Doctor's Associates, Inc., supra* note 9, 517 U.S. at 687.

[35] *Id.*

[36] *Id.*

[37] *Id.*, 517 U.S. at 688.

INTRALOT, INC., APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, APPELLEE.

757 N.W.2d 182

Filed October 31, 2008. No. S-07-933.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.

2. **Administrative Law: Judgments: Appeal and Error.** When reviewing a district court's order under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006), for errors appearing on the record, an appellate court looks at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. ____: ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings.
4. **Taxation.** The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce.
5. ____. Nebraska's statutes provide an exemption from the sales and use taxes for items purchased for the purpose of reselling the items in the normal course of business, either in the form or condition in which the property is purchased, or as an attachment to or integral part of other property.
6. **Taxation: Proof.** The burden of establishing a tax exemption is placed on the party claiming the exemption.

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

Douglas R. Aberle and Andrew D. Strotman, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee.

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

CONNOLLY, J.

SUMMARY

In February 2005, the Nebraska Department of Revenue (Department) issued a deficiency determination to Intralot, Inc., for consumer's use tax on thermal paper and play slips. Intralot purchased the items to fulfill its contractual obligations with the Department's lottery division. It contended that the items were purchases for resale and not subject to taxation. In October 2006, the Tax Commissioner sustained the Department's deficiency determination. Intralot appealed, and the Lancaster County District Court affirmed the Tax Commissioner's order. We conclude that the Tax Commissioner correctly determined that Intralot's purchases were not purchases for resale and that

Intralot made a taxable use of the thermal paper and play slips. The judgment of the district court is affirmed.

BACKGROUND

The parties do not dispute the essential facts. On April 25, 2003, the Department's lottery division (Lottery) issued a comprehensive "Request for Proposals for On-Line Lottery Gaming System and Related Services" (RFP). The RFP's purpose was to secure competitive proposals to allow the Lottery to continue with an on-line lottery gaming system. The RFP requested all proposals to provide the related operational and marketing services required to operate on-line lottery games. This required "an On-line Gaming System consisting of hardware, software, Retailer terminals, communications network, and all other equipment and technology [necessary] to support On-line game operations."

In addition, the RFP required that the contractor supply, warehouse, distribute to on-line retailers, and provide inventory control of all ticket stock, play slips, and other terminal consumables for all on-line terminals.

In response to the Lottery's RFP, Intralot submitted its proposal to the Lottery. Section 2.2.5 of the proposal addressed "Ticket Stock and Playslips." Concerning these items, the proposal identified a primary and a secondary paper supplier for the ticket stock, as required by the RFP. Intralot's proposal offered two options for the weight of the paper stock. It provided that the 3.3-mm paper would be included in the base price of a contract and that the 4.5-mm paper would be offered as an option, with separate pricing. The proposal provided that Intralot would "design and procure all consumable supplies [i.e., ticket stock and play slips] required by the on-line gaming terminals" and that Intralot would "deliver [those] supplies to all Lottery sites and retailers." The proposal described a security system to track inventory of ticket stock from the supplier to Intralot's warehouses to the retailer.

The Lottery selected Intralot to provide the on-line lottery gaming system and related services for the State of Nebraska. In December 2003, the Lottery and Intralot entered a "Contract for On-Line Lottery Gaming System and Related Services."

The contract provided that Intralot would install, implement, maintain, and operate for the Lottery an on-line gaming system, as specified in the RFP and as described in the proposal. Intralot was to install the gaming system and have it operational by July 1, 2004. As compensation, Intralot was to receive 2.39 percent of the Lottery's net on-line sales.

As part of its contractual obligation, Intralot purchased thermal paper, or ticket stock, and play slips. Thermal paper is used by Lottery retailers with the on-line terminal to print the on-line lottery tickets purchased by Lottery players. Lottery players use the play slips to indicate the numbers, games, and number of draws for the lottery games they purchase for play at retailer locations. The on-line retailer then uses the play slips to produce a lottery ticket reflecting the player's specific choices. Both items are integral components of the Lottery's on-line gaming system.

In October 2004, the Department notified Intralot it was being audited. The audit was to verify that Intralot had properly reported and paid the appropriate sales, use, withholding, and any other required taxes. The audit resulted in Intralot's being assessed a consumer's use tax liability of $272,914.25, with $11,298.14 in interest and $27,291.41 in penalties. Intralot petitioned for a redetermination of its tax liability. At an informal conference, the Department and Intralot agreed on all issues except the consumer's use tax assessed on Intralot's purchases of thermal paper and play slips.

Between January 1 and November 30, 2004, Intralot purchased $297,839.89 worth of thermal paper and $67,070.67 worth of play slips for distribution to Lottery retailers. The unpaid consumer's use tax assessed for these purchases of thermal paper and play slips was $25,543.74. The corresponding interest was $2,108.29. Intralot was also assessed $2,554.38 in penalties; however, the Tax Commissioner abated the penalties.

Intralot claims that its purchases of thermal paper and play slips are purchases for resale to the Lottery and therefore are not subject to Nebraska's consumer's use tax. In contrast, the Department asserts that Intralot makes a taxable use of the thermal paper and play slips in fulfilling its contract obligations.

ASSIGNMENT OF ERROR

Intralot asserts, restated, that the district court erred in determining that Intralot's purchases of thermal paper and play slips are subject to a use tax.

STANDARD OF REVIEW

[1-3] Under the Administrative Procedure Act,[1] an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.[2] When reviewing a district court's order for errors appearing on the record, we look at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[3] An appellate court will not substitute its factual findings for those of the district court when competent evidence supports those findings.[4]

ANALYSIS

The question presented is whether Intralot acquired the ticket stock and play slips for its own use in fulfilling its agreement with the Lottery and, therefore, is a purchase subject to a use tax. Or, did Intralot purchase the ticket stock and play slips for resale to the Lottery, exempting it from taxation?

Nebraska Sales and Use Tax

[4] The Nebraska sales and use tax imposes a tax on each item of tangible personal property in this state at some point in the chain of commerce, unless specifically excluded from taxation.[5] As stated in the Tax Commissioner's order, the sales and use tax laws "are complementary in that . . . the use tax is to protect the state's revenues and the business of local merchants

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[1] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[2] *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

[3] *Id.*

[4] *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[5] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). See Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01 and 77-27,222 (Reissue 2003).

by eliminating any advantage to residents in purchasing goods from out of state without the payment of the tax." If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside Nebraska, the use tax applies.[6] Together, the sales and use taxes provide a uniform tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property.[7]

Intralot claims that its purchases of thermal paper and play slips are exempt from taxation because it resells the items to the Lottery. If Intralot purchases the items for resale to the Lottery, Intralot would not have to pay sales or use tax on the items because purchases made for reselling the items in the normal course of business are not subject to sales and use tax.[8] Furthermore, the Lottery would also not pay a sales tax when it purchases the items from Intralot because items purchased by the state are exempt from taxation.[9] Thus, if Intralot correctly contends that its purchases of thermal paper and play slips are purchases for resale to the Lottery, then the items are not subject to sales and use tax.

[5] Intralot's position hinges upon purchases made for the purpose of reselling the items, i.e., sales for resale, are explicitly exempt from sales and use tax.[10] "Sale for resale" includes "a sale of property . . . to any purchaser who is purchasing such property . . . for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other property."[11]

[6] The burden rests on Intralot to establish that its purchases of ticket stock and play slips were purchases for resale to the Lottery. If Intralot cannot establish that it purchased the thermal paper and play slips for resale to the Lottery, then the

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[6] See *Interstate, supra* note 5.

[7] 316 Neb. Admin. Code, ch. 1, § 002.01 (1998).

[8] § 77-2703(1); 316 Neb. Admin. Code, ch. 1, § 002-04B (1998).

[9] § 77-2704.15(1).

[10] § 77-2703(1); 316 Neb. Admin. Code, ch. 1, § 002.04B.

[11] § 77-2701.34.

items are subject to a consumer's use tax.[12] As stated in the Department's rules and regulations,

> [i]t is presumed that any property . . . sold . . . in this state is sold . . . for storage, use, distribution, or other consumption in this state until the contrary is established. The burden of proving that any property . . . delivered in this state is delivered for a purpose other than storage, use, distribution, or other consumption in this state is on the person who purchases . . . the property . . . .[13]

Whether a resale to the Lottery occurred requires an examination of the relationship between the Lottery and Intralot.

Intralot's Purchases Are Not Purchases for Resale

Woven into the fabric of the parties' relationship are the Lottery's RFP, Intralot's proposal, and the parties' contract. The Lottery, through its RFP, sought to secure proposals from vendors to "provide an On-line Gaming System for the sale of On-line tickets for the Nebraska Lottery and its Retailers." The RFP required the on-line gaming system to include "hardware, software, Retailer terminals, communications network, and all other equipment and technology [necessary] to support On-line game operations." The vendor had to "provide the ticket stock, play slips and other terminal consumables [needed] for all On-line terminals." Intralot understood the purpose and requirements of the RFP when it submitted its proposal. Intralot acknowledged that, if selected, it would "provid[e] a state-of-the-art on-line gaming system complete with all of the required and related support services necessary to achieve the Lottery's sales and performance objectives."

The contract required Intralot to provide the Lottery with an up-and-running, on-line lottery system in exchange for 2.39 percent of the Lottery's net on-line sales. Neither the RFP, the proposal, nor the contract contains any indication that the purchases of thermal paper and play slips were not part of the

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[12] § 77-2703(2). See *American Totalisator Co., Inc. v. Dubno*, 210 Conn. 401, 555 A.2d 414 (1989).

[13] 316 Neb. Admin. Code, ch. 1, § 002.02 (1998).

on-line system Intralot contracted to provide. The RFP required that each proposal include a statement of "proposed compensation for providing *all phases of the On-line ticket production, equipment, and related services.*" (Emphasis supplied.) In response to the RFP, Intralot confirmed it understood the Lottery's requirements for providing the equipment and services specified in the RFP. In addition, the quoted cost covered *all expenses*.

The contract shows that the parties included ticket stock and play slips in the lottery system and as part of the agreed compensation.

Paragraph 6.19 of the contract provides as follows:

> Ticket Stock: INTRALOT agrees that it will provide delivery of all ticket stock to Retailers no later than the next day after request or as per Retailer timetable. Ticket stock will be of 4.5 mil weight and all ticket stock art must have prior approval of the Lottery. The *extra cost* of the 4.5 mil paper above the 3.3 mil paper cost will be *shared equally by both parties*.

(Emphasis supplied.)

This language shows that the base cost of the 3.3-mm ticket stock was included in Intralot's compensation. Intralot's purchases of thermal paper and play slips are part of the overall cost incurred by Intralot under the contract. Because Intralot contracted to, and is compensated for, providing the Lottery with a complete on-line lottery system, Intralot's purchases of thermal paper and play slips were not purchases for resale to the Lottery.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BRADLEY K. WILLIAMS, APPELLANT.
757 N.W.2d 187

Filed October 31, 2008. No. S-07-1239.

1. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
3. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
4. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
5. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
6. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
7. **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 Douglas County, J RUSSELL DERR, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY MARCUZZO, Judge. Judgment of District Court affirmed.

Daniel W. Ryberg 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

In this appeal, Bradley K. Williams claims the trial court abused its discretion by refusing to permit him to withdraw a plea of guilty after his participation in a domestic violence intervention program was terminated. He was sentenced to 90 days in jail and challenges the sentence imposed by the Douglas County Court as being excessive. The district court for Douglas County affirmed both the conviction and the sentence.

SCOPE OF REVIEW

[1] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

FACTS

Williams was charged with domestic assault in the third degree, criminal mischief, and disturbing the peace. These charges arose from an altercation with his intimate partner, B.C., on August 31, 2006. According to police reports, sheriff's deputies went to Williams' residence in response to an anonymous telephone call. Upon their arrival, they heard someone screaming inside the house. When the deputies knocked on the door, B.C. came out of the house with Williams following her. B.C. stated that Williams had threatened to kill her, punched and kicked her, and put a knife to her throat.

Williams appeared in court on October 13, 2006. Because he did not have a criminal record, he was eligible to participate in a plea agreement offered to first offenders. Under the plea agreement, Williams pled guilty to domestic assault in the third degree and the State dismissed the remainder of the charges. Additionally, Williams agreed to participate in the "Men's Non-Violence Program," an intervention program administered

by the YWCA, and the State agreed to dismiss the remaining domestic assault charge against Williams if he successfully completed the program.

The trial court instructed Williams:

> Finally, sir, you've been offered an opportunity to participate in a program where by [sic] if you plead guilty to this charge, I will find you guilty and I will continue sentencing to a future date. If you successfully complete the program as outlined by [the deputy county attorney], and that's completing this batterers' intervention program, you'll be allowed to come back in front of me, I'll allow you to withdraw your plea of guilty, the State will then dismiss these charges. Do you understand that?

The court further advised Williams that if he did not successfully complete the program, the court would impose a sentence. Williams agreed that he was pleading guilty because he committed the offense and not just to take advantage of the intervention program. The court continued the case to May 3, 2007, and told Williams that this court appearance would result in either sentencing or his withdrawal of the plea and a dismissal of the charge. Williams fully attended the program from the time of his enrollment in November 2006 through March 19, 2007.

In approximately December 2006, Williams was again arrested and charged with third degree domestic assault against B.C. The State requested a review hearing on March 15, 2007, at which time it asked the trial court to sentence Williams. The State noted that Williams "will not be eligible to attend that batterer's intervention program any longer since he has picked up new charges and has not accepted accountability." Williams protested the acceleration of the sentencing in the original case based on the new charges and filed a motion to withdraw his guilty plea in the original case. The court denied his motion and continued the case for further review, and potentially for sentencing, until April 19, after the jury trial on the new charges. A jury ultimately found Williams not guilty of the new charges.

On March 19, 2007, the YWCA refused to let Williams continue to participate in the program. In a letter, it noted the

reasons for his termination were that "the program has been notified of a report of abuse or threat of abuse by you" and that "the program has been notified [of] your use of threats, intimidation, or violence."

At the April 19, 2007, hearing, Williams' counsel informed the trial court of Williams' termination from the program. Counsel objected to this action because Williams had been found not guilty of the new charges of violence. The deputy county attorney stated that "[Williams] wasn't terminated from batterer's intervention because of another charge, or he was found not guilty of a charge, or that he was kicked out because his conduct is not suitable for the program." The court denied Williams' request for a presentence investigation, but continued sentencing until May 3 to give defense counsel time to prepare.

On May 3, 2007, Williams submitted a second motion to withdraw his guilty plea. In support of this motion, counsel offered a letter written by counsel to the trial court. The letter stated that Williams entered the plea agreement in good faith; however, counsel believed the prosecutor did not act in good faith in connection with Williams' termination from the program. The letter noted the court's statement that it intended to sentence Williams considering only the underlying events to which Williams pled guilty and presented Williams' version of the facts. The letter concluded with a request that the court give Williams credit for the classes he had attended and permit him to complete a period of probation. Williams did not offer any evidence challenging the propriety of his termination from the program.

The State offered Williams' status report from the program, noting that the program administrator had the sole discretion to terminate a participant from the program. Because the administrator terminated Williams from the program, he was unable to complete the only condition of the plea agreement. The trial court sentenced Williams to 90 days in the Douglas County Correctional Center.

Williams appealed to the district court for Douglas County. The district court affirmed the trial court's order and concluded that the plea agreement requiring Williams to attend the

program was not a pretrial diversion program as contemplated by Neb. Rev. Stat. § 29-3601 et seq. (Cum. Supp. 2006) and was therefore not subject to the statutes. The district court also found that the sentence was not excessive and that the trial court did not abuse its discretion in denying Williams' motions to withdraw his plea. Williams appeals.

ASSIGNMENTS OF ERROR

Williams assigns, consolidated and restated, that the district court erred in (1) ruling that the trial court did not abuse its discretion in accepting Williams' plea, (2) finding that the trial court did not err in denying Williams' motions to withdraw his plea, and (3) finding that the trial court's sentence of 90 days' incarceration was not excessive.

ANALYSIS

The issues are whether the trial court abused its discretion in accepting Williams' plea, denying Williams' motions to withdraw his guilty plea after his termination from the intervention program, and sentencing him to 90 days' incarceration.

Trial Court Acceptance of Plea

[3] A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006). To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *Id.*

Williams and the Douglas County Attorney entered into a plea agreement under which Williams agreed to plead guilty to third degree domestic assault and the prosecutor agreed to dismiss the remaining charges. If, at the time of sentencing, Williams had completed the program, the prosecutor agreed to dismiss the third degree domestic assault charge as well. The trial court advised Williams of his constitutional rights and the alternative outcomes he could expect at sentencing. The court

found that Williams entered his plea knowingly, voluntarily, intelligently, and understandingly, and accepted his guilty plea. There is no evidence that the court participated beyond what was necessary to inform Williams of his rights.

The plea agreement entered into by the Douglas County Attorney and Williams was a valid plea agreement. The condition requiring Williams to participate in the program was not part of a pretrial diversion program. As such, the statutes regulating pretrial diversion, § 29-3601 et seq., are not applicable. We find that the trial court properly accepted Williams' plea.

Motions to Withdraw Plea

[4-6] After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

In *State v. Carlson, supra*, this court determined that the defendant, who was charged with murder, did not establish a fair and just reason to withdraw his plea of no contest based on the trial court's acceptance of his plea or based on alleged erroneous advice of his counsel. The defendant claimed that his attorney had promised him he would be able to withdraw his plea and that he believed he would be able to withdraw his plea. Before accepting the defendant's plea, the trial court asked numerous questions to determine whether the defendant entered his plea of no contest freely, intelligently, voluntarily, and understandingly. While the trial court did not specifically ask the defendant whether his plea was induced by any promises, it did ultimately find that "'no promises or threat'" had

been made to the defendant prior to his entering the plea. *Id.* at 823, 619 N.W.2d at 838. Based on these findings, this court concluded that the defendant had not presented by clear and convincing evidence a "fair and just reason" to withdraw his plea such that the trial court abused its discretion. *Id*. at 824, 619 N.W.2d at 838.

Similarly, in *State v. Schneider, supra*, this court held that the trial court did not abuse its discretion when it did not allow the defendant to withdraw his plea of no contest after he learned he would be required to register as a sex offender. When accepting the defendant's plea of no contest as part of a plea agreement, the trial court informed him of the possible penalties and of the constitutional rights he would give up by entering the plea, but did not tell him he would be required to register as a sex offender. At sentencing, the defendant made a motion to withdraw his plea because he was not aware of the registration requirements. This court determined that the trial court was not required to inform the defendant of the sex offender registration requirements and did not abuse its discretion in denying the defendant's motion to withdraw his plea.

In the case at bar, Williams pled guilty pursuant to a plea agreement that required him to complete the intervention program. If Williams completed the program, the trial court would allow him to withdraw his guilty plea and the county attorney would dismiss the charge. If he failed to finish the program, however, the court would sentence him accordingly. After completing approximately half of the required classes, Williams was terminated from the program. Pursuant to the plea agreement, the court sentenced him on May 3, 2007.

At sentencing, the Douglas County Attorney offered Williams' termination notice from the program as evidence of his failure to complete the condition of the plea agreement. Williams' evidence was a letter from his attorney to the trial court that claimed the prosecutor had not acted in good faith in connection with Williams' termination from the program. He did not offer any evidence to show he was improperly terminated from the program. Considering the evidence in the record, we conclude that the trial court did not abuse its discretion in denying Williams' motions to withdraw his plea.

Excessive Sentence

[7] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). 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. *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007). Presentence reports are required only for defendants convicted of felonies. Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2006).

Williams pled guilty to domestic assault in the third degree, which is a Class I misdemeanor under Neb. Rev. Stat. § 28-323(4) (Cum. Supp. 2006). Class I misdemeanors are punishable by up to 1 year's imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2006). The trial court sentenced Williams to 90 days' incarceration, which is well within the statutory limits. We find that this sentence is not excessive and that the court did not abuse its discretion.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROGER K. SCHMIDT, SR., APPELLANT.
757 N.W.2d 291

Filed November 7, 2008. No. S-07-556.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. ____: ____. 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.

3. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
4. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
5. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
6. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
7. **Constitutional Law: Trial: Witnesses.** Although the main and essential purpose of confrontation is the opportunity of cross-examination, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
8. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
9. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.

Petition for further review from the Court of Appeals, SIEVERS, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Jefferson County, PAUL W. KORSLUND, Judge. Judgment of Court of Appeals affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, 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 Jefferson County, Roger K. Schmidt, Sr., was convicted of one count of first degree sexual assault on a child and four counts of sexual assault of a child. The Nebraska Court of Appeals affirmed his convictions,[1] and we granted his petition for further review. We now affirm the judgment of the Court of Appeals affirming Schmidt's convictions and sentences.

I. BACKGROUND

1. DISTRICT COURT PROCEEDINGS

Two of the three alleged female victims in this case were M.C., who was 10 years old at the time of trial, and K.S., who was 9. Schmidt's son lives with M.C.'s mother, and M.C. generally considered Schmidt to be her grandfather. K.S. lived across the street from Schmidt, considered him a friend, and frequently visited his home. Schmidt was charged with multiple acts of sexual assault against M.C. and K.S. during a period from January 1, 2001, to March 31, 2006. M.C. first reported the assaults to a school counselor on April 25, 2006, after a school program entitled "Good Touch Bad-Touch." M.C. subsequently reported that K.S. told her she had also been touched inappropriately by Schmidt.

Prior to trial, the State filed a motion in limine requesting that defense counsel be prohibited from commenting upon or cross-examining M.C. and K.S. regarding prior allegations of sexual assault directed at persons other than Schmidt. The State's position was that such evidence was irrelevant. Schmidt's counsel argued that the evidence was relevant to show that M.C. and K.S. were aware of the significance of "bad touch" prior to the alleged incidents involving Schmidt, but nevertheless did not immediately report them. He made an offer of proof, consisting of the depositions of M.C., her mother, and the parents of K.S., which established that both

[1] *State v. Schmidt*, 16 Neb. App. 741, 750 N.W.2d 390 (2008).

minors had been interviewed regarding prior allegations or suspicion of sexual abuse by persons other than Schmidt. Schmidt's counsel argued that he should be permitted to cross-examine M.C. and K.S. regarding these matters. The district court summarized Schmidt's argument as follows:

> So in other words, if a child knew good-touch bad-touch, had actually reported something like that before, you want to bring that out in cross-examination and/or examination of the parents and then be able to ask why did you wait . . . whatever amount of time you waited before you reported it in this case; is that the gist of it?

Schmidt's counsel responded affirmatively.

On direct examination at trial, M.C. testified that for a period of 3 to 4 years before she reported him, Schmidt had repeatedly subjected her to sexual touching, including digital penetration. On cross-examination, Schmidt's counsel elicited testimony that M.C. knew the difference between "good touch" and "bad touch" for some time prior to reporting Schmidt. M.C. also testified that she did not tell anyone of Schmidt's conduct before April 2006, despite knowing that her parents and her teacher could protect her.

Also on cross-examination, Schmidt's counsel asked M.C. if she told a counselor that she had observed Schmidt sexually touching another minor, T.B. The State objected on grounds of relevancy and hearsay, and the district court sustained the objection. Later, out of the presence of the jury, Schmidt's counsel made an offer of proof that if allowed to answer his question, M.C. would have admitted that she had made the allegation regarding Schmidt and T.B.

K.S. testified that Schmidt had been touching her since she was 4 years old and that he had touched or rubbed between her legs on numerous occasions. K.S. first told M.C. about the touching when K.S. was 8, but told no one else at that time because she was afraid. K.S. testified on cross-examination that she had previously been touched inappropriately by a cousin and that she told M.C. about this. She also testified that when her parents inquired, she initially denied being touched by Schmidt.

Douglas Klaumann, a police sergeant who investigated M.C.'s complaint, testified for the State. On cross-examination, Schmidt's counsel began to ask Klaumann, "Did [M.C.] report any other child that she witnessed . . . ." The State objected on grounds of relevance and hearsay, and the objection was sustained. Out of the presence of the jury, Schmidt's counsel made an offer of proof that if allowed to testify, Klaumann would state that M.C. reported that on an occasion when she and T.B. were playing cards with Schmidt at his home, "'she thought she observed . . . Schmidt touching [T.B.] on the area of her vagina on the outside of her clothes.'" The court sustained the State's relevancy and hearsay objections to the offer of proof. Schmidt's counsel then made a second offer of proof that if permitted to testify, Klaumann would testify that he interviewed T.B. and her sister and that both denied being touched in a sexual manner by Schmidt. The court again sustained the State's relevancy and hearsay objection.

After the State had rested and the court had overruled Schmidt's motion for a directed verdict, Schmidt's counsel requested that the court reconsider its ruling on the State's motion in limine prohibiting defense counsel from commenting upon or cross-examining M.C. and K.S. regarding prior allegations of sexual abuse by persons other than Schmidt. The court overruled this request for the reasons stated in its ruling on the motion in limine. Schmidt's counsel then made several offers of proof similar to those made at the time of the original hearing on the State's motion in limine. He stated that if permitted to testify, the parents of K.S. would testify that she had reported to them approximately 4 years earlier that she had been inappropriately touched by a cousin, who was subsequently prosecuted, and that at the time of this incident, K.S. understood the difference between appropriate and inappropriate touching.

Schmidt's counsel made a further offer of proof that if permitted to testify, M.C.'s mother would state that in 2002, there had been an investigation into whether her former boyfriend had abused M.C. and that the mother had talked to M.C. at that time about appropriate and inappropriate touching. At

that time, M.C. was 5½ years old, and she had not actually reported any abuse prior to the investigation. M.C. was interviewed, but no charges were brought. The court reaffirmed its ruling on the motion in limine excluding the matters stated in both offers of proof.

At an instruction conference, Schmidt's counsel objected to proposed jury instruction No. 14, which stated: "The testimony of a person who is the victim of a sexual assault, as charged in this case, does not require corroboration. It is for you to decide what weight to give the testimony of [M.C. and K.S.]." Schmidt's counsel acknowledged that the instruction was a correct statement of the law, but argued that it was confusing and misleading when considered together with the general witness credibility instruction which was also proposed. The objection was overruled, and instruction No. 14 was given, as was the general witness credibility instruction.

The jury returned guilty verdicts on five of the seven counts charged. Three of these counts involved M.C., one involved K.S., and the fifth involved a third victim. The jury returned not guilty verdicts on two counts, both of which involved K.S. The district court entered judgment on the verdicts and sentenced Schmidt to five consecutive terms of imprisonment. Schmidt appealed.

2. Court of Appeals

In his appeal, Schmidt assigned that the district court erred in (1) sustaining the State's motion in limine, (2) sustaining the State's objection to cross-examination of M.C. regarding her reported observation of Schmidt's touching T.B., (3) submitting jury instruction No. 14, and (4) admitting statements made by Schmidt to a police officer. The Court of Appeals found no merit in any of these assignments.

The court held that Schmidt's right of confrontation was not violated by either the ruling on the motion in limine and resulting exclusion of evidence or the restriction on cross-examination of M.C. with respect to her report that Schmidt improperly touched T.B. With respect to the alleged incident involving T.B., the Court of Appeals noted that Schmidt's offer of proof did not "establish whether the allegations regarding

Schmidt's actions toward T.B. were unfounded."[2] The court found no error in the admission of certain incriminating statements which Schmidt gave to police and no error in the giving of jury instruction No. 14. In a concurring opinion, one member of the court expressed his opinion that while jury instruction No. 14 was a correct statement of the law and was not misleading, it need not have been given, because the general instruction regarding witness credibility was adequate.[3] The concurring judge concluded that in the absence of special circumstances, trial judges should not specifically instruct the jury that the testimony of an alleged sexual assault victim does not require corroboration.

II. ASSIGNMENTS OF ERROR

In his petition for further review, Schmidt assigns, restated, that the Court of Appeals erred in affirming his convictions because (1) jury instruction No. 14 was confusing, misleading, and prejudicial to his defense; (2) the trial court denied his right to confront and cross-examine victim M.C. to demonstrate bias, prejudice, and lack of credibility; and (3) the trial court denied his right to compulsory process and impaired his right to effective cross-examination of victims M.C. and K.S. by granting the State's motion in limine.

III. ANALYSIS

1. Jury Instruction No. 14

(a) Standard of Review

[1,2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[4] 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

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[2] *Id.* at 751, 750 N.W.2d at 401.

[3] *State v. Schmidt, supra* note 1 (Cassel, Judge, concurring).

[4] *State v. Moore, ante* p. 1, 751 N.W.2d 631 (2008); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

pleadings and the evidence, there is no prejudicial error necessitating reversal.[5]

(b) Disposition

It is undisputed that the challenged jury instruction is a correct statement of the law as set forth in Neb. Rev. Stat. § 29-2028 (Cum. Supp. 2006). We agree with the Court of Appeals that the giving of the instruction in this case was not prejudicial and did not constitute reversible error, because when read as a whole, the jury instructions fairly presented the law and were not misleading. We also agree with the concurrence that while it was not prejudicial, this instruction was redundant and unnecessary, and that in the absence of special circumstances in a particular case, an instruction similar to instruction No. 14 should not be given.

2. Cross-Examination of M.C.

(a) Standard of Review

[3] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.[6]

[4] When the object of cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.[7]

(b) Disposition

[5] Schmidt argues that he was denied the right to cross-examine M.C. regarding what he characterizes as an "unfounded allegation" to authorities that M.C. had witnessed Schmidt touch the vaginal area of another minor, T.B.[8] He contends that

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[5] *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008); *State v. Gutierrez, supra* note 4; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[6] *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[7] *State v. Schreiner, ante* p. 393, 754 N.W.2d 742 (2008).

[8] Brief for appellant in support of petition for further review at 7.

the Court of Appeals erroneously dismissed this argument by noting that he had not made an offer of proof to establish that the alleged report regarding Schmidt and T.B. was unfounded. Schmidt argues that he made a record on this point through the second of two offers of proof made during Klaumann's testimony, indicating that if permitted to testify, Klaumann would state that he interviewed T.B. and that she told him Schmidt had not touched her. That offer of proof was made in response to a ruling sustaining the State's relevance and hearsay objections to a question asking Klaumann whether M.C. had reported an incident involving Schmidt and T.B. Schmidt did not assign error with respect to this ruling. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[9]

[6,7] Assuming without deciding that we could consider the offers of proof made during Klaumann's testimony in determining whether the district court erred in sustaining objections to Schmidt's subsequent cross-examination of M.C., we conclude there was no reversible error. An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.[10] Although the main and essential purpose of confrontation is the opportunity of cross-examination,[11] trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among

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[9] *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[10] *State v. Poe, ante* p. 258, 754 N.W.2d 393 (2008); *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006); *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[11] *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Schreiner, supra* note 7.

other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.[12]

Whether or not Schmidt improperly touched T.B. had no direct bearing on the essential elements of this case, and the attempted cross-examination of M.C. on this point was not directed at a prototypical form of bias. Schmidt's counsel cross-examined M.C. extensively on issues relating to her general credibility, securing her admission that although she had understood the difference between appropriate and inappropriate touching for some time, she had not reported Schmidt's conduct until long after she said that it began. From our review of the record, we conclude that a reasonable jury would not have received a significantly different impression of M.C.'s credibility had Schmidt's counsel been permitted to pursue cross-examination on the collateral matter of her reported observations of Schmidt and T.B. We agree with the Court of Appeals that this restriction on cross-examination did not violate Schmidt's right of confrontation.

3. Motion in Limine

(a) Standard of Review

[8] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.[13]

(b) Disposition

[9] Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review

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[12] See *State v. Schreiner, supra* note 7.

[13] *State v. Gutierrez, supra* note 4; *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

by an appropriate objection during trial.[14] During his cross-examination of M.C., Schmidt's counsel did not ask specific questions pertaining to possible prior abuse by other persons, but he did elicit M.C.'s admission that she understood the difference between appropriate and inappropriate touching by an adult long before she reported abuse by Schmidt. During his cross-examination of K.S., Schmidt's counsel was able to elicit her testimony regarding prior inappropriate touching by a cousin, over the State's relevance objection. Thus, Schmidt's counsel was able to confront M.C. and K.S. with certain evidence which was the subject of the State's motion in limine. Based upon the principles discussed above, we agree with the reasoning and conclusion of the Court of Appeals that the district court's ruling on the State's motion in limine, and its subsequent reaffirmance of that ruling in response to evidence offered by Schmidt in his case in chief, did not deprive Schmidt of his constitutional right of confrontation.

IV. CONCLUSION

For the reasons discussed, we affirm the judgment of the Nebraska Court of Appeals affirming the convictions and sentences entered by the district court.

AFFIRMED.

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[14] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

DAVID V. CHEBATORIS, SPECIAL ADMINISTRATOR OF THE ESTATE OF SHARON L. MOYER, DECEASED, APPELLANT, v. JOHN BRADLEY MOYER ET AL., APPELLEES.

757 N.W.2d 212

Filed November 7, 2008. No. S-07-892.

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 resolves the questions of law independently of the trial court's conclusions.
4. **Conveyances: Deeds.** A conveyance of land may occur in a document that is not formally drafted as a deed.
5. **Deeds: Parties: Intent.** The duty of the Nebraska Supreme Court with respect to a deed of land is to carry out the true intent of the parties.
6. **Conveyances: Parties: Intent.** The particular words of a conveyance are unimportant if the intention of the parties can be determined.
7. **Conveyances: Parties: Intent: Equity.** In construing instruments conveying property, equity concerns itself with the substance and not the form of the transaction, and the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.
8. **Contracts.** A court is required to construe a document as a whole and to give effect to each part, if possible.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Timothy J. Buckley, of Adams & Sullivan, P.C., for appellant.

Joseph F. Bachmann and Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

I. INTRODUCTION

David V. Chebatoris, special administrator for the estate of Sharon L. Moyer (Moyer), appeals the decision of the district court for Otoe County, Nebraska. The underlying dispute arose over Moyer's creation of a revocable trust. The special administrator alleged that Moyer had not properly transferred ownership of her real and personal property to the trust and that the property should instead be considered part of the intestate estate. The district court determined that the property had been transferred to the trust by the trust document itself, and granted summary judgment to John Bradley Moyer (Brad) and Daniel Moyer (Dan). We affirm.

II. BACKGROUND

On October 8, 2004, Moyer, the decedent, created a revocable living trust, with Ron Moyer (Ron) as cotrustee. Moyer died intestate November 15. The declaration of trust was filed with the Otoe County register of deeds on December 14. Moyer purported to fund the trust with both real and personal property that she had described in "Appendix 'A'" attached to the trust document.

Paragraph 1.3 of the trust document states that "SETTLOR desires to create a trust and is concurrently herewith transferring certain properties to this trust which are set forth on Appendix 'A' attached hereto." Paragraph 1.4 states that "TRUSTEE agrees to hold the property described on Appendix 'A' together with all investments, reinvestments and additions thereto in trust in accordance with the provisions of this Agreement." Appendix "A" describes three parcels of land, two in Otoe County, Nebraska, and one in Iowa, and lists a variety of personal effects, including bank accounts. The trust instrument also gave detailed instructions as to the distribution of the trust property upon the death of the settlor, Moyer.

The trust document named Moyer's three sons as beneficiaries. Brad was the named beneficiary of the real estate in Nebraska, and Dan was to receive all of the tools, equipment, and machinery included in the trust assets and used in the agricultural operation at the time of Moyer's death, as well as most of the land in Iowa. A third son, Chris Moyer, was to receive a tract of land in Iowa if he could fulfill certain requirements set forth in the trust document. The disposition of the Iowa land is not at issue in this case.

After Moyer's death, the special administrator was appointed to administer Moyer's intestate estate. Meanwhile Ron, acting in accordance with the trust document, sold the land in Otoe County to Brad on September 19, 2005. The deed was filed with the Otoe County register of deeds on November 2. Brad then conveyed the real property to db Ag Land, LLC, and that deed was also filed on November 2. Brad and Dan also took possession of Moyer's personal property.

The special administrator filed a claim in equity on October 5, 2006, alleging that neither the real property nor the personal

property described in the trust document had been properly conveyed by the settlor to the trustee and that therefore the trust was wholly unfunded upon Moyer's death. If true, all property mentioned in the trust document would be a part of the intestate estate.

The special administrator requested that the district court impose a constructive trust on defendants and require an accounting for any income received from the property, and also requested that the court quiet title to the real property in Otoe County. The special administrator also asked that the court require Dan and Brad to turn over any of Moyer's personal property in their possession. Defendants cross-claimed, stating that the instrument of trust effectively conveyed the real and personal property to the cotrustees. Defendants moved for summary judgment, and the special administrator did the same.

The district court ultimately sustained defendants' motion for summary judgment, relying on the definition of a deed contained in Neb. Rev. Stat. § 76-203 (Reissue 2003) and the methods for creating a trust under Neb. Rev. Stat. § 30-3827 (Reissue 2003). The court determined that under those statutes, the trust agreement acted as, and was sufficient to constitute, a deed of conveyance. Having determined that the trust instrument properly conveyed both real and personal property, the district court sustained defendants' cross-claim and quieted title in the Otoe County real estate to db Ag Land.

III. ASSIGNMENTS OF ERROR

The special administrator assigns that the district court erred in finding that (1) the "Sharon L. Moyer Revocable Trust" document was sufficient to convey legal title to Moyer's real property to the trustee of the trust and (2) the trust document was sufficient to transfer Moyer's personal property to the trustee of the trust.

IV. STANDARD OF REVIEW

[1] 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.[1]

[2,3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2] When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.[3]

V. ANALYSIS

1. Transfer of Real Property to Trust

[4] We first turn to the question of whether the Sharon L. Moyer Revocable Trust document was sufficient to convey legal title to Moyer's real property to the trustee of the trust. A conveyance of land may occur in a document that is not formally drafted as a deed.[4] In *Matter of Estate of Severson*,[5] the Iowa Supreme Court stated that "[t]he fact that an instrument is not captioned 'deed' does not deprive it of legal effect as a conveyance of real estate, provided it is otherwise valid as such a conveyance." The court noted that any writing may be effective as a legal conveyance if it names the grantor and grantee, contains words of grant, describes the land, and is delivered.[6]

Although the transfer of real property would have been best memorialized by a separate document, we nevertheless

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[1] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[2] *Id.*

[3] See *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[4] See, *Jorgensen v. Crandell*, 134 Neb. 33, 277 N.W. 785 (1938); *Neneman v. Rickley*, 110 Neb. 446, 194 N.W. 447 (1923). See, also, *Samuel v. King*, 186 Or. App. 684, 64 P.3d 1206 (2003); *In re Estate of Powell*, 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 (2000); *Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803 (1996); *Matter of Estate of Severson*, 459 N.W.2d 473 (Iowa 1990).

[5] *Matter of Estate of Severson, supra* note 4, 459 N.W.2d at 476.

[6] *Id.*

conclude that Moyer's trust agreement operates as a deed transferring real property. Section 76-203 defines a deed as "every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity." Neb. Rev. Stat. § 76-211 (Reissue 2003) lists the minimal requirements for an instrument to qualify as a deed, including that it be signed by the grantor or grantors, and be acknowledged or proved and recorded.

Moyer's trust document satisfies each of the statutory requirements for a deed of real property. Moyer signed the trust agreement as the settlor of the trust, thus satisfying the requirement of signature by the grantor of the property. Moyer and Ron also signed the agreement as cotrustees, indicating their acceptance of the trusteeship. The agreement was acknowledged by a notary public and was filed with the register of deeds, albeit after Moyer's death.

The trust agreement also purports to affect interests in land, as required by § 76-203, by stating in paragraph 1.3 that "SETTLOR desires to create a trust and is concurrently herewith transferring certain properties to this trust which are set forth on Appendix 'A' attached hereto." Although the special administrator contends that this language is insufficient to demonstrate the settlor's present intent to convey the property, we find this argument unpersuasive. The language of the trust document is unambiguous and clearly demonstrates that Moyer desired to transfer her property to the trust.

(a) Equitable Principles Apply

[5-7] We find further support for our conclusion in equity. The duty of this court is to carry out the true intent of the parties.[7] The particular words of a conveyance are unimportant if the intention of the parties can be determined.[8] In construing instruments conveying property, equity concerns itself with the substance and not the form of the transaction, and the

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[7] *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

[8] *Koehn v. Koehn*, 164 Neb. 169, 81 N.W.2d 900 (1957).

particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.[9] As noted by the trial court, Moyer's intent was clearly to transfer the property listed in Appendix "A" to the trust. We find that no ambiguity exists in the trust document as to Moyer's wishes, and that equitable principles support our determination that the trust document was sufficient to transfer the real property to the trust.

(b) Special Administrator's Objections

The special administrator also contends, however, that the trust document cannot act as a deed for two reasons: (1) because a separate deed is necessary where the settlor is not the sole trustee and (2) because the trust document fails to name a grantee. We find the special administrator's arguments unpersuasive.

(i) Trust Document Fulfills Requirements of Separate Deed

The special administrator acknowledges that it is not necessary to transfer legal title to the trustee when the settlor is the sole trustee, but contends that because Moyer designated a cotrustee, legal title in the real property should have been reregistered in their names as cotrustees. As concluded above, however, the trust document acted as a deed conveying property, and legal title was transferred to the trust in the names of Moyer and Ron, the cotrustees.

(ii) Trust Document Does Not Fail to Name Grantee

[8] The special administrator has also argued that because paragraph 1.3 does not name the trustee as the grantee of the property, the trust fails to convey legal title. However, a court is required to construe a document as a whole and to give effect to each part, if possible.[10] Again, paragraph 1.3 provides that "SETTLOR desires to create a trust and is concurrently

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[9] *Mackiewicz v. J.J. & Associates, supra* note 7.

[10] See *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

herewith transferring certain properties to this trust which are set forth on Appendix 'A' attached hereto." Paragraph 2.1 states that "[t]he TRUSTEE of this trust shall be: Appointee: Sharon L. Moyer and Ron Moyer, as Co-Trustees." Clearly, Moyer's intention was to transfer the property listed on Appendix "A" to the trust corpus, with Moyer and Ron serving as cotrustees. As such, a grantee can be discerned. The special administrator's arguments are without merit.

2. Transfer of Personal Property to Trust

The special administrator also argues that the trust document was ineffective as to the transfer of Moyer's personal property. Appendix "A" of the trust agreement lists the property Moyer "concurrently herewith transfer[red]" to the trust, including "[a]ll bank accounts, investments, household goods, personal effects, improvements, fixtures, tools, equipment and machinery, including irrigation wells and equipment, all owned or hereafter acquired by me, and all crops currently growing and to be grown on the above described real estate." As before, the special administrator contends that the transfer was ineffective because Moyer named a cotrustee in the trust agreement. We note that the language of the agreement makes clear the settlor's intent to transfer her personal property to the trust.[11] We therefore conclude that as with the real property, the trust document effectively transferred title to the personal property. While the settlor's intent in this instance is clear, we note, as we did before with regard to the real property, that a separate document may generally be helpful in clarifying a settlor's intent.

We find support for this conclusion in our own case law. In *In re Estate of West*,[12] we approved the transfer of personal property via a trust document. And in *Neneman v. Rickley*,[13] a case involving a prenuptial agreement, we approved of the transfer of personal property without requiring a bill of sale or formal deed. Other jurisdictions have similarly focused on

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[11] See, e.g., *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997).

[12] *Id.*

[13] *Neneman v. Rickley, supra* note 4.

a settlor's intent and relaxed the formalities for transferring personal property to a trust.[14]

The special administrator's arguments regarding the transfer of personal property are also without merit.

VI. CONCLUSION

The district court did not err in granting summary judgment for Brad, Dan, and db Ag Land. The trust agreement executed by Moyer fulfills the statutory requirements for a deed in land, and the language is unambiguous. Similarly, the trust document operated to transfer Moyer's personal property to the trust. We therefore affirm the decision of the Otoe County District Court.

AFFIRMED.

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[14] See, *In re Estate of Washburn*, 158 N.C. App. 457, 581 S.E.2d 148 (2003); *Samuel v. King, supra* note 4. See, also, Restatement (Third) of Trusts § 10 (2003).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN E. HUBBARD, RESPONDENT.

757 N.W.2d 375

Filed November 21, 2008. No. S-07-718.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. 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.
3. ____. The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.
4. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
5. ____. The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed in prior cases presenting similar circumstances.

Original action. Judgment of suspension.

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

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

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

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court charged attorney John E. Hubbard with violations of the Nebraska Rules of Professional Conduct (Rules) and his oath of office as an attorney for his cocaine use and subsequent arrest. The referee determined that Hubbard's conduct warranted sanctions and recommended that Hubbard be publicly reprimanded, be suspended from the practice of law for 1 year, be placed on probation for 5 years, and be subject to work-product reviews. Hubbard appeals the imposition of sanctions and argues that the referee's recommended sanctions are too severe.

BACKGROUND

Hubbard has been licensed to practice law in the State of Nebraska since 1973. He practiced with several law firms in Nebraska until early 2006. He joined another firm in November 2007.

In December 2005, Hubbard was preparing to retire. He had recently separated from his wife of 35 years. One night, he called an escort service, and the service sent a 20-year-old female, who introduced Hubbard to crack cocaine. He continued to meet the escort and used cocaine when he was with her.

Realizing he was addicted to cocaine, Hubbard voluntarily entered a 30-day inpatient program in April 2006. Upon returning from the inpatient program, Hubbard moved into a halfway house, but he moved out after only 2 weeks and again began

seeing the escort and using cocaine. During this time, Hubbard paid for her car insurance and cellular telephone, bought clothes for her, and gave her money whenever she requested it. He also planned to help her rent an apartment so she could move out of her parents' house.

Hubbard continued to meet with the escort and use cocaine until the end of the summer, when he checked himself into another treatment center. He remained in contact with the escort and sent money to her while he was in treatment. Hubbard stayed at the center for 30 days and then moved in with his daughter at the end of August 2006.

Within 2 days of Hubbard's return from the treatment center, the escort called Hubbard and he resumed seeing her and using cocaine. This continued until September 12, 2006, when Sarpy County sheriff's deputies arrested Hubbard and the escort in a motel room for possession of cocaine. Hubbard was charged with possession of a controlled substance, a Class IV felony.[1] He ultimately pled guilty to attempted possession of a controlled substance, a Class I misdemeanor.[2] The court sentenced him to 2 years of supervised probation, 100 hours of community service work, and a $1,000 fine. The court also ordered him to complete a drug treatment program.

Hubbard finished the drug treatment program and a 52-week followup program. He attends Alcoholics Anonymous meetings four to five times per week and has a sponsor. He has also entered into a 3-year monitoring agreement with the Nebraska Lawyers Assistance Program (NLAP). His probation officer has a key to his apartment and inspects it occasionally. As an additional condition of his probation, Hubbard must submit to routine drug tests. He has not tested positive for any drug since his arrest.

Following Hubbard's arrest, the Counsel for Discipline filed formal charges on June 28, 2007, alleging a violation of his oath of office and a violation of Neb. Ct. R. of Prof. Cond. § 3-508.4. A hearing on these charges was held on January 24, 2008, before a court-appointed referee. On April 17, the referee

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[1] See Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2006).

[2] See Neb. Rev. Stat. § 28-201(4)(e) (Cum. Supp. 2006).

filed a report and recommendation, finding that Hubbard violated the Rules and his oath of office as an attorney.

The referee recommended (1) placing Hubbard on probation for 5 years beginning on the date of the probation imposed in his criminal case and subject to the same terms as his criminal probation, (2) extending Hubbard's NLAP contract from 3 years to 5 years, (3) requiring Hubbard to report any contact or attempted contact with the former escort to NLAP and the Counsel for Discipline, (4) requiring mentored work-product reviews, (5) publicly reprimanding Hubbard, and (6) suspending Hubbard from the practice of law for 1 year. Hubbard contends the referee's recommended discipline is too severe.

ASSIGNMENTS OF ERROR

Hubbard asserts, summarized and restated, that the referee erred in finding that he violated § 3-508.4 of the Rules and that the referee erred in recommending a public reprimand, work-product review, and a 1-year suspension.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[3]

ANALYSIS

Section 3-508.4(b) states that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A comment to this section reads:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness

[3] *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

> for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.[4]

Formerly, the Code of Professional Responsibility (Code) governed attorney conduct. Under the Code, Canon 1, DR 1-102(A)(3), prohibited attorneys from engaging in illegal conduct involving moral turpitude and DR 1-102(A)(6) prohibited any other conduct that adversely reflected on a lawyer's fitness to practice law. Although the name and wording of the applicable regulations have changed, we are guided by the principles previously announced in our decisions under the Code.[5]

The removal of "moral turpitude" from the Rules indicates that the drafters did not intend for incidents of personal morality to be the grounds for professional liability. Instead, the intent is to sanction conduct that reflects on an attorney's honesty, trustworthiness, or fitness as a lawyer. When an attorney's illegal drug use affects a client, it unmistakably reflects on the attorney's honesty, trustworthiness, and fitness as a lawyer.[6] The outcome is less clear, however, when the drug use does not negatively impact a client, as in the case at bar.

In *State ex rel. NSBA v. Matt*,[7] an attorney, Paul G. Matt III, made arrangements for his personal friend to purchase cocaine. Matt never possessed cocaine and did not cause harm to any

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[4] § 3-508.4, comment 2.

[5] See *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

[6] See, *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007); *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

[7] *State ex rel. NSBA v. Matt*, 213 Neb. 123, 327 N.W.2d 622 (1982).

client; however, the referee emphasized that Matt's efforts enabled his friend to illegally purchase a controlled substance. The court found that Matt's actions adversely reflected upon his "fitness to practice law and constitute[d] a violation of the disciplinary rules as charged," in addition to the determination that his conduct involved moral turpitude.[8] Even though the case was decided under the superseded Code, the now-applicable Rules also contain a prohibition of conduct that reflects adversely on a lawyer's fitness to practice law. Therefore, Matt's conduct of arranging for his friend to purchase cocaine is a violation under both sets of disciplinary rules.

While Hubbard did not procure cocaine for the escort, he gave her money and paid for her car insurance, cellular telephone, and clothes during the time she was seeing him and providing him with illegal drugs. It can reasonably be inferred that the money given by Hubbard to the escort contributed to their illegal use of cocaine. 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 and disciplinary rules. Upon due consideration of the record, the court finds that Hubbard's conduct adversely reflects on his fitness to practice law and is subject to sanctions under the Rules.

[2] 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.[9]

[3-5] The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for

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[8] *Id.* at 126, 327 N.W.2d at 623.

[9] *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

suspension or disbarment.[10] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances[11]; however, the propriety of a disciplinary sanction must be considered with reference to the sanctions imposed in prior cases presenting similar circumstances.[12] Furthermore, the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[13]

In the instant case, the referee properly and carefully considered all of these criteria when he recommended that Hubbard be suspended for 1 year, be placed on probation and subject to work-product review, and be publicly reprimanded. Hubbard repeatedly violated the law over a 9-month period by using cocaine. And while it is important that attorneys suffering from addiction get the help they need, it is also crucial to deter attorneys from using illegal drugs to begin with. In addition, Hubbard was known as a prominent Omaha attorney and his actions drew negative attention to the bar.

On the other hand, Hubbard has taken steps to ensure that these transgressions do not reoccur. He has completed a drug treatment program, attends Alcoholics Anonymous meetings four to five times per week, and has a sponsor. He is in a 3-year monitoring program with NLAP and submits to drug tests. We also consider Hubbard's abstention from the practice of law during his rehabilitation as a mitigating factor. His actions did not affect his representation of any clients.

This court has imposed periods of suspension in cases with underlying facts similar to the present case. In *State ex rel. NSBA v. Matt*,[14] the referee determined that Matt's actions enabled the sale and purchase of cocaine. Considering that he

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[10] *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

[11] See *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

[12] See *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004).

[13] See *State ex rel. Counsel for Dis. v. Dortch, supra* note 5.

[14] *State ex rel. NSBA v. Matt, supra* note 7.

successfully completed pretrial diversion and was no longer involved with drugs, this court suspended Matt for 1 year. Similarly, in *State ex rel. Counsel for Dis. v. Hughes*,[15] an attorney obtained blank prescription forms and forged prescriptions to get narcotic pain medication. This court suspended Hughes for 6 months, after which time she could apply for reinstatement to the bar.[16]

Given the circumstances and mitigating factors present in Hubbard's case, we conclude that he should be suspended for a period of 9 months, after which time he may apply for reinstatement to the bar. We also find it appropriate to place Hubbard on probation for 5 years beginning the same date as his criminal probation and to extend his monitoring contract with NLAP from 3 years to 5 years. We agree with the parties that attorney review of Hubbard's work product is unnecessary.

CONCLUSION

We find by clear and convincing evidence that Hubbard violated § 3-508.4. It is the judgment of this court that Hubbard be suspended from the practice of law for a period of 9 months, effective immediately. After this period, Hubbard may apply for readmission to the bar. Upon readmission, his continued admission is subject to successful completion of the above-described 5 years' probation and continued participation in the NLAP program.

Hubbard shall also comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, Hubbard is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

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[15] *State ex rel. Counsel for Dis. v. Hughes*, 268 Neb. 668, 686 N.W.2d 588 (2004).

[16] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SHAUN F. DOWNEY, RESPONDENT.

757 N.W.2d 381

Filed November 21, 2008. No. S-07-1041.

1. **Disciplinary Proceedings.** 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.
2. ____. Each case justifying the discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
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. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires consideration of any aggravating or mitigating factors. To determine whether and to what extent discipline should be imposed, the Nebraska Supreme Court considers: (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.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Shaun F. Downey, pro se.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court, relator, charged attorney Shaun F. Downey with violations of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. Specifically, the formal charges alleged that Downey violated the rule now codified at Neb. Ct. R. of Prof. Cond. § 3-508.4 by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or by engaging in conduct that is prejudicial to the administration of justice. Downey's

answer generally admitted most of the allegations and admitted others in part.

We appointed a referee who conducted a hearing on the formal charges. In her report, the referee concluded that Downey's conduct violated § 3-508.4, as charged. The referee recommended an indefinite period of suspension with no possibility of reinstatement until Downey successfully completes his criminal probation in 2012 and maintains a voluntary period of sobriety.

On February 21, 2008, the relator filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendations and enter judgment thereon. The motion was not opposed. We sustained the motion in part, finding that the facts were as established in the referee's report. We ordered the case to proceed to oral argument on the issue of the appropriate discipline to be imposed.

BACKGROUND

Downey was admitted to the practice of law in Nebraska in 1994. He practiced in Mexico City, Mexico, for 5 years and then worked as a staff attorney in a public defender's office in Nebraska for an additional 5 years. In May 2004, he began a private practice in Nebraska, primarily consisting of criminal defense work.

On or about March 18, 2006, Downey, his girlfriend, and her 14-year-old daughter consumed alcohol in Downey's apartment. When the minor became intoxicated and unruly, Downey "slapped" her on the buttocks and told her to stop. Based on this incident, he was arrested and eventually charged with three misdemeanors: third degree assault, contributing to the delinquency of a minor, and procuring alcohol for a minor. He agreed to appear in court in Douglas County on September 22 and plead guilty to third degree assault and procuring alcohol for a minor.

However, Downey failed to appear because he was on a self-described "cocaine binge." He fled to Missouri. In mid-October, he was arrested there after a high-speed vehicular chase and charged with felony driving under the influence and possession of a controlled substance. Upon arrest, he was taken

to a hospital. Downey left the hospital without the consent or the agreement of the prosecutor, and a warrant was issued for his arrest. Although he testified that he had made arrangements to turn himself in on December 18, 2006, he was arrested on the warrant prior to that time.

Downey pled guilty to Missouri felony charges of driving under the influence of cocaine and possession of a controlled substance. He was given a suspended sentence and placed in a "'drug-offender boot camp'" for 90 days. He completed that program, and in 2007, he was placed on probation for 5 years in Missouri. According to his testimony, should he violate his probation, he faces two 8-year sentences in Missouri.

Downey was extradited to Nebraska in August 2007 and pled guilty to third degree assault and procuring alcohol for a minor. The charges were the result of the March 2006 incident with his girlfriend's daughter. He was sentenced to 90 days in jail and served that sentence. He then returned to Missouri to complete his probation.

Downey attends Narcotics Anonymous meetings daily. He attends outpatient therapy 3 hours per week and meets every other week with a counselor for individual therapy. He is subject to random drug tests but, at the time of the hearing, had not yet been tested by the Missouri probation office. Downey has been unable to find work in Missouri and believes that there are attorneys in Nebraska who may be willing to employ him in a paralegal capacity.

Downey readily admits to his drug and alcohol addictions. He first went into rehabilitation in 1983 and testified that he remained sober for about 7 years, although he was arrested for driving under the influence in 1986. He resumed abusing drugs and alcohol while attending law school in 1991 and continued while he worked in Mexico. Downey was arrested for driving under the influence in 2000 and went through a rehabilitation program. He was arrested for driving under the influence again in 2005 and obviously was using again by the time of the March 2006 incident. He has been sober since December 2006, but has been incarcerated or on intensive probation since then.

At oral argument before this court, Downey stated that his probation was transferred from Missouri to Nebraska in April 2008. He offered, and this court received, an exhibit documenting that in February 2008, he executed an agreement with the Nebraska Lawyers Assistance Program (NLAP), and that since that time, he has performed all requirements of the contract. It is the opinion of the director of NLAP that Downey is committed to taking whatever actions are necessary to ensure that he does not return to the addiction that led to his previous problems.

Based upon the evidence offered during the hearing, the referee found that Downey's conduct violated § 3-508.4, which states in part that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or to engage in conduct that is prejudicial to the administration of justice. The referee recommended an indefinite period of suspension with no opportunity for reinstatement until Downey completes the terms of his probation in 2012 and maintains a voluntary period of sobriety. We granted the relator's motion for judgment on the pleadings in part, accepting the referee's findings of fact. We ordered the case to proceed to oral argument on the issue of the appropriate sanction. Neither party assigns error in the findings or recommendations of the referee.

ANALYSIS

[1] 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.[1] Here, because neither party disputes the referee's finding that discipline should be imposed, the only question before us is whether the discipline should be that recommended by the referee or something else. The possible sanctions include (1) disbarment; (2) suspension for a fixed period of time;

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[1] *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007), citing *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

(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.[2]

[2,3] With respect to the imposition of attorney discipline in an individual case, "'each case justifying the discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.'"[3] 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.[4]

[4] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires consideration of any aggravating or mitigating factors. To determine whether and to what extent discipline should be imposed, this court considers: (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]

Although there is no indication of harm to a client, Downey's offenses as described above are serious violations of the Nebraska Rules of Professional Conduct. Such egregious actions must have a significant disciplinary consequence.[6] However, it is apparent that his drug and alcohol addiction was the primary cause for Downey's violation of the conduct rules and the near destruction of his professional career. We are persuaded by the record and Downey's appearance before us that after a lifelong struggle with his addiction, he has acknowledged responsibility

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[2] See *State ex rel. Counsel for Dis. v. Dortch, supra* note 1.

[3] *Id.* at 670, 731 N.W.2d at 596-97, quoting *State ex rel. Counsel for Dis. v. Petersen, supra* note 1. See, also, *State ex rel. Counsel for Dis. v. Hubbard, ante* p. 741, 757 N.W.2d 375 (2008).

[4] *State ex rel. Counsel for Dis. v. Dortch, supra* note 1.

[5] See, *State ex rel. Counsel for Dis. v. Hubbard, supra* note 3; *State ex rel. Counsel for Dis. v. Dortch, supra* note 1.

[6] *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

for his actions. Downey has cooperated throughout the course of the disciplinary proceedings, and he appears to have made a sincere and productive effort to confront his addiction and obtain the necessary professional treatment. All of these factors are mitigators that we consider in determining the appropriate discipline to impose.[7]

Based upon our consideration of all aggravating and mitigating factors, we agree with the conclusion of the referee that a suspension is the appropriate sanction. We therefore suspend Downey from the practice of law in the State of Nebraska for an indefinite period effective upon the filing of this opinion, with no possibility of reinstatement prior to August 1, 2012. Upon application for reinstatement, Downey shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. § 3-316. In addition, reinstatement shall be conditioned upon (1) Downey's payment of all costs of this action, which are hereby taxed to him; (2) Downey's compliance with the terms of his February 2008 contract with NLAP's monitoring program; (3) a showing by independent third-party proof that Downey has continued active participation in a recovery program and has maintained abstinence from the use of drugs and alcohol during the period of suspension; (4) a showing that Downey possesses the current legal competence to practice law in the State of Nebraska; (5) a showing that Downey satisfactorily completed his criminal probation; and (6) the submission by Downey and approval by this court of a probation plan, whereby Downey's recovery program and his compliance with the Nebraska Rules of Professional Conduct would be monitored by NLAP and the Counsel for Discipline for a period of time not less than 2 years following reinstatement.

JUDGMENT OF SUSPENSION.

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[7] See *State ex rel. NSBA v. Pullen*, 260 Neb. 125, 615 N.W.2d 474 (2000).

STATE OF NEBRASKA, APPELLEE, V. MICHAEL P. DAVIS, APPELLANT.

757 N.W.2d 367

Filed November 21, 2008. No. S-08-135.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Criminal Law: Homicide.** Malice is not a necessary element of second degree murder.
4. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
5. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **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.
8. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
9. ____. In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Matthew R. Kahler, of Finley Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CONNOLLY, J.

I. SUMMARY

In the evening hours of December 4, 1993, Michael P. Davis killed Michael Campbell with a .22-caliber revolver. Campbell was 16 years old and had never met Davis. Campbell had been arguing with a casual acquaintance of Davis when Davis fired a shot at Campbell and missed; then, after Campbell had turned away from Davis, Davis walked up to Campbell, placed the gun against the back of his head, and fired, killing him.

Following a bench trial, the court convicted Davis on one count of second degree murder and a related count of use of a weapon to commit a felony in connection with the murder. The court sentenced him to life imprisonment on the second degree murder conviction and 10 years' imprisonment on the weapon conviction. The court ordered the sentences to run consecutively. Davis argues several issues, but the principle issue is whether the State produced sufficient evidence to convict him of the second degree murder charge. We conclude that it did.

II. BACKGROUND

1. FACTS

The killing arose out of an altercation between two groups of young men ranging in age from 15 to 20 years. The first group included Joe Sandoval, Ignacio Palma, Jesse Serrano, and Davis. Before the day of the shooting, Davis had never met any of the individuals with whom he went to a shopping mall in Omaha, Nebraska. Nor had he met any members of the second group that included Campbell, Mario Castenada, Victorio Ramos, and Micah Preiksaitis.

The first group, including Davis, gathered at Palma's house before going to the mall. While there, Davis showed a Colt .22-caliber single-action revolver to Sandoval and Palma. Davis' brother, who was an acquaintance of Serrano and Palma, had given Davis the gun earlier in the day. Palma

watched Davis load the gun, place it under his coat, and leave the house.

Palma's girlfriend drove the group to the mall some time during the late afternoon or early evening. When the group arrived at the mall, Davis said "he was glad he had a gun just in case anybody started trouble with him." Around this time, the second group was arriving at the mall. The second group entered the mall and went up the escalators to the arcade. While they were going up on the escalators, Davis and Sandoval were going down. Davis and Sandoval both alleged that the second group was "throwing up gang signs and stuff like that, laughing at us and stuff."

Eventually both groups ended up in the arcade, where Campbell and Serrano got into a confrontation. The exact cause of the confrontation was unclear but apparently there had been previous run-ins between Serrano and Campbell. Both groups were in the arcade for about 2 minutes. Shortly afterward, both groups headed outside to the south entrance of the mall.

The groups stood to the east of the entrance to the mall, facing each other. Serrano and Campbell stood face-to-face, and continued exchanging words like: "'We can do this. You know, we can go ahead and fight, you know.'" Davis stood next to Serrano, but the record reflects that only Campbell and Serrano were arguing.

The fight escalated. The witnesses' testimonies vary slightly. Castenada, in Campbell's group, stated that Serrano was reaching into his waistband as if to pull a gun or knife. All the witnesses agree that Campbell then stated, "'What? You got a gun? Shoot me, shoot me,'" and then he threw his hands up. Davis then stated, "'I'll shoot him,'" pulled out his gun, and fired the first shot. The witnesses disagreed where Davis pointed the gun when he fired. Some witnesses stated it was pointed at Campbell's chest, and others stated Davis pointed it away from Campbell. The record reflects that the first shot did not hit Campbell and that the police never recovered the bullet.

After Davis fired the first shot, Campbell turned and started walking away from Serrano and Davis. According to witnesses,

between 5 and 30 seconds elapsed before Davis walked up to Campbell, placed the gun against the back of his head, and fired a second shot.

Davis and his group then got into Palma's girlfriend's car and drove away. Palma testified that in the car, Davis said, "'I shot that Lomas'" and "'I'll do it again.'" In contrast, Sandoval's testimony is that Davis stated, "'I didn't mean to shoot him.'"

An autopsy determined that the cause of death was a direct-contact gunshot wound to the back of Campbell's head.

2. Procedural History

On April 21, 1994, the court heard evidence on Davis' motion to transfer the charges to juvenile court and a motion to suppress. In support of his motion to transfer, Davis presented three medical reports outlining Davis' mental disorders. The court later denied the motion to transfer. In July, Davis appeared with counsel and waived his right to a jury trial.

3. Davis' Trial

The same judge who had ruled on Davis' motion to transfer the case to juvenile court presided over the trial. During opening statements to the court, Davis' trial counsel conceded that Davis did fire the weapon that killed Campbell. Davis' trial counsel asked the court to convict Davis of manslaughter based on a lack of evidence regarding malice. Counsel argued that Campbell provoked Davis, that Davis was confused and disoriented, and that he did not act with good judgment. In delivering the verdict, the judge specifically stated that he was aware of Davis' mental impairment and history of hospitalizations. He also stated that the evidence did not support a manslaughter conviction. At the sentencing, the judge reiterated that he had taken Davis' mental problems and terrible home life into account when determining the sentence. The judge sentenced Davis to life imprisonment for the murder conviction and 10 years' imprisonment for the weapon conviction.

In 1994, Davis appealed the convictions but withdrew the appeal based on counsel's erroneous advice regarding Davis' eligibility for parole. In November 2003, Davis moved for

postconviction relief, alleging ineffective assistance of counsel. On January 16, 2008, the Douglas County District Court determined that Davis' trial counsel's advice to withdraw his appeal was deficient and that the advice denied Davis his direct appeal. Davis now appeals his 14-year-old sentence of life imprisonment.

III. ASSIGNMENTS OF ERROR

Davis assigns, consolidated, restated, and renumbered, that the district court erred in (1) finding sufficient evidence to find Davis guilty beyond a reasonable doubt of second degree murder, (2) including malice as an element of second degree murder, (3) imposing an excessive sentence of life imprisonment, and (4) failing to find that Davis' counsel provided ineffective assistance.

IV. ANALYSIS

1. Sufficiency of Evidence

Davis contends that the evidence was not sufficient for the court to find him guilty beyond a reasonable doubt of second degree murder.

(a) Standard of Review

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1]

(b) Resolution

Our standard of review as stated above requires substantial deference to the factual findings made by the trial court. We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.[2]

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[1] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[2] *Id.* See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

The court convicted Davis of second degree murder. "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."[3] In contrast, "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[4] Davis contends that the record lacks sufficient evidence to find him guilty beyond a reasonable doubt of second degree murder. Instead, Davis claims that the evidence is consistent with manslaughter under the "sudden quarrel" element. A sudden quarrel requires provocation which causes a reasonable person to lose normal self-control.[5]

Although immediately before the shooting, an argument had erupted between Campbell and a member of Davis' group, the argument did not include Davis; nor had any of the individuals in either group displayed any weapons. What punctures Davis' manslaughter theory is that after the first shot, 5 to 30 seconds elapsed before he walked up to Campbell and shot him execution-style in the back of the head. Despite Davis' arguments, the evidence clearly shows no "sudden quarrel" or adequate provocation that hindered Davis' ability to act rationally and reasonably. The court did not err in finding beyond a reasonable doubt that Davis intentionally killed Campbell.

Viewed in a light most favorable to the State, the evidence is sufficient to support a second degree murder conviction.

2. Malice as an Element of Second Degree Murder

(a) Standard of Review

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[6]

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[3] Neb. Rev. Stat. § 28-304 (Reissue 1995).

[4] Neb. Rev. Stat. § 28-305 (Reissue 1995).

[5] *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

[6] *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

(b) Resolution

[3] Davis asserts that the trial court used the wrong standard for second degree murder when it found that Davis killed Campbell intentionally and with malice. Since 1978, § 28-304 has provided that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Before 1977, the second degree murder statute defined such a killing as one done "purposely and maliciously."[7] Despite this statutory change in the definition of second degree murder, this court continued to include malice as a necessary element of second degree murder until 1998.[8] In *State v. Burlison*,[9] we held that malice is not a necessary element of second degree murder under § 28-304. But under the law as it existed in 1994, when Davis was convicted and sentenced, malice was an element of second degree murder.[10]

Although malice was an element of second degree murder at the time of Davis' conviction, we have concluded that *Burlison* may be applied retroactively to a criminal act that occurred before *Burlison* was decided.[11] So Davis' allegation is correct that malice was not required for Davis' second degree murder conviction. We conclude, however, that the district court's finding of malice was not prejudicial to Davis because it created a greater burden on the State regarding intent.[12] By finding that Davis had to have acted with malice, the court imposed a higher burden on the State than was required under *Burlison*. Because the State nonetheless satisfied this higher burden, it clearly would have satisfied its burden of proof had it not been required to show malice. Thus, we conclude that

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[7] Neb. Rev. Stat. § 28-402 (Reissue 1975).

[8] See, e.g., *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

[9] *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[10] See *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled, State v. Burlison, supra* note 9.

[11] See *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

[12] See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Davis was not prejudiced by the required showing of malice for his conviction.

Because malice is not an element of second degree murder, the trial court placed a greater burden of proof on the State. We conclude that Davis was not prejudiced.

3. Ineffective Assistance of Counsel

(a) Standard of Review

[4,5] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[13] The determining factor is whether the record is sufficient to adequately review the question.[14] If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.[15]

(b) Resolution

Davis alleges that he received ineffective assistance of trial counsel. He asserts that (1) counsel was ineffective because despite his young age and with mental health issues, counsel allowed him to waive his right to a jury trial; (2) counsel was ineffective for advising Davis to waive his right to testify; and (3) counsel was ineffective because he did not present evidence of Davis' mental condition during the trial and did not have Davis undergo a competency examination before trial.

We determine that an evaluation of defense counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. We do not, and cannot, determine on direct appeal whether Davis received ineffective assistance of counsel because the record lacks sufficient evidence regarding defense counsel's strategy or lack thereof. We conclude that the record on direct appeal is not sufficient to adequately review these claims of ineffective assistance.

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[13] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[14] *Id.*

[15] *Id.*

4. Excessive Sentence

(a) Standard of Review

[6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[16]

(b) Resolution

[7-9] The sentence of life imprisonment imposed on Davis by the district court fell within the statutory sentencing limits for second degree murder. Accordingly, we review the sentence for abuse of discretion.[17] 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.[18] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[19] We have listed factors that control any sentence imposed by the district court:

> In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.[20]

Davis alleges that the district court's sentence of life imprisonment was an abuse of discretion because the district court did not seriously consider all of the relevant mitigating factors.

At the time of the shooting, Davis was 16 years old. He had an unstructured homelife. The State had him removed from

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[16] See, *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[17] *State v. Iromuanya, supra* note 1. See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[18] *State v. Reid, supra* note 16.

[19] *Id.*; *State v. Iromuanya, supra* note 1.

[20] *State v. Timmens, supra* note 16, 263 Neb. at 631, 641 N.W.2d at 390-91. Accord *State v. Iromuanya, supra* note 1.

his biological mother's home at age 5, and he had been in 17 different foster homes. He had been hospitalized five times for various mental illnesses, including bipolar disorder, explosive behavior, mixed personality disorder, active suicidal ideation, and substance abuse and dependency. He also had a history of mental and physical abuse.

Davis did not have any adult convictions before the shooting. But beginning at age 10, Davis had a history of incidents with the police for criminal mischief, disturbing the peace, theft, and assault. Davis also had a history of running away from foster homes and not attending school. In sum, Davis had an extensive history of behavioral problems and a lack of respect for the law.

The court stated that while it was conscious of Davis' history of mental health problems and his unstable home life, it could not overlook the casual disregard Davis had for Campbell's life. The court concluded that the evidence showed Davis shot Campbell without provocation or justification, resulting in the callous murder of Campbell. The court stated that any lesser sentence under these circumstances, even when considering the mitigating factors, would diminish the seriousness of the crime. The court also feared that if Davis were to be eligible for parole, he could be a continued threat to society.

Although Davis' youth and troubled background might merit some sympathy, we cannot ignore his gruesome crime. We conclude that the district court did not abuse its discretion by sentencing Davis to life imprisonment. We affirm Davis' convictions and the sentences imposed.

AFFIRMED.

BRETT M., ALSO KNOWN AS MORGAN V., A MINOR CHILD, EX REL. NEBRASKA CHILDREN'S HOME SOCIETY, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. JASON VESELY AND ANGELA VESELY, HUSBAND AND WIFE, APPELLANTS.

757 N.W.2d 360

Filed November 21, 2008. No. S-08-178.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record.
2. **Habeas Corpus: Minors.** The basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.
3. **Parental Rights: Adoption.** In an agency adoption, under Neb. Rev. Stat. § 43-106.01 (Reissue 2004), the rights of a parent who has relinquished in writing his or her child are terminated when the agency accepts responsibility for the child in writing.
4. **Adoption: Child Custody.** In an agency adoption, if the adoptive parents are unsuitable or decline to go through with an adoption, the agency retains custody over the child.
5. **Adoption: Guardians and Conservators.** Where a licensed child placement agency places a child with prospective adoptive parents for the purpose of adoption, it cannot arbitrarily and unreasonably terminate that placement merely by asserting and proving that it is still the legal guardian. There must be some evidence of reasonable grounds for terminating a placement for adoption by a licensed placement agency.

Appeal from the District Court for Knox County: PATRICK G. ROGERS, Judge. Reversed with directions.

Kathleen Koenig Rockey and Christopher C. Hilkemann, of Copple, Rockey & McKeever, P.C., L.L.O., and Kelly N. Tollefsen for appellants.

Tom D. Hockabout, of Moyer, Egley, Fullner & Montag, for appellee.

Jeffrey M. Doerr, of Law Offices of Jeffrey M. Doerr, P.C., guardian ad litem.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This case involves an appeal from the issuance of a writ of habeas corpus by the district court for Knox County ordering the removal of Brett M., also known as Morgan V. (Morgan), from the home of his prospective adoptive parents, appellants Jason Vesely and Angela Vesely, where he had been placed by appellee, Nebraska Children's Home Society (the agency). We conclude that although legal custody of Morgan remained with the agency, Morgan was not being illegally detained by the Veselys and that it is in the best interests of Morgan to remain with the Veselys. We reverse the issuance of the writ.

STATEMENT OF FACTS

The Veselys were the prospective adoptive parents of Morgan, who was placed in their home by the agency in anticipation of an agency adoption. The record shows that since 2003, the Veselys have lost three children, due to complications as the result of premature births, and have experienced a miscarriage and failed fertility treatments. In 2005, the Veselys contacted the agency to inquire about adoption. After contacting the agency, the Veselys attended the agency's "information sharing meeting," which the agency describes as the first step for any eligible adoptive couple. After this meeting, the Veselys expressed interest in continuing with the process to become adoptive parents.

On February 2 and 3, 2006, the Veselys attended the agency's training class for prospective adoptive parents. During this class, the agency covers issues raised by adoption, infertility, and pursuing fertility treatments. At the training, the agency advises couples that changes in their lives, including pregnancy status, that could impact the placement of a child should be reported.

After completion of the training class, the next step in the adoptive process is a home study. The Veselys' home study was completed on December 29, 2006, by the couple's caseworker, who testified that it was her usual practice to inform parents of the necessity to keep the agency advised of any changes in their circumstances.

Upon completion of a successful home study, prospective adoptive couples are provided with an approval letter informing them that they are being placed on the waiting list for placement of a child. The Veselys received their letter on February 9, 2007. The following July, Angela Vesely became pregnant through the process of in vitro fertilization.

On November 1, 2007, the Veselys were contacted by the agency and informed that the agency had a child waiting in North Platte, Nebraska, to be adopted, and that the birth mother had selected the Veselys' profile for placement of the child. The child, Morgan, was born on October 29, 2007. On November 2, the Veselys drove to North Platte and met with the birth mother. The birth mother's parents were also present. The Veselys stated that at no time during this 2-hour meeting were they asked about their pregnancy status. After meeting with the Veselys, the birth mother signed relinquishment papers irrevocably relinquishing custody of Morgan to the agency. The birth mother indicated her wish to place Morgan with the Veselys. On that same day, the Veselys left the hospital with Morgan and brought him to their home in Verdigre, Nebraska.

On November 7, 2007, the agency executed a "Confirmation of Placement" stating that the child was placed with the Veselys for the purpose of adoption. The confirmation of placement authorized the Veselys to give permission for medical and surgical care needed for Morgan and provided that as of November 2, "the adoptive parents assume full responsibility for this child."

On December 3, 2007, through a Medicaid application for Morgan, the agency became aware that Angela Vesely was pregnant. Upon learning about the pregnancy, a representative of the agency contacted Jason Vesely and inquired about the pregnancy. Jason Vesely informed the agency that because of the problems they had experienced with prior births, the Veselys were waiting to tell Morgan's birth mother about the pregnancy until after Christmas, when, according to Jason Vesely, they would feel more secure that the pregnancy would be successful.

On December 10, 2007, a representative of the agency met with the birth mother and her mother and advised them that Angela Vesely was pregnant. On December 12, representatives of the agency, including the director, met with the Veselys and advised them that the agency intended to revoke the placement. The director instructed the Veselys to return Morgan to the agency on December 14, citing as reasons the Veselys' failure to disclose their pregnancy status, the birth mother's being upset about the pregnancy, and the concern for potential bonding issues. The Veselys protested and informed the staff of the agency that they loved Morgan and would take whatever steps were necessary to keep Morgan in their home. On December 14, the agency formally revoked the confirmation of placement by executing a "Confirmation of Revocation of Placement."

The Veselys did not return Morgan to the agency, and on December 14, 2007, filed in the county court for Knox County a petition for appointment as guardians on behalf of Morgan. On December 30, Angela Vesely gave birth to a son, who was born prematurely at 28 weeks.

On January 28, 2008, the agency filed a petition for a writ of habeas corpus, asking that the district court order the Veselys to return Morgan to the custody of the agency. It is this habeas corpus action which gives rise to the instant appeal. The district court held a hearing on the petition for habeas corpus on February 11. At the hearing, the court heard testimony from Morgan's nurse practitioner, who visited the Veselys and observed them with Morgan on November 13, 2007. She testified that she observed good interaction between the Veselys and Morgan, that Morgan moved his head toward their voices, that there was a good rapport between the Veselys and Morgan, and that Morgan was cooing at the Veselys. She further opined that the Veselys and Morgan were beginning the bonding process. Morgan's physician testified that there was a good rapport between Jason Vesely and Morgan. The physician also testified that bonding between the child and parents could occur very quickly. There was also testimony at the hearing indicating that the Veselys had support from extended family, many of whom were available to help care for Morgan.

The court also heard testimony from the parties with respect to what information the Veselys received regarding the advisability of informing the agency of their pregnancy status. The agency also introduced into evidence the birth mother's placement profile, which indicated that she wanted her son placed in a home with a stay-at-home mother and wanted him to be an only child.

On February 15, 2008, the district court entered an order concluding that the agency had legal custody of Morgan; that the agency revocation of placement was valid; and that it was in the child's best interests that his care, custody, and control be returned to the agency. The court found that the Veselys had provided Morgan with all the necessary care, support, and love and that based on the testimony of the medical professionals, Morgan had thrived. Nevertheless, the court concluded that other factors supported a decision to return the child to the agency. These factors included the court's determination that the Veselys should have reported their pregnancy status to the agency; the court's determination that the birth mother selected the Veselys based on a profile that Morgan would have an at-home mother and would be an only child, and that therefore, Angela Vesely's pregnancy changed the "spirit" of the adoption; and the court's concern that there was likely to be prolonged litigation in this case. This order is the subject of this appeal.

After this ruling, the parties seem to agree that Morgan was returned to the agency and placed with his maternal grandparents. The record does not contain detailed information concerning the maternal grandparents' home environment. The district court's order states that there is nothing in the record to indicate that the placement with the maternal grandparents would not be in the best interests of Morgan or in his welfare or that the prospective placement would not provide Morgan with care and love. The district court issued a writ of habeas corpus directing the Veselys to deliver Morgan to the agency. The Veselys appeal.

ASSIGNMENTS OF ERROR

The Veselys claim that the district court erred (1) by finding that Morgan was illegally detained by the Veselys and

(2) by determining that it was in Morgan's best interests to be returned to the agency.

STANDARD OF REVIEW

[1] A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998).

ANALYSIS

[2] In this case, we are concerned with a habeas corpus action involving the custody of a child in the context of an agency adoption. Therefore, our consideration of this appeal is made by reference to the jurisprudence surrounding habeas corpus actions involving detention of a child and the law regarding agency adoptions. With respect to the latter, we note that the Legislature, as well as this court, has long recognized a distinction between agency adoptions and private adoptions. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991). With respect to habeas corpus, we have said that ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child. *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964).

Although the Agency Retained Legal Custody of Morgan, the Veselys Did Not Illegally Detain Him.

[3-5] The Veselys appeal from the district court's issuance of a writ of habeas corpus ordering the removal of the minor child, Morgan, from their home. In determining the validity of the issuance of the writ of habeas corpus, we must first determine which party had legal custody of Morgan and, thereafter, determine whether Morgan was being illegally detained by another party. Because this case involves a child placement agency, we are guided initially by statute. In an agency adoption, under Neb. Rev. Stat. § 43-106.01 (Reissue 2004), the rights of a parent who has relinquished in writing his or her child are terminated when the agency accepts responsibility for the child in writing. It is the agency that finds and investigates

the prospective parents. *Gomez v. Savage, supra*. We have stated that "[i]f the adoptive parents are unsuitable or decline to go through with the adoption, the agency retains custody over the child . . . ." *Id*. at 846, 580 N.W.2d at 531. It has also been observed that

> [w]here a licensed child placement agency places a child with prospective adoptive parents for the purpose of adoption, it cannot arbitrarily and unreasonably terminate that placement merely by asserting and proving that it is still the legal guardian. . . . [T]here must be also some evidence of reasonable grounds for terminating a placement for adoption by a licensed placement agency in this state.

Nebraska Children's Home Soc. v. Collins, 195 Neb. 531, 538-39, 239 N.W.2d 258, 262 (1976) (McCown, J., concurring).

In this case, the evidence shows that the agency retained legal custody of Morgan. Pursuant to § 43-106.01, the birth mother relinquished her parental rights to the agency in writing and the agency accepted responsibility for Morgan in writing. Neb. Rev. Stat. § 43-109(1)(a) (Reissue 2004) requires that a child reside with the prospective adoptive parents for a minimum of 6 months before the prospective adoptive parents can become eligible to adopt the child. Because Morgan had not resided with the Veselys for 6 months when the agency sought to revoke the placement and filed this habeas corpus action, no formal adoption proceedings had yet been undertaken.

The Veselys assert that they retained "legal" custody of Morgan because the agency arbitrarily revoked the placement of Morgan. While we agree with the assertion that an agency must have a proper basis for revoking a prospective adoptive placement, we do not agree with the Veselys that an improper revocation controls the issue of the legal custody of Morgan.

The district court correctly concluded that the agency retained legal custody of Morgan. This is so because the birth mother had relinquished her parental rights in writing, the agency accepted responsibility for the child in writing, and formal adoption proceedings had not been completed. However, the district court also found that by virtue of the revocation, the

Veselys' rights to physical custody for placement purposes had been properly terminated by the agency and that the Veselys were therefore illegally detaining Morgan. We disagree with this determination.

In reaching our conclusion, we have considered but rejected the agency's argument that because of its status as legal custodian and the Veselys' failure to report their pregnancy status, revocation of the placement was justified. An adoption agency cannot arbitrarily or unreasonably terminate a placement merely by asserting that it is still the legal guardian of the child. *Nebraska Children's Home v. Collins, supra*. As the Veselys point out, the parties entered into an agreement titled "Client Rights and Responsibilities," and nowhere in this agreement does it state that the Veselys were required to inform the agency of their pregnancy status. The parties did not enter into any written agreement specifically stating that the Veselys would forfeit their rights to adopt Morgan if Angela Vesely became pregnant or if she were pregnant at the time Morgan was placed with them. Absent any such written agreement or policy, we do not believe that the Veselys' failure to disclose their pregnancy status was a reasonable ground to terminate the placement for adoption with the Veselys. Contrary to the district court's determination, the Veselys were not illegally detaining Morgan.

It Was in the Best Interests of Morgan to Remain With the Veselys.

To determine the best interests of Morgan, we next review the record as of the time the district court ruled. When determining the best interests of a child, we review the record before the district court de novo. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). As we have noted above, in the case of a writ served out for the detention of a child, the law is concerned not so much with the illegality of the detention as about the welfare of the child. *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964).

The Veselys argue that the district court erred in its best interests analysis when it determined that although Morgan was thriving in the care of the Veselys, the revocation of the

placement and his removal was nevertheless warranted based on considerations such as the "spirit" of the adoption, the wishes of the biological mother, the possibility of future litigation, and the effect of the Veselys' minor child on Morgan's welfare. The Veselys generally argue that it was in Morgan's best interests to remain with them. The Veselys specifically contend that by applying the best interests criteria set forth in Nebraska custody cases involving divorcing parents, it was not in Morgan's best interests to be returned to the agency. See, e.g., *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991) (reciting best interests factors used in dissolution cases).

Although relevant, we are not persuaded that the best interests factors examined in custody cases between divorcing parents are the most appropriate criteria to a determination of best interests in the current context. Rather, in determining whether the best interests of the child are served by continued placement with prospective adoptive parents, we believe it is appropriate to consider factors that have been used in similar placement cases elsewhere. These factors include, but are not limited to, the prospective adoptive parents' ability to provide for the child's emotional and intellectual development, the quality of the prospective adoptive parents' home environment, the length of placement of the child, and the financial ability of the prospective adoptive parents to provide for the child. See, e.g., *In re Summer A.*, 49 A.D.3d 722, 854 N.Y.S.2d 195 (2008); *In re Baby Boy M.*, 269 A.D.2d 450, 703 N.Y.S.2d 221 (2000). Indeed, these factors are consistent with considerations we have applied in juvenile cases where we have reviewed whether removal of the child or termination of parental rights is in the child's best interests. In those cases, we have considered whether a parent has the insight and motivation to protect his or her child, the length of time the child has remained away from the parent, and the parent's capacity and desire to be an active parent. See, e.g., *In re DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992). We logically apply these considerations

to the Veselys as prospective adoptive parents in this habeas corpus proceeding.

With respect to the factors set forth above, we note that the agency did not argue in the district court, or on appeal, that the Veselys were unsuited to serve as parents. Importantly, on the record presented, the district court effectively found the Veselys to be suitable. In its order, the district court stated:

> This court specifically finds that since the date Morgan was placed with [the Veselys] on November 2, 2007, they have provided all of the necessary care, support and love for [Morgan] in their home which is appropriate for that purpose. The [Veselys'] immediate family has shared in said efforts and ha[s] also provided nurturing to Morgan. In response to these efforts, it is undisputed, and the court so finds, that Morgan has thrived as demonstrated by the testimony of the medical professionals, as well as other family members. The court further finds that the [Veselys] truly love Morgan and have every intention to provide for all of his needs in the future.

Our de novo review of the record shows that the district court's findings are well supported. There was testimony at the hearing by Morgan's nurse practitioner that she observed good interaction and a good rapport between the Veselys and Morgan and that the Veselys and Morgan were in the beginning stages of bonding. Morgan's physician also testified that there was good rapport between Morgan and Jason Vesely. There was evidence that the Veselys had support from their extended family. There was no evidence at the hearing to suggest that Morgan's needs were not being met by the Veselys, that the home environment was unsuitable, or that the Veselys could not financially take care of Morgan.

Based on our de novo review of the record made before the district court, and applying the considerations discussed above, we determine that it was in the best interests of Morgan to remain with the Veselys, that the district court's ruling to the contrary at the time it was made was erroneous, and that its order issuing the writ must be reversed.

CONCLUSION

Our de novo review of the record made at the district court establishes that Morgan was not being illegally detained by the Veselys and that it is in the best interests of the minor child, Morgan, to remain in the care of the Veselys. Accordingly, we reverse the order of the district court which issued the writ of habeas corpus and we hereby order that Morgan be returned to the Veselys, pending the initiation and resolution of adoption proceedings.

REVERSED WITH DIRECTIONS.

IN RE APPLICATION OF DAVID V. HARTMANN FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

757 N.W.2d 355

Filed November 21, 2008. No. S-34-070006.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. § 3-115, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. ____: ____. The Nebraska Supreme Court has delegated administrative responsibility for bar admissions solely to the Nebraska State Bar Commission.
4. **Attorneys at Law: Proof.** The applicant for admission to the Nebraska State Bar bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application.
5. **Attorneys at Law.** Where the record of an applicant for admission to the Nebraska State Bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.
6. ____. When evidence exists to indicate that an applicant has engaged in conduct demonstrating a lack of character and fitness in the past, the Nebraska State Bar Commission must determine whether present character and fitness qualify the applicant for admission.

Original action. Application granted.

Sean J. Brennan for applicant.

Brad Roth and Chris F. Blomenberg, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for Nebraska State Bar Commission.

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

PER CURIAM.

INTRODUCTION

David V. Hartmann appeals the decision of the Nebraska State Bar Commission (Commission) denying his application to sit for the July 2007 Nebraska bar examination. Hartmann previously applied to sit for the July 2004 examination. That application was denied, and this court addressed Hartmann's appeal of that decision in 2005.[1] In that case, as well as in this one, the Commission determined that Hartmann did not have the requisite fitness and character to be admitted to the bar. Hartmann claims that he has presented sufficient evidence on this occasion to demonstrate that he has the necessary character and fitness. We agree with Hartmann and grant his application to sit for the bar examination.

BACKGROUND

Hartmann originally applied to sit for the bar examination in 2002. In his application, Hartmann disclosed his complete criminal history, including a 2002 charge of third degree sexual assault. The sexual assault charge was based on allegations made by his then 15-year-old niece. The Commission allowed Hartmann to sit for the July 2002 bar examination, but withheld approval of Hartmann's application on character and fitness grounds until further investigation could be completed. Hartmann then failed the 2002 bar examination and reapplied to sit for the 2004 examination. The Commission denied Hartmann's application based on a lack of character and fitness, focusing specifically on the allegations made by his niece. This court accepted the Commission's recommendation and denied Hartmann's application based on a

[1] *In re Application of Hartmann*, 270 Neb. 628, 705 N.W.2d 443 (2005).

number of factors,[2] including Hartmann's relatively recent inappropriate behavior with his niece. We also considered an incident in which Hartmann wrote an inappropriate letter to a 14-year-old female student whom he had taught a number of years before, and Hartmann's two arrests for driving under the influence of alcohol, which led to two convictions for reckless driving.

This court cited the testimony of Dr. Robert D. Larson, a psychologist whom Hartmann had seen for a total of eight sessions at the time of the first hearing. Dr. Larson testified that he had concerns regarding Hartmann's ability to handle stress in an appropriate manner. Dr. Larson also testified that he could not state with a reasonable degree of certainty that Hartmann's problems had been resolved. Further, the seriousness and recency of the behavior cast doubt on Hartmann's ability to conduct himself appropriately and there was "insufficient evidence of rehabilitation to safely predict that the pattern of behavior [would] not recur."[3] For those reasons, we determined the record did not sufficiently demonstrate that Hartmann's psychological issues were resolved, or if such resolution was even possible.[4]

Hartmann then applied to sit for the July 2007 bar examination. The Commission once again denied his application, and Hartmann appealed. At a hearing held on October 17, 2007, Dr. Larson testified that he had revised Hartmann's diagnosis from adjustment disorder with depressed mood, major depressive disorder, and personality disorder not otherwise specified to major depressive disorder. Dr. Larson stated that he and Hartmann had addressed Hartmann's use of inappropriate coping mechanisms and had worked on finding other ways to combat stress. Dr. Larson also testified that Hartmann had successfully completed counseling and that in Dr. Larson's opinion, to a reasonable degree of psychological certainty, Hartmann would not present a risk to future clients.

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[2] *Id.*

[3] *Id.* at 640, 705 N.W.2d at 451.

[4] *Id.*

Hartmann also testified. In his testimony, Hartmann indicated that he was currently in a long-term relationship with an adult female. He stated that he was sober and would not drink alcohol again, that touching his niece's leg was inappropriate, and that he felt a great deal of remorse for those actions. Hartmann also denied that he had sexually assaulted his niece at any point in the past and stated that he felt it was "very sad that some sort of campaign . . . was launched against [him]." Hartmann produced a number of letters written by friends, family members, and coworkers in support of his admission to the bar. After the hearing on Hartmann's appeal, the Commission decided to deny Hartmann's application.

ASSIGNMENT OF ERROR

Hartmann assigns that the Commission erred when it determined that he had not met his burden in showing that he has the requisite character and fitness to be admitted to the bar.

STANDARD OF REVIEW

[1] Under Neb. Ct. R. § 3-115, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission.[5]

ANALYSIS

[2,3] This 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] Neb. Rev. Stat. § 7-102(1) (Reissue 2007) provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." This court has delegated administrative responsibility for bar admissions solely to the Commission.[7]

Neb. Ct. R. § 3-103, which governs the admission of attorneys, describes the applicable standards for character and fitness of attorneys as follows:

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[5] *In re Application of Antonini*, 272 Neb. 985, 726 N.W.2d 151 (2007).

[6] *In re Application of Hartmann, supra* note 1.

[7] See *id.*

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. . . . [T]he essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (A) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> (B) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;
>
> (C) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> . . . .
>
> (F) The ability to exercise good judgment in conducting one's professional business;
>
> (G) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
>
> . . . .
>
> (J) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

[4-6] The applicant for admission bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application.[8] Where the record of an applicant for admission to the bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.[9] When evidence exists to indicate that an applicant has engaged in conduct demonstrating a lack of character and fitness in the past, the

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[8] *Id.*; *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003).

[9] See *In re Application of Roseberry*, 270 Neb. 508, 704 N.W.2d 229 (2005).

Commission must determine whether present character and fitness qualify the applicant for admission.[10]

Although the Commission has good reason to be reluctant to grant Hartmann's application, the record before us indicates that Hartmann complied with the conditions set forth in our prior opinion. As noted, we denied Hartmann's application for admission to the bar based on his history of alcohol abuse and inappropriate conduct with underage girls, including his niece.[11] There was also a lack of evidence of rehabilitation in the record at the time.[12] We cited the fact that Hartmann was still undergoing treatment and stated that the record did "not afford a sufficient basis for predicting when, if, or how" resolution of his psychological condition would occur.[13] Our previous opinion suggested that Hartmann would be eligible to sit for the bar examination if he could sufficiently demonstrate that he had resolved his psychological condition.

The record shows that since our denial of Hartmann's previous application, he completed counseling and is taking antidepressant medication. Testimony from Dr. Larson indicated that Hartmann was unlikely to repeat his inappropriate behavior. Hartmann has expressed remorse for the behavior that led to the criminal charges, although he also expressed resentment against his niece and her immediate family for what he insists are false allegations of other conduct which have never resulted in criminal prosecution. Hartmann presented a substantial number of letters in support of his application from those who know him through his employment in the military, in his construction job, and through his volunteer work.

Hartmann presented community involvement affidavits regarding cleanup efforts following a tornado which struck Hallam, Nebraska, Meals on Wheels, and the National Audubon Society. He reenlisted in the Nebraska Army National Guard after he had reached the 20-year retirement mark, and he

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[10] See *In re Application of Hartmann, supra* note 1.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 640, 705 N.W.2d at 451.

also served in Iraq in 2003. According to letters sent to the Commission by members of Hartmann's military unit, Hartmann is highly regarded by those with whom he has served.

To the extent the previous denial of Hartmann's application was based on a lack of rehabilitation, we conclude that Hartmann has overcome that obstacle. As noted, according to Dr. Larson, Hartmann has successfully completed counseling and is continuing on antidepressant medication for his psychological condition. Although the Commission's reluctance to grant Hartmann's application to sit for the bar is understandable, the record appears to demonstrate that Hartmann has fulfilled the conditions set forth in our prior opinion. When asked if he perceived Hartmann "to represent a risk of engaging in a pattern of . . . inappropriate behavior in the future," Dr. Larson responded that he did "not see that as likely."

Hartmann's rehabilitation, combined with the cited evidence demonstrating character and fitness, is persuasive, and nothing in the record appears to contradict the evidence Hartmann presented. We accordingly grant Hartmann's application to sit for the Nebraska bar examination.

CONCLUSION

Because Hartmann presented sufficient evidence that he has resolved his psychological condition and has been rehabilitated as required by our earlier opinion, and because no evidence to the contrary can be found in the record, we now grant Hartmann's application to sit for the Nebraska bar examination.

APPLICATION GRANTED.

MILLER-LERMAN, J., participating on briefs.

ORD, INC., ET AL., APPELLEES, V. AMFIRST BANK AND VAN KORELL, APPELLANTS.

758 N.W.2d 29

Filed December 5, 2008. No. S-06-1363.

1. **Actions: Rescission: Equity: Appeal and Error.** An action for rescission sounds in equity, and it is subject to de novo review upon appeal.

2. **Contracts: Parties.** Nebraska law provides that all parties to an instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the District Court for Red Willow County, DONALD E. ROWLANDS, Judge. Judgment of Court of Appeals affirmed.

Andre R. Barry, James M. Bausch, and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Mark J. Appleton, of Robinson, Waters & O'Dorisio, P.C., and Ronald D. Mousel, of Mousel & Garner, for appellees.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellees Ord, Inc., with Kevin Ord as owner, and D&J Trust, with Dan Liebig as trustee, purchased notes issued by DFS Credit Corporation (DFS) from Aragon Financial Services (Aragon) through its registered representative Kent Carter. Carter's company was called AmFirst Investment Services. Carter was associated with appellants, AmFirst Bank and its president, Van Korell. DFS defaulted on those notes, and appellees filed suit in the district court for Red Willow County.

This case was previously appealed to the Nebraska Court of Appeals, which in part reversed, and remanded for trial. *Ord v. AmFirst Invest. Servs.*, 14 Neb. App. 97, 704 N.W.2d 796 (2005) (*Ord I*). Upon remand, a jury found in favor of appellees and against appellants. The district court subsequently ruled that certain assignment and hold harmless agreements signed by appellees were null and void and, therefore, did not serve as an impediment to the entry of a monetary judgment in favor of appellees. Appellants appealed to the Court of Appeals. In a memorandum opinion, the Court of Appeals affirmed the district court's judgment. *Ord, Inc. v. AmFirst*

Bank, No. A-06-1363, 2008 WL 1746999 (Neb. App. Apr. 8, 2008) (selected for posting to court Web site). We granted appellants' petition for further review. We affirm.

STATEMENT OF FACTS

In 1992, Korell, as president of AmFirst Bank, met with a registered representative of Aragon to discuss entering into an arrangement in which an Aragon representative would sell securities to AmFirst Bank's retail customers. Korell brought Carter to the meeting. After the meeting, Carter took and passed his "Series 7" securities examination and became a registered representative of Aragon. AmFirst Bank, Carter, and Aragon entered into an arrangement whereby Carter would lease space at AmFirst Bank and sell securities from Carter's company, AmFirst Investment Services.

In 1997, Ord was the president and owner of Ord, Inc. At that time, Ord, Inc., had $160,000 from the sale of a restaurant. At trial, Ord testified that he had a discussion with Korell about investing these proceeds and that Korell advised him to go to AmFirst Bank and talk with Carter. Ord testified that when he met with Carter, Carter told Ord about DFS notes and described them as a sound investment. DFS notes appeared on Aragon's approved products list. Ord ultimately purchased $160,000 in DFS notes.

Liebig was an AmFirst Bank customer who was referred to Carter for the purpose of purchasing investments. Liebig purchased DFS notes from Carter. Prior to the purchase of DFS notes, Liebig and Carter had two conversations discussing potential investments. Liebig informed Carter that he was hoping for a safe investment for his retirement, and Carter told Liebig that he believed DFS notes would be such an investment. Acting on this information, Liebig purchased $62,000 worth of DFS notes on June 9, 1997. Liebig subsequently invested more of his retirement funds in DFS notes, ultimately totaling $250,000.

Carter filled out documents for both appellees indicating that the clients' investment objectives were "[c]onservation of capital with stable income." However, without the knowledge of either Ord or Liebig, Carter also completed portions of the

documents as to the income and net worth of Ord, Inc., and D&J Trust in which Carter inflated the economic profile of appellees, making them appear eligible to invest in the unregistered DFS securities.

In July 2000, investors in the DFS notes received notice that the DFS trusts that issued the notes were in default on their obligations to pay interest. On November 15, appellees met separately with representatives of Aragon, including Carter and John Connealy, in the AmFirst Bank boardroom. During the meetings, Carter and Connealy asked appellees to each sign a document entitled "Assignment and Hold Harmless Agreement." The agreements assigned all of appellees' claims associated with the DFS notes to Aragon and in separate provisions released and held harmless several individuals and entities including Aragon, AmFirst Bank, and Korell from liability related to the sale of the DFS notes. Appellees testified that representations were made to them that the best chance for success in recovering their money was to sign the assignment and hold harmless agreements. Appellees testified that they were not informed at these meetings that DFS had been a high-risk investment and that Carter had completed documents to make appellees appear eligible to make these investments, which could only be sold to "accredited investors," including individuals or entities with high income and high net worth. Appellees each signed the agreements.

On June 8, 2001, appellees filed their lawsuit in the district court for Red Willow County against AmFirst Investment Services; AmFirst Bank; Korell; Carter; Aragon; DynaCorp Financial Strategies; DFS Credit Corporation; DFS Secured Healthcare Receivables Trusts II and IV; Robert Vener; Bank of New York Western Trust Company; Chiao, Smith & Associates; and Buchanan, Anderson and Pratt. In their complaint, appellees asserted several claims for relief against AmFirst Bank, Carter, and Aragon, including the following: violation of the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1101 et seq. (Reissue 1997 & Cum Supp. 2000); common-law negligence, by misrepresentation; common-law fraud, by omission; breach of contract; violation of broker-dealer registration provisions under § 8-1103 and 15 U.S.C. § 78*o* (2000); violation of

investment adviser registration provisions under § 8-1103 and 15 U.S.C. § 80b-3 (2000); violation of securities registration provisions under § 8-1104 and 15 U.S.C. § 77e (2000); violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999); common-law agency; and controlling person liability provisions under §§ 8-1102 and 8-1118(3) and 15 U.S.C. §§ 77*o* and 78t(a) (2000). On October 9, 2001, appellees filed an amended complaint, which contained essentially the same allegations. The amended complaint was served upon the same defendants, including Aragon.

On October 26, 2001, Aragon filed an answer to appellees' amended complaint. In its answer, Aragon alleged, inter alia, that appellees were prohibited from bringing the lawsuit by virtue of the assignment and hold harmless agreements that appellees had entered into with Aragon. The assignment and hold harmless agreements were attached to Aragon's answer. The lawsuit proceeded for some time with Aragon's active participation, in which Aragon, inter alia, continued to allege that appellees had assigned away their rights to file suit on claims associated with their DFS investments and that appellees had agreed to hold harmless various parties now being sued.

On February 7, 2003, Aragon's attorney of record filed a motion to withdraw from representing Aragon. The motion was granted. The parties agree that Aragon stopped actively engaging in the litigation some time in 2003. On July 24, 2003, AmFirst Bank, Korell, and Carter filed a motion for summary judgment. On January 5, 2004, the district court granted the motion, stating that the assignment and hold harmless agreements were valid contracts and that such agreements showed that appellees were no longer the real parties in interest, having assigned their interests to Aragon. The district court further found that by signing the agreements, appellees released AmFirst Bank and Korell from any liability.

Subsequently, the district court dismissed Carter from the action because the U.S. Bankruptcy Court for the District of Nebraska had entered a discharge against Carter. Furthermore, on March 5, 2004, the district court entered default judgment against Aragon and in favor of Ord for $160,413.86 plus

interest at 3.016 percent per annum, and in favor of Liebig for $280,213.04 plus interest at the same rate, based on Aragon's failure to respond to discovery requests. A separate judgment was entered against Aragon on March 10, stating that "ON March 5, 2004, JUDGMENT WAS RENDERED FOR PLAINTIFFS [appellees] AGAINST ARAGON FINANCIAL SERVICES."

In *Ord I*, Ord and Liebig appealed, inter alia, the district court's grant of summary judgment in favor of AmFirst Bank, Korell, and Carter. On October 11, 2005, the Nebraska Court of Appeals concluded that genuine issues of material fact existed as to whether Ord and Liebig were fraudulently induced to enter into the assignment and hold harmless agreements and in part reversed the judgment and remanded the cause for trial. *Ord v. AmFirst Invest. Servs.*, 14 Neb. App. 97, 704 N.W.2d 796 (2005).

After the remand, on June 1, 2006, the district court granted appellees' motion to file a third amended complaint to add a separate cause of action for rescission of the assignment and hold harmless agreements. The third amended complaint did not name Aragon, nor was Aragon served. At the trial of this case, the district court declined to rule on the cause of action for rescission until after the jury had rendered its verdict on the claims in the earlier complaints seeking damages for investment-related causes of action. The outcome of this jury trial and subsequent bench trial on the rescission cause of action gives rise to this appeal.

A jury trial on appellees' third amended complaint began on August 15, 2006. At the conclusion of the trial, the jury returned a verdict finding that Carter was an agent of both AmFirst Bank and Aragon and that Carter acted within the scope of his authority as AmFirst Bank's agent when he sold DFS notes to appellees. The jury found against appellants and for appellees on their claims of negligent misrepresentation, fraudulent misrepresentation, and breach of fiduciary duty and found that appellants knew, or in the exercise of reasonable care should have known, of Carter's claimed misconduct. The jury returned a verdict of $110,768.78 in favor of Ord and $204,124.25 in favor of Liebig.

After the jury returned its verdict, the district court considered the rescission cause of action. The court concluded that appellees had clearly and convincingly established that Carter was guilty of both fraudulent concealment and fraudulent misrepresentation when he sold the notes to appellees and that before signing the assignment and hold harmless agreements, appellees justifiably relied on Carter, who did not tell them that the notes were high-risk investments. On October 30, 2006, the court entered an order rescinding the assignment and hold harmless agreements signed by appellees. In this same order, the district court denied appellants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The district court reduced appellees' judgment against appellants in response to a remittitur filed by appellants and entered monetary judgment in favor of appellees and against appellants.

In this current appeal, AmFirst Bank and Korell appealed to the Nebraska Court of Appeals, asserting that the district court erred (1) by submitting appellees' claims to the jury, because they had assigned those claims to Aragon; (2) by entering an order rescinding the assignment and hold harmless agreements signed by appellees; (3) by denying appellants' motions for directed verdict and judgment notwithstanding the verdict, because there was no evidence that Carter acted as the agent of AmFirst Bank; and (4) by failing to give appellants' requested jury instructions on agency. In a memorandum opinion filed April 8, 2008, the Court of Appeals affirmed the judgment of the district court. *Ord, Inc. v. AmFirst Bank*, No. A-06-1363, 2008 WL 1746999 (Neb. App. Apr. 8, 2008) (selected for posting to court Web site). Appellants petitioned this court for further review, which we granted.

ASSIGNMENTS OF ERROR

In their petition for further review, appellants, AmFirst Bank and Korell, assert that the Nebraska Court of Appeals erred (1) by applying the doctrine of collateral estoppel based on the prior appeal; (2) by disregarding the requirement that all parties to an instrument sought to be canceled be named and served as necessary parties to the suit for rescission; (3) by

failing to give appropriate weight to the written agreement between AmFirst Bank and its lessee, Carter, and concluding that there was substantial evidence to support the jury's verdict that Carter was an agent of AmFirst Bank; and (4) by concluding that their proposed jury instructions on the subject of agency "'would only serve to mislead and confuse the jury on the law of agency,'" because they used the term "'employee'" rather than "'agent.'"

We granted the petition for further review because we deemed appellants' assignment of error claiming that the Court of Appeals erred by disregarding the requirement that all parties to an instrument sought to be canceled are necessary parties to the suit for cancellation merited discussion. Because we conclude that the Court of Appeals properly resolved the remainder of appellants' assigned errors, we decline to address those claims.

STANDARD OF REVIEW

[1] An action for rescission sounds in equity, and it is subject to de novo review upon appeal. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

ANALYSIS

In their petition for further review, appellants, AmFirst Bank and Korell, assert that although the Court of Appeals correctly quoted Nebraska law to the effect that "[a]ll parties to an instrument to be canceled are necessary parties to the suit for cancellation," see *Ord, Inc. v. AmFirst Bank*, No. A-06-1363, 2008 WL 1746999 at *5, the Court of Appeals ignored this rule when it affirmed the district court's decision to rescind the assignment and hold harmless agreements at a point in the litigation at which judgment against Aragon had already been entered. Appellees, Ord and Liebig, argue that Aragon was not required to be in the action at the time the district court ordered the contract rescinded, because Aragon had gone out of business and was insolvent. We do not adopt the reasoning of the parties, but, nevertheless, for the reasons stated below, affirm.

[2] An action for rescission sounds in equity, and it is subject to de novo review upon appeal. *Schuelke v. Wilson, supra*.

As appellants correctly note, Nebraska law provides that all parties to an instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants. See, *Rumbel v. Ress*, 166 Neb. 839, 91 N.W.2d 36 (1958); *Shaul v. Brenner*, 10 Neb. App. 732, 637 N.W.2d 362 (2001). In applying this principle in *Rumbel*, we cited a supplemental opinion in *Cunningham v. Brewer*, 144 Neb. 211, 219, 16 N.W.2d 533, 534-35 (1944), which explained that "all persons whose rights, interests or relations with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard in their own behalf." It has been observed that where the rights derived from a contract are at issue, "a contracting party is the paradigm of an indispensable party." *Travelers Indem. Co. v. Household Intern., Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). Although the Court of Appeals did not directly rule that the rescission claim could go forward without Aragon, its opinion implies that Aragon's absence was not an impediment to the rescission case, thus implicitly rejecting appellants' claim of necessary party. See, e.g., *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

As noted, appellees filed their third amended complaint containing the cause of action for rescission after judgment had been entered against Aragon, and Aragon was not named in or served with a copy of the third amended complaint. In this appeal, we are asked to determine whether the district court's order of rescission of the assignment and hold harmless agreements to which Aragon was a party was proper where Aragon was not named or served with the rescission cause of action but had previously participated in the case. Under the unique facts and unusual procedural history of this case, including Aragon's initial participation in the litigation during which it attempted to assert the protections of the hold harmless provisions of the agreements, we conclude that the district court did not err in granting rescission, and the Court of Appeals did not err in affirming the district court's order.

In considering appellants' rescission-related argument, it is first necessary for us to examine what rights were in fact transferred to Aragon upon entering into the assignment and hold harmless agreements, and whether Aragon had an opportunity to be heard on its own behalf with respect to the rescission of those rights. See *Cunningham v. Brewer, supra*.

The agreement states in relevant part:

> 1. Assignment. Investor hereby assigns and conveys to Aragon all of its rights and interests in and to any and all claims or causes of action or other rights of recovery associated with its investment in the Securities ("Claims"). . . .
>
> . . . .
>
> 3. Release and Hold Harmless. Investor hereby agrees, on behalf of itself and all who may claim through it, to release and hold the Released Parties (as hereinafter defined) harmless from and against all claims, causes of action, debts, liabilities, obligations or expenses, of any nature, that arise out of or in any way relate to the offer and/or sale of the Securities . . . . For purposes of this Agreement, "Released Parties" means and includes Aragon . . . and every bank or other financial institution with which Aragon contracted, or which participated or acted together with Aragon, in any capacity, in connection with the offer and/or sale of the Securities.

This contract has two elements: First, it assigns all of appellees' rights and interests in claims associated with the DFS notes to Aragon, and second, it holds harmless, among others, Aragon and appellants in relation to the sale of the DFS securities. An examination of these agreements shows that with respect to the assignment portion, appellees in effect assigned to Aragon their rights to sue numerous entities, including Aragon itself. In its initial participation in this litigation, Aragon could have—but did not—take steps to sue the various entities involved in this dispute. Aragon had an opportunity to exercise its right to assert claims against others and chose to forgo this right. As to Aragon's right to sue itself, we believe that this portion of the assignment was essentially meaningless. Thus, the failure, if any, of appellees to notify Aragon of their

attempt to rescind the assignment portion of the agreements is of no consequence.

With respect to the hold harmless portion of the agreements, appellees agreed to hold Aragon and others harmless. In order for the court to properly rescind this portion of the agreements, it was necessary that Aragon be made aware of appellees' effort to ignore the hold harmless provisions by seeking judgment against Aragon for its alleged wrongdoing and that Aragon have an opportunity at some point in the lawsuit to enforce the agreements and to assert its claimed right to be held harmless. Therefore, the issue before us is whether Aragon had an opportunity in this lawsuit to be heard on its own behalf with respect to appellees' effort to rescind the hold harmless portion of the agreements and seek judgment against it and the other various people and entities encompassed by the agreements.

A review of the record shows that in 2001, Aragon had the requisite opportunity and placed its claim to be held harmless and its objection to rescission squarely at issue in this lawsuit. It is clear that appellees' effort to avoid the hold harmless provisions as to Aragon by filing suit against Aragon and others was apparent to Aragon, and the record shows that as early as 2001, Aragon had an opportunity to and in fact did challenge what was effectively appellees' effort to rescind the hold harmless provisions. Specifically, on October 26, 2001, Aragon answered appellees' amended complaint and alleged an affirmative defense based on the assignment and hold harmless agreements**.** In its answer, Aragon objected to appellees' suit and alleged that it should be held harmless under the agreements at issue. The agreements were attached to Aragon's answer. Although Aragon was served with numerous pleadings in this case, Aragon stopped actively participating in the litigation in 2003. A judgment was entered against Aragon on March 10, 2004, and Aragon did not seek to have this judgment set aside.

Based on this record, Aragon was fully on notice that appellees did not deem the agreements to be valid, was afforded an opportunity to be heard, and did in fact invoke the hold harmless protections of the agreements in this lawsuit. Instead of pursuing its right to be held harmless as set forth in the

agreements, Aragon abandoned the issue by failing to participate in the litigation, which ultimately resulted in a judgment against it. In sum, although not named and served with the third amended complaint, Aragon was in fact on notice as a party in this lawsuit that appellees believed the agreements to be invalid. Under the unique facts of this case, Aragon had an opportunity to, and did in fact, oppose appellees' efforts at rescission and we, therefore, find no fault in the Court of Appeals' claimed failure to discuss the issue of whether Aragon was a necessary party to the district court's consideration of appellees' rescission claim.

CONCLUSION

Because we conclude that Aragon had an opportunity to be heard on its own behalf with respect to its rights under the assignment and hold harmless agreements in this lawsuit, we conclude that the Court of Appeals did not err in upholding the district court's decision rescinding the agreements. We conclude that the Court of Appeals did not err in any respect challenged on further review and, therefore, affirm.

AFFIRMED.

WRIGHT, J., not participating.

SKYLINE WOODS HOMEOWNERS ASSOCIATION, INC., ET AL., APPELLEES AND CROSS-APPELLANTS, V. DAVID A. BROEKEMEIER, AN INDIVIDUAL, ET AL., APPELLANTS AND CROSS-APPELLEES.

PAISLEY, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE AND CROSS-APPELLANT, V. LIBERTY BUILDING CORPORATION, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

758 N.W.2d 376

Filed December 5, 2008. Nos. S-07-952, S-07-953.

1. **Equity: Appeal and Error.** A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact

that the trial court observed the witnesses and accepted one version of the facts over another.

2. **Restrictive Covenants: Deeds.** It is possible for a restrictive covenant to arise by implication from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans.
3. **Restrictive Covenants: Property.** In order for implied restrictive covenants to exist, there must be a common grantor of land who has a common plan of development for the land.
4. **Restrictive Covenants: Property: Equity.** If there is a common plan of development that places restrictions on property use, then such restrictions may be enforced in equity.
5. **Restrictive Covenants: Property: Notice.** To enforce an implied restrictive covenant against a subsequent owner of land, the subsequent purchaser must have actual or constructive knowledge of the implied restrictive covenant.
6. **Restrictive Covenants.** Because implied restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.
7. **Property: Easements: Sales: Records.** When a map or plat showing a park or other like open area is used to sell property, the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated. This is a private right, and it is not dependent on a proper making and recording of a plat for purposes of dedication.
8. **Records: Notice: Equity.** Nebraska's recording acts have not abolished the equity rule as to actual and constructive notice; thus, every purchaser will be charged with notice of every fact which an inquiry, if made, would have given him or her.
9. **Records: Notice.** Pursuant to Neb. Rev. Stat. § 76-238 (Reissue 2003), any instrument that must be recorded, but is not, shall not be enforced against subsequent purchasers without notice.
10. **Bankruptcy: Restrictive Covenants.** Restrictive covenants are not extinguishable in a bankruptcy proceeding, unless otherwise required by statute.
11. **Nuisances: Real Estate: Words and Phrases.** A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land.
12. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
13. ____. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Judgment in No. S-07-952 affirmed as modified. Appeal in No. S-07-953 dismissed.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellants.

James D. Sherrets and Diana J. Vogt, of Sherrets & Boecker, L.L.C., for appellees Skyline Homeowners Association, Inc., et al., in No. S-07-952.

James E. Lang and Kathleen M. Foster, of Laughlin, Peterson & Lang, for appellee Paisley, LLC, in No. S-07-953.

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

MCCORMACK, J.

I. NATURE OF CASE

Liberty Building Corporation (Liberty) and its owners appeal from the district court's order finding that the property purchased by Liberty in a chapter 11 bankruptcy sale is burdened by restrictive covenants limiting its use to a golf course. Liberty wished to develop the property for other purposes, but homeowners adjacent to the property filed suit to compel its continued maintenance as a golf course. The parties dispute whether implied enforceable restrictive covenants requiring the property to be maintained and operated as a golf course run with the land and whether the bankruptcy order authorizing the sale of the property to Liberty extinguished any such covenants.

II. BACKGROUND

As early as 1967, the property in dispute was operated as a golf course, then known as Chapel Hills Farm and Golf Course. Since that time, its ownership has changed hands many times. The parties agree, however, that sometime in 1969, a group of partners, including Seb A. Circo, purchased the golf course property, although the record does not contain the deed to this transaction. Between 1969 and 1977, the chain of title for the golf course property is unclear. Sometime around 1977, Dennis Circo (Circo), owner of Paisley, LLC, and the chairman of the board and chief executive officer of Precision Industries, acquired the golf course. Circo and his father, Seb, eventually formed a limited partnership called Skyline Golf Club, Ltd. (Skyline Golf), and changed the name of the golf course to Skyline Woods.

Circo also owned a significant amount of land abutting the golf course. He eventually developed the "Skyline Woods" residential area, selling the lots where the plaintiff homeowners and Circo now live. When selling the lots, Circo advertised the proximity and existence of the Skyline Woods golf course. In fact, Circo testified that the golf course was the "center and the heart" of the residential development project.

In 1990, Circo sold the Skyline Woods golf course to American Golf Corporation (American Golf). Circo kept the residential lots that had not yet been sold. Eventually, American Golf merged with National Golf Operating Partnership, L.P. Then, the partnership conveyed the property by special warranty deed to Skyline Woods Country Club, L.L.C. (Skyline Country Club).

1. Bankruptcy Sale

In late 2004, Skyline Country Club filed for bankruptcy in the U.S. Bankruptcy Court for the District of Nebraska. The homeowners in the Skyline Woods development were not included in the Skyline Country Club creditor's matrix, and their claimed restrictive covenants were not specifically raised. On February 9, 2005, the bankruptcy court entered an order approving the sale of the golf course property to Liberty, which is owned and operated by David A. Broekemeier and Robin Broekemeier.

The bankruptcy court's order approved the sale of the property "free and clear of all mortgages, liens, pledges, charges, . . . easements, options, rights of first refusal, restrictions, judgments, claims, demands, successor liability, defects or other adverse claims, interests or liabilities of any kind or nature (whether known or unknown, accrued, absolute, contingent, or otherwise)." Pursuant to the bankruptcy order, on February 11, 2005, Skyline Country Club issued a warranty deed to Liberty, conveying the property "free from encumbrance except covenants, easements and restrictions of record."

2. Lawsuit

Shortly after purchasing the property, David Broekemeier called a meeting with the members of Skyline Country Club

to inform them that because of the bankruptcy sale, he was not bound by their existing membership contracts and would not be honoring them. Liberty operated the property as a golf course for only 1 year, did not rehire the staff, and did not honor the original membership contracts, which brought in $70,000 a month from the club members. Further, David Broekemeier testified that he had no intention of reopening the golf course in its then-present condition.

The condition of the golf course property has deteriorated since Liberty purchased the property. David Broekemeier himself admitted that the property is in a worse condition now than it was when Liberty purchased it. Circo testified that trees have been uprooted and left on the property and that water has been taken out of the pond located on the 12th hole, causing algae growth and other problems such as an increase in mosquitoes. A licensed real estate broker testified that the property is in horrible condition, as the lagoons are unhealthy and the property is covered in weeds. In fact, he described the property as "a real eyesore."

Skyline Woods Homeowners Association, Inc.; The Villas at Skyline Woods Homeowners Association; and numerous individual homeowners (collectively Homeowners) filed suit against Liberty and the Broekemeiers in the district court for Douglas County, Nebraska, to compel Liberty and the Broekemeiers to maintain the property as a golf course. Homeowners asked the court to enter a temporary restraining order and temporary and permanent injunctions ordering Liberty and the Broekemeiers to cease and refrain from destroying or interfering with the continued maintenance and operation of the golf course and to comply with all state and local laws and ordinances regarding maintenance of private property. Finally, Homeowners asked the court to award monetary damages.

In a separate action, Paisley filed suit against Liberty, alleging trespass and breach of restrictive covenants.

3. Documentary Evidence

At trial, various documents were entered into evidence that purported to demonstrate an implied restrictive covenant to maintain the property as a golf course.

(a) Land Contract

A land contract was recorded in 1976, wherein Skyline Golf agreed to sell the property to the "Office of Willis Mouttet, Inc." The land contract specifically identified the property as a golf course and clubhouse and required the buyer to maintain the course in its then "present condition" "during the term of this agreement to prevent the course from deteriorating." The land contract also referenced Willis Mouttet's plan for developing residential lots in combination with the golf course and country club. The record is not clear whether ownership of the property actually passed under the land contract. If it did, the property was apparently later reconveyed to Skyline Golf.

(b) Declaration of Protective Covenants

A "Declaration of Protective Covenants" was recorded on April 10, 1981, which placed requirements on homes built on the residential lots adjacent to the golf course, including the following:

> No unused building material, junk, or rubbish shall be exposed on any property except during actual building operations.
>
> . . . No property owner may golf on the fairways just behind his or her house, nor on any part of the golf course except starting and paying at the clubhouse.
>
> . . . No perimeter fencing shall be allowed. . . .
>
> . . . .
>
> . . . No trees with trunks over one inch in diameter shall be moved, removed, damaged or destroyed without prior written approval of the Architectural Control Committee.

(c) Second Amendment to Declaration of Protective Covenants

In 1983, Skyline Golf recorded a "Second Amendment to Declaration of Protective Covenants" burdening the abutting residential lots. The second amended covenants added the requirement that "[t]he windows of all dwellings shall have a protective covering consisting of (i) plexiglass, (ii) laminated glass, (iii) tempered glass, (iv) a wire screen or (v) such other protective covering as may be approved by the Architectural Control Committee."

(d) Third Amendment to Declaration of Protective Covenants

Skyline Golf recorded a "Third Amendment to Declaration of Protective Covenants" in 1985. This amendment created an architectural control committee "'[i]n order to maintain and establish continuity, integrity, beauty and uniqueness of the development.'"

(e) Ratification and Reaffirmation of Declaration of Protective Covenants

In 1986, Skyline Golf recorded a "Ratification and Reaffirmation of Declaration of Protective Covenants." This document includes the following statement of intent:

> NOW, THEREFORE, with the intent of establishing a general plan for the development and use of the aforedescribed property meant to secure the enforcement of the existing restrictions and covenants upon the usage and development of all said lots, Declarant hereby announces, ratifies and reaffirms the Original Covenants . . . and announces and declares that said covenants are and shall be binding upon, [and] adhere to the benefit of, and apply to [Skyline Golf], as well as its respective successors and assigns . . . .

(f) Golf Easement

On May 18, 1990, Circo recorded an easement against the properties of homeowners in the Skyline Woods subdivision to ensure the use of the property as a golf course was not disturbed by the adjacent homeowners. It required that golf balls be allowed to go through the air and across the homeowners' grass. Specifically, the golf easement states:

> Grantor reserves an easement as hereafter described, in the entire airspace above, and upon the entire real property and improvements described in [the legal description] attached hereto, to permit the doing of every act necessary and proper to the playing of golf on the golf course (which is the dominant tenement . . .) adjacent to the land which is the subject of these restrictions (which is the subservient tenement . . .).

(g) Purchase Agreement

A 1990 purchase agreement evidenced the sale of the golf course by Circo to American Golf, although the agreement was never recorded and does not appear in the chain of title. Paragraph 9.2 of the purchase agreement states, "Buyer covenants that, subsequent to Closing, it shall maintain the golf course in a manner and condition equal to or better than the standard of course maintenance which Seller has applied in its operation of the course."

(h) Memorandum of Understanding

A 1990 memorandum of understanding (MOU) between Circo and American Golf provided instructions on necessary improvements and maintenance of the golf course. The MOU was not recorded at the time of the purchase, but it was recorded later, in 1997, as an attachment to an "Assignment of Memorandum Rights." The MOU referenced the unrecorded purchase agreement and attempted to incorporate the terms of the purchase agreement by reference.

Paragraph 8 states in pertinent part:

> It is understood and agreed to by Seller and Buyer that any successor Subdivision developer or any successor Skyline [Woods golf course] titleholder shall be subject to all of the rights, obligations, terms and conditions of this [MOU] to the same extent as are Seller and Buyer. These terms and conditions are intended to and shall be a covenant running with and burdening all of the land upon which Seller (or a subsequent titleholder involved in development and construction of residential housing for re-sale) may construct residential housing adjacent to Skyline [Woods golf course] in the future, and shall also be a covenant running with and burdening Skyline [Woods golf course], and this covenant may be recorded at either party's option.

(i) Memorandum of Memorandum of Understanding

On December 28, 1990, the parties entered into a "Memorandum of Memorandum of Understanding," again

referencing the unrecorded purchase agreement. It again stated that the terms of the unrecorded purchase agreement "shall be a covenant running with and burdening the Golf Course," but it did not specify the terms of the unrecorded purchase agreement. This document was recorded on December 31 and appears in the chain of title.

4. Other Evidence

David Broekemeier admitted he was aware of all the restrictions and covenants referencing or affecting the golf course listed above—except for the unrecorded purchase agreement. Liberty's title insurance policy specifically excluded "[e]asements, claims of easement or encumbrances which are not shown by the public records." The policy listed as exceptions to the golf course property title all the restrictions on the property appearing of record as well as "[a]ny facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof" on the property.

Additionally, Liberty owns property which abuts Skyline Woods golf course called Ranch View Estates. Liberty advertised the sale of lots in Ranch View Estates by referencing the proximity of the golf course. David Broekemeier also told prospective purchasers about the proximity to and benefits of living near the golf course.

5. District Court's Orders

On April 26, 2006, the district court issued a temporary restraining order against Liberty and the Broekemeiers. The temporary restraining order prohibited Liberty and the Broekemeiers from taking any actions that would interfere with or damage the golf course or prevent the property from being used as a golf course.

On June 13, 2006, the district court consolidated Homeowners' and Paisley's causes of action for the convenience of arguments. Also, at that time, the parties entered into a joint stipulation. Under the stipulation, Liberty and the Broekemeiers agreed to maintain the property in accordance with specified

standards during the pendency of the litigation. The joint stipulation mandates, as follows:

> 1. All fairways and greens on the Golf Course property will be mowed within fourteen (14) days of the execution of this Stipulation. The property will be mowed from the abutting property owners' residential lots, out a distance of 12 to 15 feet into the golf course. All grass that is to be mowed shall be mowed to a length of five (5) inches and will be mowed again whenever it achieves the length of six and one half (6.5) inches. (But not the rough which shall not be mowed except as otherwise provided herein.)
>
> 2. Any grass clippings or materials will be removed from the Golf Course property within seven (7) days after the initial mowing or the same shall be thoroughly mulched. Thereafter, when cut the grass clippings will either be removed from the Golf Course property or the grass will be mulched consistent with proper turf grass maintenance. Any fallen trees cut down by Defendants on the property will be removed within thirty (30) days of the execution of this Stipulation.
>
> 3. Steps will be taken to repair the pumps on the Golf Course property by all necessary and appropriate means, including obtaining permits or other steps necessary to provide access to the same.
>
> 4. The fairways on the Golf Course property (other than the greens) will be watered in a prudent manner so that it will remain green to the point that it not be allowed to become dormant. To the extent the greens are already dormant, they need not be watered to counter their dormancy.
>
> 5. The use of "Round-up" and other herbicides or weed killing materials will be applied only to weeds on the Golf Course property. (Herbicides and other materials customarily applied to golf courses may be utilized.)
>
> 6. Cut trees and/or brush has been placed on the parcel owned by Paisley LLC by Defendants. Said cut trees and/or brush will be removed within thirty (30) days from the execution of this Stipulation.

> 7. Defendants may use the well on the Paisley parcel for irrigation purposes and may access the same as necessary to operate or repair the well but Defendants will not otherwise go onto the Paisley property. Notwithstanding the foregoing, access for ingress and egress across the Paisley property is granted as necessary to effect the provisions of this Order.

On March 28, 2007, the district court granted partial summary judgment in favor of Homeowners and Paisley on the issue of whether restrictive covenants "limiting the use of the property to that of a golf course" ran with the land. In concluding that restrictive covenants exist burdening the golf course property, the court relied on these six documents: (1) the 1976 land contract, (2) the 1981 declaration of protective covenants, (3) the 1983 second amendment to declaration of protective covenants, (4) the 1990 unrecorded purchase agreement, (5) the 1990 MOU (not recorded until 1997), and (6) the 1997 assignment of memorandum rights with the attached MOU. From these documents, the court concluded that the parties intended that the covenants run with the land. The order did not conclude that the restrictive covenants required Liberty and the Broekemeiers to actually operate the property as a golf course.

The court also concluded that the bankruptcy order did not sell the property free and clear of the restrictive covenants, as the restrictive covenants are property rights belonging to third-party Homeowners. Subsequently, a trial was had on all the remaining issues except for Paisley's cause of action for trespass.

The court's judgment was against the individual defendants, David Broekemeier and Robin Broekemeier, as well as Liberty. The record does not reveal that the Broekemeiers challenged Homeowners' petition against them as individuals or the district court's order as such. The court overruled Liberty and the Broekemeiers' cross-motion for summary judgment. Liberty and the Broekemeiers moved for a "New Trial" on the summary judgment proceedings, and Homeowners and Paisley moved to clarify the order.

After the trial, on August 10, 2007, the court issued an order finding that Homeowners failed to prove their causes of action for promissory estoppel, intentional misrepresentation, nuisance, and breach of contract for third-party beneficiaries. This order made additional findings as well as restated and consolidated its findings of March 28, 2007.

The August 10, 2007, order concluded and stated that restrictive covenants burden the golf course property, requiring that Liberty and the Broekemeiers use the property only as a golf course or maintain the property "in the appropriate fashion as a golf course or an attractive lawn." The court specifically ordered that Liberty and the Broekemeiers "properly and timely" trim, mow, water, and fertilize the grounds; maintain the trees, shrubs, and other growth on the property; maintain the ponds so that they are attractive; and maintain the property in a manner preventing the value of the surrounding homes from declining.

The court explicitly stated, however, that it was not yet making any determination as to Paisley's cause of action for trespass. While the record reflects that the parties discussed certifying the August 10, 2007, order pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), the court, in fact, did not issue any order of certification before the parties' notices of appeal were filed with this court.

Following the August 10, 2007, order, Liberty and the Broekemeiers appealed and Homeowners and Paisley cross-appealed. On appeal, Liberty and the Broekemeiers filed two separate notices of appeal. There are separate transcripts on appeal (because they filed two separate docketing fees), and separate briefs addressing their respective issues were filed by Homeowners, case No. S-07-952, and Paisley, case No. S-07-953. We consolidated the cross-appeals of Homeowners and Paisley for the purpose of oral argument.

III. ASSIGNMENTS OF ERROR

Liberty and the Broekemeiers allege, consolidated and restated, that the district court erred in (1) concluding that the bankruptcy court's judgment directing sale and delivery of title to Liberty left the real estate encumbered by implied restrictive

covenants requiring the property be maintained as a golf course, (2) entering judgment against the Broekemeiers as individuals, and (3) failing to find that Liberty and the Broekemeiers were protected by Nebraska's statutes governing the impact of unrecorded instruments on subsequent purchasers.

On cross-appeal, Homeowners and Paisley assert that the district court erred in finding it could not order Liberty and the Broekemeiers to operate the property as a golf course or, alternatively, order that the property be sold or leased to an entity that would operate it only as a golf course. Homeowners also assigned as error the court's dismissal of Homeowners' cause of action for nuisance.

IV. STANDARD OF REVIEW

[1] A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[1]

V. ANALYSIS

1. Jurisdiction

Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it irrespective of whether the issue is raised by the parties.[2] When multiple causes of action are presented or multiple parties are involved and final judgment is entered as to one of the parties or causes of action, but not the remaining causes of action or parties, § 25-1315(1) mandates the court certify the final judgment in order for the judgment to be appealable.[3] In the present case, the August 10, 2007, order disposed of all Homeowners' causes of action. However, it only disposed of Paisley's cause of action for breach of contract and specifically made no determination as to Paisley's other cause of action for trespass. We determine

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[1] *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[2] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

[3] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

that the order was final as to Homeowners but not as to Paisley. We thus lack jurisdiction in case No. S-07-953.

2. Covenants

[2] We first consider whether the district court was correct in concluding that an implied covenant restricts Liberty's land to usage as a golf course and that Liberty and the Broekemeiers had constructive notice of such covenant. It is possible for a restrictive covenant to arise by implication from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans.[4] Such an implied restrictive covenant has been defined as "a covenant which equity raises and fastens upon the title of a lot or lots carved out of a tract that will prevent their use in a manner detrimental to the enjoyment and value of neighboring lots sold with express restrictions in their conveyance."[5]

[3,4] In order for implied restrictive covenants to exist, there must be a common grantor of land who has a common plan of development for the land.[6] If there is a common plan of development that places restrictions on property use, then such restrictions may be enforced in equity.[7] "A court's primary interest in equity is to give effect to the actual intent of the grantor . . . by looking not only to language in deeds, but variously to matters extrinsic to related written documents, including conduct, conversation, and correspondence."[8]

[5,6] To enforce an implied restrictive covenant against a subsequent owner of land, the subsequent purchaser must have actual or constructive knowledge of the implied restrictive covenant.[9] However, it should be noted that because implied

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[4] 9 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 60.03[1] (2000); 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2005).

[5] *McCurdy v. Standard Realty Corporation*, 295 Ky. 587, 588, 175 S.W.2d 28, 29 (1943). See 20 Am. Jur. 2d, *supra* note 4.

[6] *Roper v. Camuso*, 376 Md. 240, 829 A.2d 589 (2003); Annot., 119 A.L.R.5th 519 (2004).

[7] *Roper v. Camuso, supra* note 6.

[8] *Id.* at 261, 829 A.2d at 602.

[9] 9 Powell & Wolf, *supra* note 4.

restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.[10]

In *Wessel v. Hillsdale Estates, Inc.*,[11] we were faced with express protective covenants by the developer to preserve land for a park for the surrounding homeowners' enjoyment, but the covenants failed to specify how much land would be set aside for that purpose. However, the original plat and brochures used by the developer to sell the lots designated a particular 4.35-acre lot as "'Community Unit Area,'" and several covenants made reference to the variety of uses of the park.[12] We concluded that the protective covenants, read in their entirety, implied an amount of land "sufficient" for a park and recreational area with the variety of uses referred to in the covenants.[13] While we did not compel the developer to use the entirety of the 4.35 acres for recreation purposes, we stated that it would be absurd to conclude that the 50- by 80-foot parcel the developer had proposed to set aside would be sufficient.[14]

Instead, we concluded that the amount of land used to build the park and recreation area had to be in accordance with the buyer's expectations, stating:

> "A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property."[15]

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[10] *Id.*

[11] *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978).

[12] *Id.* at 797, 266 N.W.2d at 66.

[13] *Id.* at 801, 266 N.W.2d at 68.

[14] *Wessel v. Hillsdale Estates, Inc., supra* note 11.

[15] *Id.* at 801, 266 N.W.2d at 68 (quoting *Lund v. Orr*, 181 Neb. 361, 148 N.W.2d 309 (1967)).

We ultimately held that 2.35 acres of the lot had to be used for the conceived park and recreation area.

We have never directly addressed whether a restrictive covenant will be implied simply from a common scheme or plan where there are no express covenants found in the chain of title. But other courts faced with a common scheme or plan have invariably found an enforceable restrictive covenant where it is sufficiently implied by the conduct and expectations of the parties and any documents of record or it is known to the buyer.[16]

In *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*,[17] for instance, the court held that there was an implied restrictive covenant to maintain property as a golf course despite the fact that there were no express covenants burdening the golf course property on behalf of the adjoining homeowners. Nevertheless, all of the adjacent homeowners' properties had various easements and restrictions limiting specific improvements and prohibiting homeowners from taking certain actions that would interfere with the use of the adjoining golf course property. Moreover, sales materials the developer distributed to the purchasers of the adjacent properties represented that there would be a golf course maintained for their benefit.[18]

The court concluded that the common plan of development, which included a golf course, combined with the representations made to the purchasers about the maintenance of the golf course and the adjoining homeowners' express covenants, created an implied restrictive covenant that the land be used only as a golf course.[19] The court explained that the homeowners who purchased property because of the proximity of the golf

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[16] See, e.g., *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 688 P.2d 682 (Ariz. App. 1984). Compare, *Warren v. Detlefsen*, 281 Ark. 196, 663 S.W.2d 710 (1984); *Mackinder v. OSCA Development Co.*, 151 Cal. App. 3d 728, 198 Cal. Rptr. 864 (1984); *Grange v. Korff*, 248 Iowa 118, 79 N.W.2d 743 (1956); *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923 (Tenn. 1979).

[17] *Shalimar Ass'n v. D.O.C. Enterprises, Ltd., supra* note 16.

[18] *Id.*

[19] *Id.*

course were entitled to ensure their expectations that the golf course would remain.[20]

The defendants in *Shalimar Ass'n* argued that because they checked the recorded documents against the golf course property and no restrictions were found, they should not be bound by the implied restrictive covenant.[21] But the court concluded that the new owners had constructive notice because they were aware that the seller of the golf course told the new owners that the property was restricted to use as a golf course, they knew the property was being operated as a golf course at the time of purchase, they knew of a recorded golf course plat, and they knew that the golf course was surrounded by residential lots designed to take advantage of the views of the golf course property.[22] The court concluded that the defendants failed to satisfy their duty of inquiry and that, had they inquired properly, they would have discovered the implied covenants.[23]

[7] Similarly, in *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*,[24] the court found an implied restriction for the land's continuing use as a golf course. Although this case is not directly on point because it involved a suit by lot owners directly against the developer and not his successor, the court, in its decision, focused on the representations made to prospective purchasers and the materials used in the sales of the lots.[25] When the developer in *Ute Park Summer Homes Ass'n* sold subdivided lots, he had distributed maps which pictured an area marked "golf course."[26] After selling these lots, the developer tried to sell the golf course without any restrictions on its use.[27]

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, 77 N.M. 730, 427 P.2d 249 (1967).

[25] *Id.*

[26] *Id.*

[27] *Id.*

Even though the maps had not been recorded and none of the deeds contained any reference to the map or to any interest in the golf course, the court concluded that the lot owners had a legal right to use the area as a golf course.[28] The court concluded that when a map or plat showing a park or other like open area is used to sell property, "the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated. As stated, this is a private right, and it is not dependent on a proper making and recording of a plat for purposes of dedication."[29] Further, the court noted:

> The rationale of the rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat.[30]

In the present case, the record does not contain the plats or maps to which any of the deeds refer. However, the record is replete with testimony supporting the existence of a common scheme of development establishing implied restrictive covenants. Circo owned both the golf course property and the developmental property adjacent to the golf course, and he testified that he developed the residential lots in the subdivision

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[28] *Id.*

[29] *Id.* at 735, 427 P.2d at 253 (citing *People v. Reed*, 81 Cal. 70, 22 P. 474 (1889); *East Atlanta Land Co. v. Mower*, 138 Ga. 380, 75 S.E. 418 (1912); *Mann v. Bergmann*, 203 Ill. 406, 67 N.E. 814 (1903); *Will v. City of Zion*, 225 Ill. App. 179 (1922); *Fisher v. Beard*, 32 Iowa 346 (1871); *Lord v. Atkins et al.*, 138 N.Y. 184, 33 N.E. 1035 (1893); *Matter of City of New York (Edgewater Road)*, 138 A.D. 203, 122 N.Y.S. 931 (1910); *Green v. Miller*, 161 N.C. 24, 76 S.E. 505 (1912)).

[30] *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co., supra* note 24, 77 N.M. at 735, 427 P.2d at 253.

"specifically with the belief and it panned out that the lots would be more valuable if there was a successful golf course — actually a country club." Circo also testified that the golf course was the "center and the heart" of the residential development project. Further, Circo testified that when he sold the golf course property, he sold it to a buyer, American Golf, that he was sure would maintain the golf course. Such testimony from Circo leaves no doubt that the residential lots and golf course are part of a common scheme and plan.

Moreover, Circo sold the residential lots using advertisements that centered around the existence of the golf course and country club. Circo testified that the marketing plan for the sale of the residential lots "was an elegant or country club or leisure lifestyle." Several homeowners whose homes abut the golf course testified that they bought their property and paid a premium price for the property because of the proximity of the golf course and the lifestyle offered.

Not only did homeowners rely on the existence of the golf course when purchasing their property, they also have been required to take certain precautions for their property because of the golf course. Like *Shalimar Ass'n*, the homeowners have recorded restrictions placed on their properties referencing and affecting the golf course, which supports the existence of a common scheme or plan giving rise to an implied restrictive covenant.

We conclude that homeowners who bought their property relying on the proximity and existence of the golf course should be protected by implied restrictive covenants that the property be maintained as a golf course. We therefore agree with the district court that an implied restrictive covenant requiring that it be used only as a golf course burdens and runs with the golf course property. As to maintenance, we conclude that the June 13, 2006, joint stipulation entered into between the parties should continue as the standard of maintenance of the golf course.

[8] Liberty and the Broekemeiers argue, however, that even if there is a restrictive covenant running with the land which would be enforceable against them in common law, such covenant is unenforceable under Nebraska's recording

statute[31] because it was unrecorded. This argument is without merit. As discussed above, implied restrictive covenants are only enforceable against a subsequent purchaser who buys the property and has knowledge of the covenants.[32] As we said in *Shonsey v. Clayton*,[33] "[t]he recording acts have not abolished the equity rule as to actual and constructive notice." Under this rule, we consider whether there are circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry. If so, then the purchaser will be charged with notice of every fact which an inquiry, if made, would have given him or her.[34]

The Broekemeiers had notice of the implied restrictive covenants burdening the golf course property and failed to satisfy their duty of inquiry. David Broekemeier admitted that he knew that the property was used as a golf course since the early 1980's and that he also knew from the title policy of the restrictions and requirements placed on the homeowners' properties designed to protect the use of the adjacent golf course. To their detriment, neither the Broekemeiers nor their or Liberty's attorneys made any effort to inquire about how the surrounding homeowners would be protected.

Additionally, Liberty obtained a title insurance policy which included the restrictions and requirements filed against the surrounding homeowners' properties. This policy specifically excluded "[e]asements, claims of easement or encumbrances which are not shown by the public records" and listed as exceptions to the golf course property title all the restrictions on the property appearing of record as well as "[a]ny facts, rights, interests, or claims which are not shown by the public

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[31] Neb. Rev. Stat. § 76-238 (Reissue 2003).

[32] *Roper v. Camuso, supra* note 6; *Shalimar Ass'n v. D.O.C. Enterprises, Ltd., supra* note 16.

[33] *Shonsey v. Clayton*, 107 Neb. 695, 701, 187 N.W. 113, 115 (1922) (citing *Bourland v. The County of Peoria et al.*, 16 Ill. 538 (1855)).

[34] See *Shonsey v. Clayton, supra* note 33. See, also, *McParland v. Peters*, 87 Neb. 829, 128 N.W. 523 (1910); *Barney v. Chamberlain*, 85 Neb. 785, 124 N.W. 482 (1910); *Galland v. Jackman*, 26 Cal. 79 (1864); *Cooper v. Flesner et al.*, 24 Okla. 47, 103 P. 1016 (1909).

records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof" on the property. These facts would most certainly alert a potential, prudent buyer of the possibility of restrictions on its use.

Even more convincing, however, is the fact that before owning the golf course property, Liberty promoted the sale of Ranch View Estates, property that it owns which abuts the same golf course. Liberty did this by referencing the proximity and existence of the golf course. In its advertisements distributed to potential purchasers, Liberty specifically mapped out the lots available and made reference to where the golf course was located. The advertisements for Ranch View Estates specifically state: "Skyline Woods Golf Course is just across the section," and the advertisements for Ranch View Estates II state: "All the lots are walkouts. Backing up to Skyline Woods Golf Course."

Liberty not only used the proximity of the golf course in the written advertisements, but David Broekemeier also told prospective purchasers about the benefits of the golf course location. A prospective buyer testified that she contacted David Broekemeier in 2002 about purchasing a lot to build a home in Ranch View Estates. She stated that "[David] Broekemeier said that what was really nice about the lots was that the golf course for Skyline Woods was just on the other side, so it was just like being on the golf course."

The Broekemeiers undoubtedly knew that abutting property owners relied on the existence of the golf course and that the residential lots were designed to benefit from the proximity of the golf course. Further, David Broekemeier knew of the recorded restrictions on the homeowners' properties that were designed to protect the use of the golf course. If David Broekemeier had been prudent, he would have inquired further and found that the surrounding homeowners were protected by restrictive covenants connected with the golf course. In fact, Liberty and the Broekemeiers do not actually dispute their knowledge of the possibility of implied covenants under common law.

[9] Our recording statute does not change the analysis. Section 76-238 provides that any instrument that must be

recorded, but is not, shall not be enforced against "subsequent purchasers without notice."[35] As we concluded above, Liberty and the Broekemeiers were not purchasers without notice of the restrictions.

We conclude that an implied restrictive covenant existed which would have required that the property be maintained as a golf course, pursuant to items (1) through (7) of the joint stipulation. Furthermore, Liberty and the Broekemeiers had sufficient knowledge of the existence of the implied covenant for it to be enforceable against them. We next consider Liberty and the Broekemeiers' primary contention that any enforceable implied covenants that may have existed were extinguished in the bankruptcy sale.

3. Bankruptcy Sale

Liberty and the Broekemeiers allege that even if they would have otherwise been bound by implied restrictive covenants to maintain the property as a golf course, the bankruptcy court's order selling the property to Liberty free and clear of any interest under 11 U.S.C. § 363(f) (2000) extinguished any covenants running with the land. Homeowners argue that the bankruptcy court's order never purported to extinguish the restrictive covenants in question in this case. In any event, Homeowners argue that the bankruptcy court lacked jurisdiction to do so. We conclude that the bankruptcy sale has no effect on implied restrictive covenants and that as such, Liberty and the Broekemeiers are still bound by them.

A trustee can only sell property of an estate free and clear of "any interest" under one of the five circumstances listed in 11 U.S.C. § 363(f):

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
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> (2) such entity consents;
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> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
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> (4) such interest is in bona fide dispute; or

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[35] See *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002).

> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

"Any interest" is not defined by the bankruptcy code. However, case law demonstrates that the bankruptcy order authorizing the sale to Liberty did not extinguish the implied restrictive covenants limiting the property to the use as a golf course, because such interests are not within the meaning of "any interest" under § 363(f). The courts addressing whether a bankruptcy trustee may sell property of an estate free and clear of restrictive covenants under § 363(f) have all concluded that such a sale is not permitted.[36]

For example, the court in *In re Oyster Bay Cove, Ltd.*[37] concluded that the language of § 363(f) does not include "non-monetary restrictions of record which run with the land."[38] And, in *Gouveia v. Tazbir*,[39] the court reasoned under Indiana law that because covenants running with land are interests in property, rather than executory contracts which can be rejected, 11 U.S.C. § 365 (2000) of the bankruptcy code does not apply to them. Further, restrictive covenants create equitable interests that do not compel a person to accept a monetary interest; thus, when restrictive covenants are involved, there is nothing that can force those who benefit from restrictive covenants to "forego [sic] equitable relief in favor of a cash award."[40] In *In re Rivera*,[41] the court concluded that covenants running with the land are property interests that cannot be removed in a

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[36] See, *Gouveia v. Tazbir*, 37 F.3d 295 (7th Cir. 1994); *In re WBQ Partnership*, 189 B.R. 97 (E.D. Va. 1995); *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338 (E.D.N.Y. 1993); *In re 523 E. Fifth St. Housing Pres. Dev. Fund*, 79 B.R. 568 (S.D.N.Y. 1987). See, also, Basil H. Mattingly, *Sale of Property of the Estate Free and Clear of Restrictions and Covenants in Bankruptcy*, 4 Am. Bankr. Inst. L. Rev. 431 (1996).

[37] *In re Oyster Bay Cove, Ltd., supra* note 36.

[38] *Id.* at 343. See, also, *Gouveia v. Tazbir, supra* note 36; *In re 523 E. Fifth St. Housing Pres. Dev. Fund, supra* note 36.

[39] *Gouveia v. Tazbir, supra* note 36.

[40] *Id.* at 299.

[41] *In re Rivera*, 256 B.R. 828 (M.D. Fla. 2000).

discharge because to do so would be taking a property interest away from a third party and giving the debtor a property interest which the debtor never had.

[10] The Restatement (Third) of Property[42] states: "No servitude, other than a covenant to pay money that is not imposed as part of a general plan of development, conservation servitude, or easement arrangement, is extinguishable in a bankruptcy proceeding, unless otherwise required by statute." We agree with the district court that the bankruptcy court's order did not extinguish the implied restrictive covenants.

As such, Homeowners' suit regarding the existence of implied restrictive covenants is not a collateral attack on the bankruptcy order. A collateral attack is where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified or a proceeding in equity to prevent its enforcement.[43] Homeowners do not seek to vacate, reverse, modify, or prevent the enforcement of the bankruptcy order. Therefore, Homeowners are not collaterally attacking the bankruptcy order.

4. Cross-Appeal: Scope of Order

The district court ordered that the property be maintained as a golf course and then set forth certain maintenance requirements. Other than contesting the enforceability of the underlying covenants, Liberty and the Broekemeiers do not assert that particulars of this order were outside the scope of the covenants. In their cross-appeal, Homeowners assert that the court should have ordered not just that the property be maintained as a golf course, but that the court should have also compelled Liberty to reopen and operate it as such, or sell it to an entity capable of doing so. Considering the restrictive covenants at the time the homeowners purchased their lots, we believe they relied on the atmosphere and beauty that living near a golf course provides, and they have a right, enforceable against Liberty, to abut grounds maintained at least to the same standard as set out in the joint stipulation. However, we are unconvinced that

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[42] Restatement (Third) of Property: Servitudes § 7.9 at 388 (2000).

[43] *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985).

the implied covenant is so broad that it entails an obligation to operate the golf course. We find no merit to Homeowners' allegation that the district court's order inadequately protected their rights under the implied covenant.

5. Cross-Appeal: Nuisance

[11] As to Homeowners' contention that Liberty's actions constitute a nuisance, we confine ourselves to their argument in their brief: "The Defendants' failure to operate the course or properly maintain the property interferes with the ability of the homeowners in Skyline Woods and other subdivisions near the golf course to enjoy their property."[44] "'"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."'"[45] In an equity action, "the invasion of or interference with another's private use and enjoyment of land need only be substantial."[46] Our court recognizes the principles set forth in Restatement (Second) of Torts[47] regarding nuisance.[48] Specifically, our court recognizes that § 822 provides a description of conduct that provides a basis for nuisance liability.[49] Such section states:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[50]

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[44] Brief for appellees on cross-appeal in case No. S-07-952 at 47.

[45] *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 131, 728 N.W.2d 101, 108 (2007) (quoting *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989), quoting Restatement (Second) of Torts § 821D (1979)).

[46] *Hall v. Phillips, supra* note 45, 231 Neb. at 278, 436 N.W.2d at 145.

[47] Restatement (Second), *supra* note 45, § 822.

[48] *Hall v. Phillips, supra* note 45.

[49] *Id.*

[50] Restatement (Second), *supra* note 45, § 822 at 108.

[12] Homeowners' brief fails to set forth the sufficient facts that would warrant a finding of nuisance. Instead, Homeowners' argument that the district court erred in failing to find Liberty and the Broekemeiers liable for nuisance is merely a restatement of their claim that implied restrictive covenants exist on the property requiring that the golf course be properly maintained. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.[51] As such, we find no merit to Homeowners' cross-appeal that the district court erred in denying a separate claim for nuisance.

6. Broekemeiers' Personal Liability

[13] Finally, we address the Broekemeiers' argument that judgment should not have been entered against them, as they are not proper parties to the claim asserted against them for violation of protective covenants. The record does not reveal any evidence that this issue was ever presented to the trial court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[52] As such, we find no merit to this assignment of error.

VI. CONCLUSION

As to Homeowners, case No. S-07-952, for the foregoing reasons, we affirm the order of the district court that the implied covenants require that the property is to be used only as a golf course. As to maintenance, the golf course shall be maintained according to standards (1) through (7) of the June 13, 2006, joint stipulation of the parties. Accordingly, we modify the district court's order regarding the required standards of maintenance.

As to Paisley, case No. S-07-953, we dismiss the appeal for lack of jurisdiction.

Judgment in No. S-07-952 affirmed as modified.
Appeal in No. S-07-953 dismissed.

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[51] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[52] *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003).

STATE OF NEBRASKA, APPELLEE, V. JAY D. AMAYA, APPELLANT.

758 N.W.2d 22

Filed December 5, 2008. No. S-07-1117.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
3. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Postconviction: Effectiveness of Counsel: Presumptions: Proof.** Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.
8. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

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

Scott H. Trusdale, of Trusdale & Trusdale, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

STEPHAN, J.

In 1998, Sheri Fhuere was sexually assaulted and killed in her home in North Platte, Nebraska. Michael E. Long and Jay D. Amaya were arrested and charged in connection with the crimes. Amaya entered pleas of no contest and was convicted on one count of first degree murder, one count of use of a knife in the commission of a felony, and one count of sexual assault. The district court for Lincoln County imposed consecutive sentences of life imprisonment on the murder conviction, 10 to 20 years' imprisonment on the weapon conviction, and 20 to 40 years' imprisonment on the sexual assault conviction. No direct appeal was filed. In 2006, Amaya filed a verified motion for postconviction relief. After appointing counsel and conducting an evidentiary hearing, the district court denied postconviction relief. Amaya appeals from that order.

BACKGROUND

When police arrived at Fhuere's home on July 16, 1998, they found Long attempting to resuscitate her. Fhuere had been beaten and sexually assaulted, and her throat had been slashed. There was a severe bite mark on her left thigh. Fhuere was pronounced dead at the scene, and a pathologist later determined that she died as the result of either the slash wound or the beating.

Long was interviewed several times over the next hours and eventually gave a written statement to police dated July 16, 1998. Although there were inconsistencies in his story, he generally told officers that he and Amaya beat Fhuere and that Amaya slashed her throat. Long also told the officers where to find the knife that Amaya used, and he stated that Amaya had bitten Fhuere during the assault. A forensic dentist later matched the bite mark to a dental impression

of Amaya's teeth. DNA testing established the presence of Fhuere's blood on Amaya's shoe. Amaya wrote letters confessing to the crimes.

Both Long and Amaya were charged with first degree murder. Amaya was also charged with use of a deadly weapon to commit a felony and first degree sexual assault. Long entered into a plea agreement with the State. In exchange for his testimony against Amaya, the charges against Long were reduced to aiding and abetting second degree murder and aiding and abetting first degree sexual assault. Long was sentenced to 25 years' to life imprisonment on the murder conviction and 5 to 10 years' imprisonment on the sexual assault conviction.

Amaya's appointed trial counsel deposed Long after Long had entered into the plea agreement but before Amaya had entered his no contest pleas. The deposition revealed that Long had significant drug, alcohol, and mental health issues that began in his early teens and continued at the time of the deposition. It also revealed that he had given several statements about Fhuere's death to the police and that, in general, each succeeding statement tended to mitigate his culpability and exaggerate Amaya's. Long stated during this deposition that the written statement he had given to police on July 16, 1998, was truthful. He also stated, however, that he was extremely intoxicated the night of the murder and that some of the details in the statement were not correct. He admitted that he had also told officers that evening that he had blacked out and could not remember everything that had happened.

After Long had been deposed, and after being fully advised of his rights, Amaya entered the no contest pleas in exchange for the State's agreement not to seek the death penalty or introduce evidence of aggravating circumstances. Prior to entering the pleas, Amaya wrote a letter to his attorneys expressing his desire to avoid the death penalty. The pleas were entered on October 19, 1999, and Amaya was sentenced on November 19. On November 22, counsel wrote a letter to Amaya informing him of his right to appeal. The letter advised Amaya that the deadline for filing a notice of appeal was December 20, 1999, and further stated:

> If you wish to appeal, or discuss that matter further, please notify me as soon as possible so that I will have time to prepare and file the necessary paperwork. Since some of the appeal documents require your signature, I have enclosed with this letter the following:
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> 1. Application to Proceed In Forma Pauperis;
> 2. Financial Affidavit;
> 3. Motion and Order.
>
> If you decide to appeal, you must complete these pleadings, sign them, have your signature notarized and return them to my office no later than December 20, 1999.

On December 9, 1999, counsel received a letter from Amaya stating in part: "Here are the forms you sent me all filled out. About the appeal they could reduce my time but they could not give me more [time] or more charges right? Please get a hold of me to let me know." Counsel replied on the same day and advised Amaya of the State's statutory right to appeal a sentence as excessively lenient. Counsel further stated in the same letter that he did not recommend filing an appeal, but that the final decision on the matter was Amaya's. The letter specifically stated: "If you do wish to appeal, please let me know and the appeal will be filed. The appeal must be on file on or before **December 20, 1999**." Counsel testified that he received no further direction from Amaya regarding an appeal.

On November 21, 2006, Amaya filed a verified motion for postconviction relief. The motion alleged that he received ineffective assistance of counsel in 10 particulars. After an evidentiary hearing, the district court denied relief in a detailed order analyzing each of Amaya's postconviction claims. Amaya filed this timely appeal.

ASSIGNMENTS OF ERROR

Amaya assigns that the district court erred in (1) denying relief on the 10 areas of alleged ineffective assistance of counsel set forth in his motion for postconviction relief, (2) failing to determine that trial counsel did not conduct proper discovery with regard to Long's statements, and (3) failing to determine that trial counsel did not file a direct appeal after being asked to do so.

STANDARD OF REVIEW

[1] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[1]

ANALYSIS

[2] Amaya's first assignment of error is very broad and is not argued in his brief. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[2] Accordingly, we address only the two assignments of error which Amaya has argued.

Investigation of Long's Statement Prior to Pleas

[3,4] As noted, Amaya entered pleas of no contest to the charges on which he was convicted. A plea of no contest is equivalent to a plea of guilty.[3] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[4] In his motion for postconviction relief, Amaya alleged that his trial counsel was ineffective in failing to "[a]dequately pursue discovery" in order to obtain information regarding Long's "'[d]eal'" with the prosecutor.

[5,6] Familiar principles of law govern our consideration of this claim. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the

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[1] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

[2] *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[3] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

[4] *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

area.[5] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[6] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[7] When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[8]

To buttress his argument that his trial counsel failed to conduct sufficient "discovery" with respect to Long, Amaya directs us to an affidavit executed by Long in 2007, after Amaya filed his postconviction motion. In this affidavit, Long avers that in his July 16, 1998, statement to police, he falsely placed the blame on Amaya in order to exact revenge after police told him that Amaya had implicated him in the crimes. Long further stated in the 2007 affidavit that he did not "know for sure what went on the night of the crime" because he was so "high and drunk" that he could not "remember what I was doing let alone what . . . Amaya was doing." Amaya argues that Long's statement to police was the key piece of evidence against him and that if his counsel had done more to investigate, Long's statement would have been discredited before he entered his pleas. Without expressly saying so, Amaya implies that if Long's statement had been properly tested by his counsel, he would not have agreed to enter his pleas.

The record clearly reflects that Amaya's trial counsel did not accept Long's July 16, 1998, statement at face value. Before Amaya entered his pleas, counsel deposed Long with respect to the various statements Long had given to police. This questioning established that Long had at times lied to police, but he maintained that his written statement implicating Amaya in the

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[5] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[6] *Id.*

[7] *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008).

[8] *State v. McLeod, supra* note 4.

crimes was true. Also, Long's plea agreement with the prosecutor was produced at his deposition.

In a deposition received at the postconviction hearing, Amaya's trial counsel testified that Long's anticipated trial testimony was only a part of the body of incriminating evidence confronting Amaya at the time he entered his no contest pleas. Other items included the victim's blood on Amaya's shoe, the determination of a forensic dentist that Amaya had inflicted the bite wound, and various letters in which Amaya had confessed to the crimes. The district court agreed with trial counsel's characterization of this evidence of guilt as "bordering on overwhelming." The district court also determined that Amaya's allegations that trial counsel did not adequately investigate Long's statements were "patently frivolous." The court further determined that Long's 2007 affidavit had "no credibility whatsoever," because it was "impossible to separate fact from fiction in anything which Long says about this case or Amaya's involvement therein." Based upon our review of the record, the district court's findings of fact on this issue are not clearly erroneous, and therefore, we conclude that the court did not err in denying this claim for postconviction relief.

Alleged Failure to File Direct Appeal

[7,8] Amaya contends that his trial counsel was ineffective for failing to file a direct appeal in response to his request that he do so. Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.[9] After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.[10]

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[9] *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003); *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

[10] *State v. Barnes, supra* note 1; *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

Assuming without deciding that the same principle would apply where conviction is the result of a guilty or no contest plea, the critical question of fact is whether Amaya directed his counsel to file a direct appeal on his behalf. After reviewing the evidence received at the postconviction hearing, the district court concluded that he did not. As noted above, the final letter which counsel sent to Amaya specifically requested that Amaya notify him if he wished to file an appeal. After receiving conflicting evidence, the district court found that counsel "never heard again" from Amaya and that Amaya's statements to the contrary were not credible. Based upon our review of the record, we conclude these findings are not clearly erroneous.

CONCLUSION

For the reasons discussed, we conclude that the district court did not err in denying Amaya's motion for postconviction relief, and we affirm its judgment.

AFFIRMED.

IN RE INTEREST OF JOEL ANAYA, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JOSUE ANAYA AND MARY ANAYA, APPELLANTS.

758 N.W.2d 10

Filed December 5, 2008. No. S-07-1136.

1. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction.
2. ____: ____: ____. Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. 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 decisions made by the lower courts.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
4. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.

5. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
6. **Moot Question: Appeal and Error.** Under the public interest exception to the mootness doctrine, a court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
7. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
8. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
9. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
10. **Constitutional Law.** Both the First Amendment's Free Exercise Clause and article I, § 4, of the Nebraska Constitution protect religious freedom and prohibit interference therewith.
11. **Constitutional Law: Statutes: Appeal and Error.** When reviewing the constitutionality of a law that is challenged based on the Free Exercise Clause, the question is whether the law is neutral and has a general application.
12. **Civil Rights: Statutes.** A law is neutral and of general applicability if it does not aim to infringe upon or restrict practices because of their religious motivation and if it does not in a selective manner impose burdens only on conduct motivated by religious belief.
13. ____: ____. A neutral law of general applicability need not be supported by a compelling governmental interest even though it may have an incidental effect of burdening religion.
14. **Statutes: Appeal and Error.** When engaging in statutory interpretation, an appellate court's objective is to harmonize the language of conflicting statutes.
15. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006), the State must prove the allegations of the petition by a preponderance of the evidence.
16. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2006).
17. ____: ____. If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction and any subsequent orders of the court are a nullity.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Appeal dismissed.

Jefferson Downing and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellants.

Donald W. Kleine, Douglas County Attorney, and Nicole Brundo Goaley for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

MILLER-LERMAN, J.

NATURE OF CASE

In this appeal, appellants Josue Anaya and Mary Anaya claim that the newborn screening statutes, Neb. Rev. Stat. §§ 71-519 to 71-524 (Supp. 2007), violate the free exercise of religion provisions found at article I, § 4, of the Nebraska Constitution. The Anayas also assert that the separate juvenile court of Douglas County erred in ordering that their son, Joel Anaya, be tested pursuant to those statutes and remain in the custody of the State of Nebraska pending the results of the testing. We conclude that the screening statutes are constitutional, and we further conclude that due to insufficient proof, the separate juvenile court did not have jurisdiction under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) and its orders were a nullity. However, because we conclude that the instant appeal is moot and because the above-stated determination is based on the public interest exception to the mootness doctrine, we dismiss the present appeal.

STATEMENT OF FACTS

The Anayas object to the State's enforcement of the newborn screening statutes with respect to their son, Joel. The newborn screening statutes require that every newborn in Nebraska have a blood test. See §§ 71-519 to 71-524. The screening test is administered to advise parents and physicians whether an infant suffers from any of the following eight metabolic and genetic disorders: congenital primary hypothyroidism, hemoglobinopathies, biotinidase deficiency, congenital adrenal hyperplasia, cystic fibrosis, phenylketonuria, medium-chain acyl co-a dehydrogenase (MCAD) deficiency, and galactosemia. 181 Neb. Admin. Code, ch. 2, § 003 (2005). The conditions are serious

and, if untreated, could lead to mental disabilities, loss of hearing, loss of vision, irreversible brain damage, or death. The test involves obtaining a specimen of the infant's blood via a prick to the heel. Pursuant to the regulations established by the Department of Health and Human Services (DHHS), the test is to be performed within 24 to 48 hours of the infant's birth. 181 Neb. Admin. Code, ch. 2, §§ 005.04 and 008 (2005). The evidence indicates that the goal of the screening program is to have every child tested and treated within the first week of his or her life.

Joel was born at home on September 2, 2007. DHHS' newborn screening program staff was alerted to Joel's birth by reviewing registered birth certificates. Once alerted to an out-of-hospital birth, it is the practice of the newborn screening program staff to check the newborn screening data system to determine whether the child has been screened. Although it is not clear from the record when the newborn screening program staff learned of Joel's birth, the record shows that Krystal Baumert, a member of that staff, did such a check on Joel. When she determined that Joel had not been screened, she sent the Anayas a certified letter on September 18 notifying them of the requirement to have Joel submit to the newborn screening test. The letter stated that if the newborn screening program staff did not hear from the Anayas by September 21, it "[would] presume the screening has not been done, and must notify the County Attorney to initiate action pursuant to Nebraska Revised Statute §71-524." Also on September 18, Baumert followed up the mailing with a telephone call to Mary inquiring whether the Anayas planned to have the screening test performed. Mary informed Baumert that they would not have Joel tested.

The newborn screening program staff notified the State that the Anayas refused to have Joel tested. On October 10, 2007, the State filed a petition for adjudication in the separate juvenile court of Douglas County under § 43-247(3)(a), alleging that Joel lacked proper parental care by reason of the faults or habits of his parents, the Anayas. The petition alleged that the Anayas' failure to submit Joel for the newborn screening test

placed him at risk for harm. On that same date, the State also filed a motion for temporary custody pending a hearing on the petition and asked that Joel be placed in the custody of DHHS. Also on that same date, the court issued an ex parte order for immediate custody, finding that there was an immediate and urgent need for out-of-home placement of Joel for his protection and that DHHS had made reasonable efforts to prevent his removal from the family home. On October 11, when Joel was about 5 weeks old, he was removed from the family home and taken into the custody of DHHS.

The court held a formal hearing on October 12, 2007. At the hearing, the court received into evidence, inter alia, an affidavit in support of temporary custody of Joel sworn to by an employee of DHHS, the September 18 letter sent to the Anayas by Baumert, and a report from two DHHS employees to a deputy Douglas County Attorney; the report stated that after observing the Anayas' home environment, the DHHS employees had concluded that Joel appeared to be a healthy 6-week-old infant, and it recommended that Joel be returned to the Anayas' care pending the resolution of the newborn screening issue. The court also heard testimony from Dr. Richard E. Lutz, former chairman of the State of Nebraska Newborn Screening Advisory Committee; one of the DHHS employees who wrote the above-mentioned report; and the Anayas. Dr. Lutz testified that the testing of a child could still be relevant at 6 weeks of age because "[s]ome of these ailments don't become clinically relevant for weeks or months." Dr. Lutz cited MCAD deficiency as an example, stating that a patient may not "present" with that disease until he or she is 2, 6, or 9 months or 2 or 4 years of age. During the hearing, the Anayas stated that the taking of a blood sample from Joel was contrary to their sincerely held religious beliefs, and they unsuccessfully challenged the newborn screening statutes as violative of their right to the free exercise of religion under Neb. Const. art. I, § 4.

At the conclusion of the October 12, 2007, hearing, the court effectively found that Joel was a child as described under § 43-247(3)(a) and determined that Joel was at risk of

harm and that it was necessary the newborn screening test be administered immediately. The court directed that Joel be tested and further directed that he remain in the custody of DHHS until the results of the blood test were known. The court later entered a written order memorializing its October 12 oral rulings.

There seems to be no dispute that on October 16, 2007, the results of the test came back negative and that Joel was returned to the Anayas' custody on that same day. The State moved to dismiss the case. On October 17, the court filed an order dismissing the case. The Anayas appeal.

ASSIGNMENTS OF ERROR

The Anayas assign numerous errors. Our disposition of the following two claimed errors resolves the case. The Anayas claim that the separate juvenile court erred when it (1) rejected their claim that the newborn screening statutes infringed upon their rights to the free exercise of religion under Neb. Const. art. I, § 4, and (2) found that the evidence was sufficient to adjudicate Joel as a child under § 43-247(3)(a) and ordered his continued detention after the blood specimen had been obtained.

STANDARDS OF REVIEW

[1,2] Mootness does not prevent appellate jurisdiction. *BryanLGH v. Nebraska Dept. of Health & Human Servs., ante* p. 596, 755 N.W.2d 807 (2008). But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions. *Id.* 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 decisions made by the lower courts. *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

[3] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

ANALYSIS

This Appeal Will Be Considered Under the Public Interest Exception to the Mootness Doctrine.

Before reaching the legal issues presented, we address the justiciability issue raised by the State. Prior to oral argument, the State moved for summary dismissal of this case on the basis that the case is moot. The State contended that because the screening testing had been accomplished and the separate juvenile court had dismissed the petition, there was no longer a case or controversy for this court to review. The Anayas opposed the State's motion and claimed that the matter remained reviewable because it fell within the public interest exception to the mootness doctrine. We agreed with the Anayas, and we denied the motion.

[4,5] Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power. *BryanLGH v. Nebraska Dept. of Health & Human Servs., supra*. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

[6,7] Although the Anayas concede that the underlying facts are moot, they nevertheless argue that the case should be reviewed because it falls within the public interest exception to the mootness doctrine. Under the public interest exception to the mootness doctrine, a court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Green v. Lore*, 263 Neb. 496, 640 N.W.2d 673 (2002). When determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id*. After

considering these factors, we conclude that this case meets this standard and merits review.

The validity of the newborn screening statutes and the proper statutory method of enforcing the statutes fall squarely within the public interest. Resolution of these issues involves the health and welfare of all children born in the state, an issue of paramount importance to the citizens of this state. Furthermore, this court's resolution of the constitutional and statutory issues in this case will provide guidance for state officials and the juvenile courts on the validity of the newborn screening statutes and the proper method of enforcing these statutes. Finally, the appellants in this case are of childbearing age, so the issues presented in this appeal are capable of recurring in the future, and in addition, similar cases are likely to arise.

Constitutional Question: The Newborn Screening Statutes Do Not Violate Neb. Const. Art. I, § 4.

[8,9] The Anayas claim that the newborn screening statutes violate their rights to the free exercise of religion under article I, § 4, of the Nebraska Constitution. Article I, § 4, provides: "No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted." A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Stenger v. Dept. of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Id*. Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Id*.

The newborn screening statute § 71-519, challenged by the Anayas, provides:

> (1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, [MCAD] deficiency, and such other metabolic diseases as [DHHS] may from time to time specify. . . .

> (2) . . . If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by [DHHS].

In *Douglas Cty. v. Anaya*, 269 Neb. 552, 694 N.W.2d 601 (2005) (*Anaya I*), this court addressed and rejected the Anayas' challenge to the newborn screening statutes under the Free Exercise Clause of the federal Constitution. The Anayas argue that the analysis in *Anaya I* wherein we employed a rational basis review does not control this case. The Anayas rely on Nebraska case law and the Nebraska Constitution in support of their argument. The Anayas direct us to *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996), in which we examined a free exercise issue under the higher "compelling state interest" standard, and to the language of the free exercise provisions of the Nebraska Constitution, both of which the Anayas claim require us to review their state constitutional challenge under a higher degree of scrutiny than challenges under the Free Exercise Clause of the federal Constitution. We are not persuaded by these arguments.

With respect to *Palmer*, the Anayas rely on our statement therein in which we observed that where the Free Exercise Clause is involved, "a state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom." 249 Neb. at 818, 545 N.W.2d at 755. The Anayas assert that *Palmer* established that the State must demonstrate a higher "compelling interest" before it can interfere with the exercise of religion and that we are bound to follow this standard. The Anayas misperceive the significance of this case.

Our comment in *Palmer* was a correct statement of the law when made, but is no longer the standard in Nebraska under the free exercise provisions of the Nebraska Constitution. *Palmer* was filed April 12, 1996. At that time, 42 U.S.C. § 2000bb (1994) of the Religious Freedom Restoration Act was in effect, which legislation purported to restore the "compelling state interest" test after *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), had previously announced the

"rational basis review" test. However, the Religious Freedom Restoration Act was found unconstitutional in 1997 in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the year after we decided *Palmer*. Following *City of Boerne*, the rational basis review standard again controlled. Thus, subsequent to *Palmer*, the rational basis review standard described in *Smith* once again became applicable and we applied it in *Anaya I*.

[10] With respect to the textual argument, we recognize that the language of the state and federal provisions at issue differs; however, we are not prepared to accord these textual differences weight in terms of their constitutional significance. Both the First Amendment's Free Exercise Clause and article I, § 4, of the Nebraska Constitution protect religious freedom and prohibit interference therewith. See, U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); Neb. Const. art. I, § 4 ("[n]o person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted"); *Palmer v. Palmer, supra*. See, also, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 2d 1213 (1940) (stating that "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). Where state and federal constitutional provisions contain similar language and protect similar rights, we may conclude and indeed have concluded that they should be interpreted in congruence. For example, in *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005), we stated that the due process clause of the Nebraska Constitution does not contain a right of privacy broader than that recognized under the federal Constitution. Similarly, in *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006), we extended this principle of congruence to the context of a parent's substantive due process rights because the federal and state Constitutions contain similar due process language and both provide that no person shall be deprived of life, liberty, or property without due process of law. Accordingly, because the free exercise

provisions of the Nebraska Constitution protect the same rights as the Free Exercise Clause of the federal Constitution, we will review the newborn screening statutes under the same standard—and that standard, rational basis review, was recently applied in *Anaya I*.

[11-13] As we explained in *Anaya I*, when reviewing the constitutionality of a law that is challenged based on the Free Exercise Clause, the question is whether the law is neutral and has a general application. See, also, *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). A law is neutral and of general applicability "if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief.'" *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004), quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). A neutral law of general applicability need not be supported by a compelling governmental interest even though it may have an incidental effect of burdening religion. See *Employment Div., Ore. Dept. of Human Res. v. Smith, supra*.

In *Anaya I*, we concluded that § 71-519 was a neutral law of general applicability, noting that because "[§] 71-519 does not contain a system of particularized exemptions that allow some children to be excused from testing . . . [, t]he statute does not unlawfully burden the Anayas' right to freely exercise their religion, nor does it unlawfully burden their parental rights." 269 Neb. at 560, 694 N.W.2d at 608. We further concluded in *Anaya I* that § 71-519 could not be construed as regulating religious-based conduct and that there was no evidence the State had an antireligious purpose in enforcing the law.

After concluding in *Anaya I* that § 71-519 was a neutral law of general applicability, this court reviewed the evidence presented in the district court to determine whether there was a rational basis for the law. Because the State has an interest in the health and welfare of all children born in Nebraska and the purpose of § 71-519 is to protect such health and welfare, we concluded in *Anaya I* that this interest is a rational basis

for the law and that therefore, § 71-519 does not violate the federal Constitution. The record supports, and we apply, a similar analysis in the instant case. Based on this analysis, we conclude that the newborn screening statutes do not violate the free exercise provisions of the Nebraska Constitution.

Enforcement of the Newborn Screening Statutes Under the Juvenile Code Was Not Warranted, for Lack of Proof of Neglect.

We now turn to the enforcement of the newborn screening statutes in this case. The juvenile code and the newborn screening statutes are relevant to our consideration of this appeal. Section 71-524 contains the procedure in district court for the enforcement of the newborn screening statutes. Section 71-524 states:

> In addition to any other remedies which may be available by law, a civil proceeding to enforce section 71-519 may be brought in the district court of the county where the infant is domiciled or found. The attending physician, the hospital or other birthing facility, the Attorney General, or the county attorney of the county where the infant is domiciled or found may institute such proceedings as are necessary to enforce such section. . . . A hearing on any action brought pursuant to this section shall be held within seventy-two hours of the filing of such action, and a decision shall be rendered by the court within twenty-four hours of the close of the hearing.

As provided for by the Legislature, § 71-524 is the primary method for enforcing the newborn screening statutes via a civil proceeding in district court. In this case, however, the State enforced the newborn screening statutes in the separate juvenile court through § 43-247(3)(a) of the juvenile code. Section 43-247 states:

> The juvenile court shall have exclusive original jurisdiction as to[:]
>
> . . . .
>
> (3) [a]ny juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or

> custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

[14] Although there is tension between the language of § 71-524, which instructs that enforcement of the newborn screening statutes be sought in district court, and the exclusivity provision of § 43-247(3)(a), regarding juvenile court jurisdiction, we determine that both statutes are relevant to the enforcement of the newborn screening scheme. In this regard, we have stated that when engaging in statutory interpretation, our objective is to harmonize the language of conflicting statutes. See *Hoeings v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998) (stating that where it is possible to harmonize apparently conflicting statutes, such is to be done).

By its terms, in addition to the specific and therefore preferred remedy in district court, § 71-524 states that the newborn screening statutes may also be enforced through "other remedies which may be available by law." Under the proper set of proven facts, enforcement through the neglect provisions of the juvenile code may be one such "other remedy." The goals of the juvenile code are to ensure the rights of all juveniles, to provide them a safe and stable living environment, and to develop their capacities for a healthy personality, physical well-being, and useful citizenship. See Neb. Rev. Stat. § 43-246 (Reissue 2004). A proceeding brought under the juvenile code alleging and establishing a failure to test along with other indicators of neglect may be warranted and would be compatible with § 71-524. Here, however, the State did not meet its burden of proof to acquire jurisdiction to proceed in juvenile court under § 43-247(3)(a), and thus, its enforcement effort under the juvenile code ought not to have succeeded.

[15-17] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction and any subsequent orders of the court are a nullity. See, *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992); *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998).

While the State need not prove that the juvenile has actually suffered physical harm, our cases make clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. See, e.g., *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000) (holding that parent's alleged alcoholism was not sufficient evidence for adjudication under § 43-247(3)(a) when there was no evidence that such drinking caused harm or resulted in improper care of children). Here, the State did not meet its burden of proof as required under § 43-247(3)(a). Nothing presented at the October 12, 2007, hearing was tantamount to proof that the Anayas had neglected Joel. On the contrary, the evidence at the October 12 hearing established that during a DHHS home visit, the staff observed that Joel's needs were being met and that he was a healthy 6-week-old baby. Although failure to comply with the newborn screening statutes may be relevant, along with other facts, to a determination that a child was neglected as that term is understood under § 43-247(3)(a), the fact of failure to test under the newborn screening statutes, standing alone, does not establish neglect.

Our review of the record convinces us that the State failed to establish that this was an emergency situation, that harm was imminent, or that continued detention of Joel was warranted. At 5 weeks old, Joel was well past the first 24- to 48-hour

emergency time period set forth in the newborn screening statutes and regulations. The only evidence presented at the hearing with respect to the need for testing at 5 or 6 weeks of age was the testimony of Dr. Lutz to the effect that the testing was still relevant for a 6-week-old infant because some of the conditions can still be detected. The record suggests that testing can still identify beneficial information after the first week of life; however, this fact alone does not prove that without immediate testing, a 5-week-old infant is at immediate risk of harm warranting jurisdiction under § 43-247(3)(a) or that such an infant's continued detention after a blood specimen is obtained is necessary. There simply was no legal, factual, or logical basis to keep Joel in State custody after the blood sample was taken.

Because the State failed to meet its burden of proof under § 43-247(3)(a), the separate juvenile court did not acquire jurisdiction over Joel and all orders entered by the separate juvenile court were a nullity.

CONCLUSION

We conclude that the newborn screening statutes do not violate Nebraska's free exercise of religion provisions under Neb. Const. art. I, § 4. With respect to enforcement, we conclude that the State did not meet its burden of proof under § 43-247(3)(a), that the juvenile court did not acquire jurisdiction over Joel, and that its orders for testing and continued detention were a nullity. However, because we have concluded that the instant appeal is moot and because the above-stated determinations are made based on the public interest exception to the mootness doctrine, we dismiss the present appeal.

APPEAL DISMISSED.

HEAVICAN, C.J., not participating.

STUART A. CARTER, APPELLEE, V. NAHOKO HATA CARTER, APPELLANT.

758 N.W.2d 1

Filed December 5, 2008. No. S-08-025.

1. **Child Custody: Jurisdiction: Appeal and Error.** In considering whether jurisdiction existed under the Uniform Child Custody Jurisdiction and Enforcement Act, when the jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.
2. **Child Custody: Jurisdiction.** Jurisdiction over a child custody proceeding is governed exclusively by the Uniform Child Custody Jurisdiction and Enforcement Act.
3. **Child Custody: Jurisdiction: States.** Jurisdiction over custody matters having interstate dimension must be determined independently by application of the Uniform Child Custody Jurisdiction and Enforcement Act.
4. ____: ____: ____. The Uniform Child Custody Jurisdiction and Enforcement Act treats a foreign country as a state of the United States, unless the laws of the foreign country violate fundamental principles of human rights.
5. ____: ____: ____. In order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act.
6. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
7. **Child Custody: Jurisdiction: States: Time.** Under the Uniform Child Custody Jurisdiction and Enforcement Act, regardless of where the child was born, if the child and his or her parents have been living in another state for the 6 months immediately preceding the commencement of a custody proceeding, then the state in which the child was born is not the child's home state under Neb. Rev. Stat. § 43-1227 (Reissue 2004).
8. **Child Custody: Jurisdiction: States: Time: Words and Phrases.** For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, the plain and ordinary meaning of "home state" is the state where the child has "lived" with a parent or person acting as a parent for the 6 months immediately preceding the child custody action.
9. ____: ____: ____: ____: ____. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a "temporary absence" should be counted as part of the 6 months during which the child must live in a state for it to be the home state.
10. **Child Custody: Jurisdiction: Armed Forces: Words and Phrases.** For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, the time spent living in another state or country due to a permanent military assignment is not considered a "temporary absence" simply because it was motivated by such assignment.
11. **Child Custody: Jurisdiction: Armed Forces.** In the determination of jurisdiction in a child custody dispute, an adult does not gain or lose a domicile or residence by serving in the military.

12. **Child Custody: Jurisdiction: States.** The determination of a child's home state is separate and distinct from the determination of either the parents' or the child's legal residence.
13. **Attorney Fees: Appeal and Error.** The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
14. **Jurisdiction: Attorney Fees: Costs: Appeal and Error.** The Nebraska Supreme Court has the power to determine jurisdictional issues and to allow attorney fees and costs regarding litigation of such jurisdictional issues.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Reversed and remanded with directions.

Susan Ann Koenig and Jennifer J. Stevens, Senior Certified Law Student, of Koenig & Tiritilli, P.C., L.L.O., for appellant.

Christopher A. Vacanti, of Cohen, Vacanti, Higgins & Shattuck, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case presents a dispute over whether Nebraska has jurisdiction over a child custody dispute under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[1] After living in Nebraska for about 3 years, Stuart A. Carter, his wife, Nahoko Hata Carter, and their 10-week-old son, Alexander Lee Carter (Alex), moved to Japan for approximately 2½ years during Stuart's permanent military duty assignment. At the end of his assignment, without warning or Nahoko's consent, Stuart took Alex to Nebraska and immediately filed for legal separation and custody. Nahoko, who is both a Japanese and an American citizen, argues that Nebraska is not Alex's home state and, therefore, does not have jurisdiction over the parties and the subject matter.

BACKGROUND

The facts of this case are generally not in dispute. Stuart was commissioned into the Navy through the Navy Aviation

[1] Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004 & Supp. 2007).

Officer Candidate School in Pensacola, Florida, and over the last 20 years he has served in a variety of locations. Stuart and Nahoko met in Japan while Stuart was stationed there, and they were married in Japan on November 11, 1994. After about a year, Stuart was reassigned. During their marriage, Stuart was assigned to several different locations, and Nahoko accompanied him. After living in Japan, Stuart and Nahoko moved to San Diego, California, where Stuart was assigned military duty. Stuart and Nahoko lived in San Diego for about 3 years; after that, they moved to Kansas because Stuart was assigned to the Army Command and General Staff College in Fort Leavenworth for 1 year. Stuart was then accepted to the School of Advanced Military Studies for another year in Fort Leavenworth.

In November 1999, Stuart and Nahoko moved to Nebraska, where Stuart was assigned to U.S. Strategic Command at Offutt Air Force Base. Alex was born in Nebraska on August 15, 2002.

In October 2002, when Alex was 10 weeks old, Stuart was assigned to a Navy base in Yokosuka, Japan, and the family moved back to Japan. For the next 2½ years, Alex attended daycare in Japan, his first language was Japanese, and he formed bonds with his Japanese relatives.

In May 2005, Stuart's assignment ended and Stuart retired. Stuart and Nahoko had discussed where they should live during Stuart's retirement, and Nahoko was in favor of staying in Japan, while Stuart wished to move back to the United States. Stuart and Nahoko apparently had not yet reached an agreement on this point.

The military issued Stuart an order stating that he needed to go to San Diego for out-processing. It is unclear whether Nahoko knew of this requirement. Nahoko stated that Stuart had obtained Alex's passport from her, explaining that it was for a special visa that would allow Stuart to stay in Japan after his retirement. Stuart did not discuss with Nahoko the possibility of taking Alex with him on any trip to the United States.

On May 27, 2005, the day he left Japan, Stuart called Nahoko's mother, who usually picked Alex up from daycare, and told her he would be picking Alex up and taking him to

lunch and then to the park. Nahoko testified that on May 27, she tried calling Stuart several times, but Stuart's telephone was off. Finally, at approximately 4 p.m., Nahoko received a text message from Stuart. The message was sent from the airport and stated simply, "ajevx [sic] is ok we are going to our ho me [sic] in usa m ore [sic] info later Stu."

Nahoko testified that she did not understand from this message exactly where in the United States Stuart might be taking Alex and that this took her by complete surprise. When Nahoko arrived home, she found that her key no longer opened the locks. Stuart admitted that right before leaving, he changed the locks on the family home. Stuart explained that he was concerned about Nahoko's destroying property.

The next day, Nahoko received an e-mail from Stuart stating that Alex was fine and telling Nahoko that she "should be looking for an Omaha-based attorney." The e-mail also warned Nahoko "not [to] take any irrational actions," because "wasteful spending or other negative actions could result in a less favorable settlement for you."

Stuart apparently first took Alex with him to his outprocessing in San Diego. They then went on to Nebraska. From the time Stuart joined the Navy until his retirement in 2005, Stuart's home of record was Michigan. But during outprocessing in San Diego, Stuart changed his home of record with the military from Michigan to Nebraska.

On May 31, 2005, almost immediately after arriving in Omaha, Stuart filed for legal separation and sought temporary care and permanent custody of Alex. On June 6, Nahoko left Japan to go to Omaha for the purposes of the child custody and legal separation proceedings. Nahoko filed a motion to dismiss the child custody case, based on the grounds that Nebraska lacked jurisdiction over the matter and over Alex. The court issued an order on November 3 denying the motion. The court concluded that Nebraska had jurisdiction, accepting Stuart's contention that he was ordered back to Nebraska at the end of his tour, and that Nebraska was Stuart's residence at all relevant times.

On February 28, 2006, the court issued a temporary custody order, again concluding that it had subject matter jurisdiction

and jurisdiction over the parties. The court concluded it was in Alex's best interests for Stuart and Nahoko to have joint legal and physical custody. The court prohibited either party from removing Alex from Nebraska without further order.

On March 29, 2006, Stuart amended his complaint for legal separation to dissolution of marriage. Nahoko filed her answer, again denying that the court had jurisdiction over the parties and the subject matter of the custody dispute, and she filed another motion to dismiss for lack of jurisdiction.

In her motion, Nahoko argued that the court's finding that Stuart had sufficient ties to the State of Nebraska was incorrect. Nahoko presented proof that Stuart's home of record was listed as Michigan throughout his military career—and not Nebraska as he previously alleged. However, the district court dismissed this motion on November 15, 2006, concluding that Nebraska was the home state and thus had jurisdiction over Alex. The court reasoned that Stuart had vehicles licensed in Nebraska, he had personal property left in Nebraska, and Alex was born in Nebraska.

Finally, on September 25, 2007, the court entered an order for dissolution of marriage, and the decree was entered on December 19. The court again found that it had jurisdiction over the parties and subject matter. It then found that both parties were fit and proper parties to have joint legal and physical custody and that neither party was entitled to attorney fees. On January 7, 2008, Nahoko filed her notice of appeal challenging the decree of dissolution of marriage for lack of jurisdiction.

ASSIGNMENTS OF ERROR

Nahoko asserts, restated and renumbered, three assignments of error. First, she asserts the district court erred in its application of the UCCJEA, resulting in the wrongful exercise of subject matter jurisdiction over the parties' minor child, because (1) Nebraska does not have jurisdiction to make an interstate custody determination; (2) Nebraska was not Alex's home state, because the 6-month requirement was not satisfied; (3) the years the parties lived in Japan do not constitute a temporary absence; and (4) Stuart's abduction of Alex was unjustifiable conduct.

Second, Nahoko argues that in the event we find the district court had jurisdiction, then the court erred by awarding the parties joint legal and physical custody of Alex by not adopting her proposed parenting plan, because it was in Alex's best interests.

Finally, Nahoko asserts the court erred in failing to award her attorney fees.

STANDARD OF REVIEW

[1] In considering whether jurisdiction existed under the UCCJEA, when the jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.[2]

ANALYSIS

[2,3] Jurisdiction over a child custody proceeding is governed exclusively by the UCCJEA.[3] Jurisdiction over custody matters having interstate dimension must be determined independently by application of the UCCJEA.[4]

[4] The UCCJEA was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders.[5] The UCCJEA treats a foreign country, such as Japan, as a state of the United States, unless the laws of the foreign country violate

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[2] *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

[3] See Neb. Rev. Stat. § 42-351(1) (Reissue 2004).

[4] See, *Dorothy v. Dorothy*, 88 Ark. App. 358, 199 S.W.3d 107 (2004); *Stevens v. Stevens*, 682 N.E.2d 1309 (Ind. App. 1997); 27C C.J.S. Divorce § 986 (2005).

[5] Uniform Child Custody Jurisdiction and Enforcement Act (1997) § 101, comment, 9 U.L.A. 657 (1999).

fundamental principles of human rights.[6] In this case, there is no allegation that Japan violates fundamental principles of human rights.

[5] In order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the act.[7] Under the facts of this case, for Nebraska to exercise initial jurisdiction over a child custody dispute, Nebraska must be the home state as defined by the UCCJEA.[8] The UCCJEA provides that a state has jurisdiction to make an initial custody determination only if

> (1) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.[9]

Stuart does not allege that any of the exceptions to the home state requirement are applicable here. Instead, he asserts that the district court properly exercised jurisdiction over Alex because, at the time of the filing, Nebraska was Alex's home state.

Home state of the child is defined in the UCCJEA as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.[10]

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[6] § 43-1230.

[7] See § 43-1238.

[8] *Id.*

[9] *Id.*

[10] § 43-1227(7).

[6,7] Statutory language is to be given its plain and ordinary meaning.[11] We first note that although Stuart emphasizes that portion of § 43-1227 which refers to children under 6 months of age, the statement that "[i]n the case of a child less than six months of age, [home state] means the state in which the child lived from birth" clearly refers back to the sentence preceding it and applies only to a child custody case involving a child under the age of 6 months of age at the time of the commencement of the proceedings.[12] In other words, this clause was meant to provide a home state for a child when a custody proceeding is commenced at a time when a child has not lived in a state for the requisite 6-month period—because the child has not been alive for that period of time.[13] It is not meant to say that a child's state of birth is that child's home state.[14] Under the UCCJEA, regardless of where the child was born, if the child and his or her parents have been living in another state for the 6 months immediately preceding the commencement of a custody proceeding, then the state in which the child was born is not the child's home state under § 43-1227.[15]

[8,9] As the Nebraska Court of Appeals emphasized in *Lamb v. Lamb*,[16] the plain and ordinary meaning of "home state" is the state where the child has "lived" with a parent or person acting as a parent for the 6 months immediately preceding the action.[17] But Stuart argues that the 2 years spent in Japan was only a "temporary absence" from Nebraska and that thus, under § 43-1227, Alex continued to live in Nebraska for well

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[11] *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002).

[12] See, *In re D.S.*, 354 Ill. App. 3d 251, 828 N.E.2d 1189, 293 Ill. Dec. 691 (2004); *State ex rel. In Interest of R.P. v. Rosen*, 966 S.W.2d 292 (Mo. App. 1998).

[13] *Id.*

[14] *Id.*

[15] *Paulsen v. Paulsen*, 11 Neb. App. 582, 685 N.W.2d 49 (2003).

[16] *Lamb v. Lamb*, 14 Neb. App. 337, 707 N.W.2d 423 (2005).

[17] See, e.g., *In re Marriage of Ben-Yehoshua*, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979); *Bergstrom v. Bergstrom*, 271 N.W.2d 546 (N.D. 1978).

over the requisite 6-month period. Section 43-1227 states that "[a] period of temporary absence of any of the mentioned persons is part of the period." Thus, under the UCCJEA, a "temporary absence" should be counted as part of the 6 months during which the child must live in a state for it to be the home state.[18]

[10] Stuart argues that the absence was temporary because it was due to a military assignment. We disagree. In the present case, the fact that Alex was in Japan because of Stuart's military obligations is of no consequence. The UCCJEA does not specifically address the meaning of "temporary absence" as used in § 43-1227. But it is clear that time spent living in another state or country due to a permanent military duty assignment is not considered a "temporary absence" simply because it was motivated by such assignment.[19]

In *Consford v. Consford*,[20] the child was born while her parents were on military assignment in Germany. When that assignment was completed several months later, the family moved to Texas to await the father's next military assignment. Less than 8 weeks later, the family moved to Arizona upon the father's military assignment there. Shortly after moving to Arizona, the parents separated and the mother and child went to Florida to stay with the child's maternal grandmother. The father continued living in Arizona. Five months after moving there, he filed for divorce in Texas, and the Texas court eventually entered a custody decree.

[11,12] In the meantime, the mother and child had moved to New York, where the parties eventually disputed whether the Texas custody decree was enforceable for lack of jurisdiction. The Supreme Court of New York, Appellate Division, ultimately held that Texas lacked jurisdiction as the child's home state despite the fact that the parents had chosen Texas

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[18] See, e.g., *In re Marriage of Richardson*, 255 Ill. App. 3d 1099, 625 N.E.2d 1122, 193 Ill. Dec. 1 (1993).

[19] See, *Consford v. Consford*, 271 A.D.2d 106, 711 N.Y.S.2d 199 (2000); *L.H. v. Youth Welfare Office*, 150 Misc. 2d 490, 568 N.Y.S.2d 852 (1991); *Jackson v. Jackson*, 390 So. 2d 787 (Fla. App. 1980).

[20] *Consford v. Consford, supra* note 19.

as their legal domicile, had registered a vehicle there, and had filed their tax returns there before being moved to Arizona on military assignment. Although the move from Texas was compelled by a military assignment, the court held that time spent in Arizona could not be considered simply a temporary absence from Texas. The court explained: "Although an adult does not gain or lose a *domicile or residence* by serving in the military . . . , the determination of a child's *home state* . . . is separate and distinct from the determination of either the parents' or the child's legal residence . . . ."[21] The court found simply that the family had functioned as a family unit in Arizona in a manner such that they "lived" there.

In the present case, we note that before moving to Japan for Stuart's last military assignment, Stuart and Nahoko had significant ties to Japan. Nahoko is a Japanese citizen and has family in Japan. Stuart and Nahoko were married in Japan, and they lived in Japan previously to living in Nebraska. When they moved back, they stayed for over 2 years, most of Alex's life at that time. Alex attended daycare in Japan, he established close family relationships with his Japanese grandparents, and his first language was Japanese. Under these facts, Alex's absence from Nebraska could not be considered simply "temporary." While their move to Japan was required by Stuart's military assignment, this is no different from any of the previous places the family had lived during their married life. In fact, the family lived in Nebraska only briefly prior to leaving for Japan—because of Stuart's military assignment there. While Alex may have been under 6 months of age at the time they left, that fact does not change our analysis in this case.

The time spent in Japan is not considered a "temporary absence," and, therefore, it is clear that Alex was not living in Nebraska for the 6 months prior to the commencement of these proceedings. Thus, the district court did not have jurisdiction, and it should have granted Nahoko's motion to dismiss the child custody dispute.

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[21] *Id.* at 111-12, 711 N.Y.S.2d at 204-05 (emphasis supplied) (emphasis in original).

[13,14] Nahoko also assigns error to the district court's failure to award her attorney fees. The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.[22] Although the district court did not have jurisdiction to decide the child custody case because Nebraska is not Alex's home state, we have the power to determine jurisdictional issues and to allow attorney fees and costs regarding litigation of such jurisdictional issues.[23] Based on our de novo review of the record, the district court abused its discretion in not awarding Nahoko attorney fees. Nahoko was forced to leave her home in Japan to defend this lengthy and meritless jurisdiction dispute. As such, we award $10,000 to Nahoko in attorney fees.

CONCLUSION

We conclude that the district court lacked jurisdiction over the child custody dispute and that this court also lacks that same jurisdiction. We, therefore, vacate the district court's order relating to child custody and direct it to dismiss the child custody proceeding. We also award Nahoko attorney fees in the amount of $10,000.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

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[22] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[23] See *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). See, also, *Carlson v. Carlson*, 75 Ariz. 308, 256 P.2d 249 (1953).

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, APPELLEE AND CROSS-APPELLEE, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLANT, AND TREETOP, INC., APPELLEE AND CROSS-APPELLANT.

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, APPELLEE AND CROSS-APPELLEE, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLANT, AND JON L. LARGE, APPELLEE AND CROSS-APPELLANT.

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, APPELLEE, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLANT, AND DIRK S. JOHNSON AND JESSICA JOHNSON, APPELLEES.

NORMAN H. AGENA, LANCASTER COUNTY ASSESSOR, APPELLEE, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLANT, AND LINCOLN CITY CHURCH, APPELLEE.

758 N.W.2d 363

Filed December 5, 2008. Nos. S-08-154 through S-08-157.

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. **Constitutional Law: Statutes.** Whether a statute is constitutional is a question of law.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
5. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
6. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
7. **Statutes: Legislature: Intent.** For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
8. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
9. **Administrative Law: Taxes: Agriculture: Appeal and Error.** Under Neb. Rev. Stat. § 77-5016 (Supp. 2007), the Tax Equalization and Review Commission has the authority to reverse a decision of a county board of equalization classifying

the subject property as agricultural and granting greenbelt status if the board's decision was unreasonable or arbitrary.

10. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
11. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
12. **Constitutional Law: Statutes.** Although most decisions invoking the void-for-vagueness doctrine have dealt with criminal statutes, the doctrine applies equally to civil statutes.
13. **Constitutional Law: Statutes: Notice.** In order to survive a vagueness challenge, a statute must (1) give adequate notice to citizens, such that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited or required, and (2) supply adequate standards to prevent arbitrary enforcement, such that there are explicit standards for those who apply it.
14. **Statutes.** A statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.
15. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute.

Appeals from the Tax Equalization and Review Commission. Affirmed.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellant.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., and Vincent Valentino for appellee Norman H. Agena.

Steven E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellee Treetop, Inc.

William F. Austin, of Erickson & Sederstrom, P.C., for appellee Jon L. Large.

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

HEAVICAN, C.J.

I. BACKGROUND

These cases involve the eligibility of four properties for special valuation as agricultural or horticultural land for tax

purposes under Neb. Rev. Stat. §§ 77-201(2) and 77-1344 (Cum. Supp. 2006). This particular special valuation is colloquially known as "greenbelt status." These four properties are the "Treetop" property, the "Large" property, the "Johnson" property, and the "Church" property.

1. Disqualification of Greenbelt Status and Subsequent Protest and Appeal

Prior to the 2007 tax year, the properties, or at least portions of the properties, at issue in these appeals had been considered agricultural land and qualified for greenbelt status under § 77-1344. However, as a result of an amendment to Neb. Rev. Stat. § 77-1359 (Cum. Supp. 2006), which defines agricultural or horticultural land, and pursuant to its authority under Neb. Rev. Stat. §§ 77-1347 (Cum. Supp. 2006) and 77-1347.01 (Supp. 2007), the Lancaster County assessor's office reevaluated certain properties receiving greenbelt status. Pursuant to this evaluation, Norman H. Agena, the Lancaster County assessor, recommended disqualification of the greenbelt status for each of these properties. In response, each taxpayer filed a protest with the Lancaster County Board of Equalization (Board), as permitted by § 77-1347.01. The taxpayers argued that their properties were primarily used for agricultural purposes and therefore entitled to continued greenbelt status.

The Board rejected the county assessor's recommendations and instead agreed with the taxpayers that each property was being primarily used for an agricultural purpose and was entitled to greenbelt status. The county assessor appealed the Board's decisions to the Tax Equalization and Review Commission (TERC) pursuant to § 77-1347.01 and Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2006). TERC reversed the Board's decisions and concluded that none of the properties were agricultural as defined by § 77-1359. Pursuant to Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2006), the Board appeals. Two of the four taxpayers cross-appeal.

2. "Treetop" Property—Case No. S-08-154

Treetop, Inc., is a family corporation formed for purposes of holding ownership in the family's farmland. The vice president

of Treetop is Steven E. Guenzel. Prior to 1998, Treetop owned land totaling 120 acres. In 1998, Guenzel and his wife formed a limited liability company for purposes of starting a business involving the production and sale of hydroponic tomatoes. Guenzel and his wife arranged a like-kind exchange wherein they acquired title to 19.98 acres of land owned by Treetop in order to house their business. The land in question is located in an agricultural district, but does not have a Farm Service Agency (FSA) number. The business operated from 1998 to 2003, but ceased operations because it was not profitable. Prior to the hearing before TERC, Guenzel and his wife deeded the property back to Treetop.

The property in question houses a utility building and a greenhouse formerly used for growing tomatoes. These buildings are located on approximately 1 acre of land. Attempts to sell the greenhouse have been unsuccessful. The remaining acres are not farmed or fenced in. There are walnut trees located on the land, and Guenzel indicated an interest in harvesting these trees. However, similar trees on adjacent land owned by Treetop have not been harvested. Guenzel made no mention of the trees to the county assessor or before the Board, and he acknowledged at oral argument before this court that it would be difficult to contend that these trees qualified as an agricultural purpose under § 77-1359.

There is no residence on the property, and according to the record, it is not feasible to build a residence for two reasons: (1) Zoning regulations prevent the construction of a residence on less than 20 acres of land zoned agricultural, and (2) soil conditions prevent the installation of a traditional septic system.

3. "Large" Property—Case No. S-08-155

Jon L. Large owns 21 acres of land located in Lancaster County, Nebraska. Large purchased the property in 2002 in order to reside in the existing home, which has a detached garage and rests on approximately 2.3 acres. Large testified that he purchased the property because he "wanted to live on a piece of agricultural property."

Large testified that he maintains between 40 and 88 grapevines on the east side of his residence, as well as nine fruit trees on the west side. At the present time, no income has been realized from these ventures, but Large indicated that it will take several years for the fruit to develop. As with Guenzel, these ventures were not mentioned to the county assessor or to the Board. In addition, Large rents out between 16 and 18 acres to a local farmer who farms the land in conjunction with adjacent parcels of land owned by the farmer and another property owner. The farmer has an FSA number. Large is paid $1,157 per year in rent; in 2006, the land produced $5,968 in income for the farmer.

4. "JOHNSON" PROPERTY—CASE NO. S-08-156

Dirk S. Johnson and Jessica Johnson own 20 acres of land located in Lancaster County. The Johnsons purchased the property in 1997 or 1998 with the goal of constructing a residence. For 5 years, the Johnsons leased the entire property to a dairy farmer. In approximately 2002, a storage building and a residence for the Johnsons were constructed on 2 acres. The lease to the dairy farmer was reduced accordingly. That lease was terminated in 2004. Since that time, the Johnsons have leased the property to other local farmers. The current lessee has his own FSA number and has planted and harvested crops on the 18 acres, retaining all profits and paying rent for the use of the land. He paid a total rent of $910 for the 2006 tax year. According to the record, this farmer also farms land lying to the north of the Johnsons' property. Land lying to the south is separately farmed.

5. "CHURCH" PROPERTY—CASE NO. S-08-157

Lincoln City Church owns approximately 26 acres of land purchased in 2000 for the purpose of constructing a church building. That building was built shortly after the purchase of the land. The building is used for worship, as a Christian school, and as a daycare. In 2001, 6 acres of the property were granted a religious exemption; the remaining land was not granted such an exemption. There are no immediate plans to expand or erect any new structures on the balance of the

land owned by the church. This remaining land is leased to a local farmer. That farmer and the church are currently involved in a profit-sharing arrangement wherein the church pays no expenses and receives one-half of the crop revenue. The land does not have an FSA number.

II. ASSIGNMENTS OF ERROR

The Board assigns that TERC erred in finding that the primary use of these parcels was not for commercial agricultural use.

Treetop cross-appeals and assigns, restated, that (1) the statutes in question are unconstitutional and (2) TERC erred in reversing the Board's decision finding the primary purpose of its parcel was agricultural and therefore the property was entitled to greenbelt status.

Large cross-appeals and assigns, restated and consolidated, that TERC erred in (1) reversing the Board's decision finding the primary purpose of his parcel was agricultural and therefore the property was entitled to greenbelt status and (2) admitting the testimony of Board member Ray Stevens regarding his opinion as to factors that should be considered in determining an agricultural or horticultural purpose.

Neither the Johnsons nor Lincoln City Church filed cross-appeals in their respective cases, nor did either party make an appearance in these appeals.

III. STANDARD OF REVIEW

[1] Decisions rendered by TERC shall be reviewed by an appellate court for errors appearing on the record of the commission.[1]

[2,3] Whether a statute is constitutional is a question of law.[2] Statutory interpretation also is a question of law, which an appellate court resolves independently of the trial court.[3]

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[1] *Darnall Ranch v. Banner Cty. Bd. of Equal., ante* p. 296, 753 N.W.2d 819 (2008).

[2] *Pavers, Inc. v. Board of Regents, ante* p. 559, 755 N.W.2d 400 (2008).

[3] *Borrenpohl v. DaBeers Properties, ante* p. 426, 755 N.W.2d 39 (2008).

IV. ANALYSIS

1. Whether Board Has Standing to Appeal

In the county assessor's brief, he raises the issue of whether the Board has standing to challenge the constitutionality of a statute. For reasons which will become apparent, we need not and do not address this precise question. We do, however, believe that we should determine the more general question of whether the Board has standing to appeal TERC's decisions to this court.

[4,5] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.[4] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[5]

We conclude that the Board has standing. Section 77-5019(1) provides in part that

> [a]ny party aggrieved by a final decision in a case appealed to [TERC], any party aggrieved by a final decision of [TERC] on a petition, or any party aggrieved by an order of [TERC] issued pursuant to section 77-5020 or sections 77-5023 to 77-5028 shall be entitled to judicial review in the Court of Appeals. Upon request of the county, the Attorney General may appear and represent the county or political subdivision in cases in which [TERC] is not a party.

To begin, the above language allowing the Attorney General to represent the county under certain circumstances supports a conclusion that the Legislature intended for the Board to be involved in appeals from TERC decisions. We note that the statute provides for the *county* and not specifically the *Board* to request Attorney General representation, but we are not persuaded that such distinction is of any import in this case.

In addition, a review of the records indicates that the Board was treated as, and acted as, a party to the proceedings before TERC. After the Board reversed the county assessor's denials of greenbelt status for the properties in question, the county

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[4] *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[5] *City of Omaha v. City of Elkhorn, ante* p. 70, 752 N.W.2d 137 (2008).

assessor appealed those decisions to TERC. The Board was named as appellee in those appeals and filed answers in response to the county assessor's appeals. The Board appeared at the TERC hearing and was represented by counsel at that hearing. All revelant filings were served upon the Board. Upon reversal of its decisions, the Board requested appellate review of TERC's decisions. All of this lends further support to the conclusion that the Board has standing to appeal TERC's decisions to this court.

2. Board's Appeal and Treetop's and Large's Cross-Appeals

Having concluded that the Board has standing to appeal these decisions, we turn to the arguments presented on appeal. As noted, the Board assigns that "TERC erred in finding that the primary use of the parcel[s] was not for commercial agricultural use." And on cross-appeal, both Treetop and Large assign that TERC erred in reversing the Board's decisions finding that the primary use of their respective properties was agricultural and in granting to their respective properties greenbelt status. In addition, Treetop assigns that the 2006 amendments to Neb. Rev. Stat. § 77-132 (Cum. Supp. 2006) and § 77-1359 are unconstitutionally vague and violate constitutional requirements regarding uniformity. Finally, Large assigns that TERC erred in admitting the testimony of Board member Stevens.

As an initial matter, we note the Board assigns only that TERC erred in finding the primary use of each parcel was not for commercial agricultural use. However, in its brief, the Board argues that §§ 77-132 and 77-1359 are unconstitutionally vague and also that these statutes violate article VIII, § 1, of the Nebraska Constitution.

[6] This court has repeatedly held that errors argued but not assigned will not be considered on appeal.[6] And because the Board failed to specifically assign the alleged unconstitutionality of §§ 77-132 and 77-1359, we decline to reach that issue as

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[6] See *Sturzenegger v. Father Flanagan's Boys' Home, ante* p. 327, 754 N.W.2d 406 (2008).

raised by the Board. We note that we will reach certain constitutional arguments which were raised by Treetop. However, we will address the assertion, raised by the Board, and by Treetop and Large, that TERC erred in reversing the decisions of the Board finding their respective properties to be agricultural and granting those properties greenbelt status.

(a) Relevant Statutory Provisions

We begin with a review of the relevant statutory provisions. Under § 77-1344, special valuation (i.e., greenbelt status) can only be applied to agricultural or horticultural land. Such land is defined under § 77-1359, which provides in relevant part:

> (1) Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;
>
> (2) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture.

"Parcel" is defined by § 77-132 as

> a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel.

The prior version of § 77-1359 is relevant in this case. That version provided in relevant part:

> For purposes of sections 77-1359 to 77-1363:
>
> (1) Agricultural land and horticultural land shall mean land which is primarily used for the production of agricultural or horticultural products, including wasteland lying in or adjacent to and in common ownership or

> management with land used for the production of agricultural or horticultural products. . . .
>
> (2) Agricultural or horticultural products shall include grain and feed crops; forages and sod crops; animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry; and fruits, vegetables, flowers, seeds, grasses, trees, timber, and other horticultural crops[.][7]

(b) Meaning of § 77-1359

The definition of agricultural land under § 77-1359 is central to the resolution of this case. In particular, we are concerned with the following language: "[a]gricultural land . . . means a parcel of land which is primarily used for agricultural . . . purposes . . . . Agricultural land . . . does not include any land directly associated with any building or enclosed structure."[8] As is noted above, this language was amended in 2006, and the statute previously stated that "[a]gricultural land . . . shall mean land which is primarily used for the production of agricultural . . . products."[9]

In concluding that the subject properties were not agricultural and therefore not eligible for greenbelt status, the county assessor concluded that the amendment to § 77-1359 effected a change in the operation of the statute. In particular, the county assessor noted that the addition of the term "parcel," defined as a "contiguous tract of land,"[10] indicated that he was to consider the primary use of an entire *parcel* rather than the primary use of the *land*. Prior to the change in the statute, the county assessor had divided the land into different uses, regardless of whether the use was primary. Thus, if specific land was used for agricultural purposes, the land would be considered agricultural land and would be entitled to greenbelt status. Any portion of land with a residence on it, however, would not have been considered agricultural.

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[7] § 77-1359 (Reissue 2003).

[8] § 77-1359(1) (Cum. Supp. 2006).

[9] § 77-1359(1) (Reissue 2003).

[10] § 77-132.

In contrast, the Board made its decision by asking three questions of property owners: (1) whether the property had an FSA number; (2) whether a form 1040 farm tax return was filed showing farm income; and (3) whether a "majority" of the parcel (determined by looking at the number of acres devoted to the activity) generated income from recreation, hobby, or agricultural or horticultural use. According to a member of the Board, the Board gave consideration to whether there was a residence on the property and then "looked at the balance of the land to see how that was actually being used."

[7,8] For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[11] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[12]

Section 77-1359 requires an examination of an entire parcel to determine primary use. While the county assessor focuses on the addition of the term "parcel" and concludes that such requires his office to consider the use of the land as a whole, the Board concludes that "primary use" means the use of a majority of the acres of a parcel. Given the language of the statute, both are reasonable interpretations. We therefore conclude that § 77-1359 is ambiguous. Thus, in interpreting § 77-1359, we look to its legislative history.

The committee statement is particularly telling with respect to the amendment of § 77-1359. That statement reads in part:

> Agricultural and horticultural land means a parcel of land predominately used for agricultural purposes. . . . The use of the term "parcel" means that entire tracts will be considered when examining the predominate use. Currently, many owners have argued that part of a parcel is still eligible for greenbelt assessment even though another part contains a large house. Under the committee amendment, any land directly associated with any

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[11] *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

[12] *Id.*

> building or enclosed structure cannot be agricultural land. It is thought that these changes will narrow the definition of agricultural and horticultural land and, in turn, the use of special value.[13]

Aside from the committee statement, specific amendments were discussed during the floor debate on the underlying legislative bill:

> SENATOR RAIKES: But I do want to just offer you an example which I hope will perhaps clarify some things for you. A hypothetical example: A property owner owns an 8-acre parcel in the outlying areas of a county, next to a city or wherever it might be. Two acres of the parcel are devoted to the home site; the remaining 6 acres of the parcel are allowed to go to grassland and are baled twice a year into prairie hay. Under the current system, this landowner is able to receive the agricultural value, greenbelt value, on these 6 acres. However, the primary use of the parcel from all appearances is to serve as a home site. In these instances, it is my belief that the benefit of agricultural valuation should be extended only to those properties primarily devoted to agricultural or horticultural purposes. The bill would allow a county assessor in this situation to make a determination as to the primary use of the parcel . . . .[14]

The legislative history of the amendments to § 77-1359 shows that the Legislature intended to narrow the definition of agricultural property. And it is also clear that the addition of the term "parcel" was intended to require a county assessor to consider the entire tract of land, including any homesite, to determine whether the predominate use of the *parcel* was for agricultural purposes. This was the approach taken by the county assessor in these cases. Such is in contrast to the approach of the Board, which appeared to consider a homesite and the remainder of the land separately, then made a determination as to whether the remainder was being

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[13] Committee Statement, L.B. 808, Revenue Committee, 99th Leg., 2d Sess. (Feb. 2, 2006) (emphasis in original).

[14] Floor Debate, 99th Leg., 2d Sess. 11110-11 (Mar. 22, 2006).

used for agricultural purposes. Indeed, it appears the Board's approach was no different than it would have been prior to the amendment.

[9] We review TERC's decisions for errors appearing on the record.[15] And TERC has the authority to reverse the Board's decisions classifying the subject properties as agricultural and granting greenbelt status if the Board's decisions were unreasonable or arbitrary.[16] In each of these cases, the Board failed to consider the use of the entire parcel in determining whether the property was agricultural. We conclude that this failure was unreasonable and arbitrary. As such, we cannot conclude that TERC's decisions reversing the Board's decisions were in error. The arguments of the Board, Treetop, and Large to the contrary are without merit.

(c) Constitutionality of §§ 77-132 and 77-1359

[10,11] We next turn to Treetop's assertion that §§ 77-132 and 77-1359 are unconstitutionally vague and violate the uniformity requirements of Neb. Const. art. VIII, § 1. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.[17] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[18]

(i) Vagueness

Treetop first contends that §§ 77-132 and 77-1359, when considered together, are vague. Under § 77-1359, agricultural land is defined as "a parcel of land which is primarily used for agricultural . . . purposes." Treetop contends that the use of the term "parcel" is vague, because the definition of that term, found in § 77-132, provides that "[i]f all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel." Treetop contends that such does not provide adequate standards

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[15] *Darnall Ranch v. Banner Cty. Bd. of Equal., supra* note 1.

[16] Neb. Rev. Stat. § 77-5016 (Supp. 2007).

[17] *Pavers, Inc. v. Board of Regents, supra* note 2.

[18] *Id.*

for the county assessor in determining what should be considered a parcel.

Treetop also asserts that the following language from § 77-1359 is vague: "Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." In its brief, Treetop questions whether such language would eliminate land "under or near barns, grain silos, farm equipment storage buildings, etc.? That certainly seems to be what the statute says, but if so, it makes no sense whatsoever."[19] Though Treetop does not explain further, we believe that it is making the same argument here as with the definition of parcel: that, with respect to the meaning of this language, the relevant statutes do not provide sufficient guidance to the county assessor.

[12-15] Although most decisions invoking the void-for-vagueness doctrine have dealt with criminal statutes, the doctrine applies equally to civil statutes.[20] In order to survive a vagueness challenge, a statute must (1) give adequate notice to citizens, such that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited or required, and (2) supply adequate standards to prevent arbitrary enforcement, such that there are explicit standards for those who apply it.[21] Another wording of the same test states that a statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.[22] Statutes are to be evaluated under these standards using principles of flexibility and reasonable breadth.[23] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute.[24]

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[19] Brief for appellee Treetop on cross-appeal at 7.

[20] *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806 (1989).

[21] *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999), *overruled in part on other grounds, Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[22] *Id.*

[23] *Id.*

[24] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

We conclude that Treetop lacks standing to assert vagueness in both particulars. With respect to the alleged vagueness of the definition of parcel, the property owned by Treetop clearly fits within the definition of "parcel" set forth by § 77-132. Moreover, the discretion granted to the county assessor by the last sentence of § 77-132 is not applicable to Treetop's situation. At the time the county assessor denied the property greenbelt status, the property was owned by Guenzel and his wife. There is no indication from the record that at the relevant time, there were additional lots located in the same block and tax district which were also owned by the Guenzels. Thus, with respect to this property, the county assessor would have had no discretion to consider several lots as one parcel.

Treetop also lacks standing to assert the vagueness of the language excluding from the definition of agricultural land "any land directly associated with any building or enclosed structure."[25] Even assuming that the greenhouse located on Treetop's property would fall within this exclusion, the subject property still fails to qualify as agricultural land because it has not been used for *any* purpose, agricultural or otherwise, since at least 2003.

Treetop's assignment of error regarding vagueness is without merit.

(ii) Uniformity

Treetop also alleges that §§ 77-132 and 77-1359, as amended, cannot be uniformly enforced. Neb. Const. art. VIII, § 1(4), provides:

> [T]he Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon

[25] § 77-1359(1).

all property within the class of agricultural land and horticultural land.

Treetop's assertion regarding uniformity is also without merit. The Legislature enacted §§ 77-132 and 77-1359 in order to provide a definition for agricultural land. Neb. Const. art. VIII, § 1, allows the Legislature to so define. And the Legislature has chosen to narrow the classification of properties in such definition to exclude properties which do not meet certain standards of agricultural use when considered as a whole. The amendments as enacted are capable of being uniformly applied and, accordingly, do not violate article VIII, § 1.

(d) Testimony of Stevens

Finally, Large assigns that TERC erred in receiving the testimony of Board member Stevens. Large contends that Stevens' testimony was without foundation and irrelevant. Stevens was the sole Board member to vote against granting Large's property greenbelt status. In his testimony, Stevens explained the reasons behind his dissenting vote.

As discussed above, our resolution of the primary question presented on appeal—whether the properties in question were agricultural—was dependent upon our interpretation of the applicable statutes. And the interpretation of a statute is a question of law, which we review de novo.

Our conclusion as to the proper interpretation of these statutes, and in turn our conclusion that TERC did not err in reversing the Board's decisions, was reached without reliance upon Stevens' testimony. Thus, even assuming that the receipt of Stevens' testimony was error, we conclude that Large suffered no prejudice as a result. Large's assignment of error on this point is therefore without merit.

V. CONCLUSION

The Board has standing to appeal TERC's decisions to this court. Further, as raised in the Board's appeals and in Treetop's and Large's cross-appeals, TERC did not err in reversing the decision of the Board granting the properties at issue greenbelt status.

With respect to Treetop's cross-appeal, we conclude that Treetop lacks standing to raise a vagueness challenge to

§§ 77-132 and 77-1359 and that these statutes do not violate Neb. Const. art. VIII, § 1. With respect to Large's cross-appeal, we conclude that Large was not prejudiced by any error in the admission of the testimony of Stevens.

We therefore affirm the decisions of TERC in these appeals.

AFFIRMED.

CHRIS W. CHRISTIAN AND TABITHA CHRISTIAN, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS, V. BERT SMITH IV, APPELLEE AND CROSS-APPELLEE, AND B4 CATTLE COMPANY, INC., APPELLANT AND CROSS-APPELLEE.

759 N.W.2d 447

Filed December 12, 2008. No. S-07-215.

1. **Jurisdiction.** Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the discretion of the trial court.
2. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Corporations: Equity: Liability.** Proceedings seeking disregard of corporate entity, that is, piercing the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions.
5. **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.
6. **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.
7. **Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong.
8. **Damages: Verdicts: Juries: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.
9. **Jurisdiction.** A forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.
10. **Jurisdiction: States.** The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.

11. **Jury Instructions.** While instructions withdrawing consideration of material issues of fact presented by the pleadings and evidence are erroneous, the trial court must eliminate all matters not in dispute and submit only the controverted questions of fact on which the verdict must depend.
12. **Trial: Evidence: Juries.** A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence.
13. **Trial: Appeal and Error.** A litigant must specify the grounds for an objection at trial to preserve the issue for appeal.
14. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
15. **Corporations: Liability: Appeal and Error.** Generally, a corporation is viewed as a complete and separate entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation.
16. **Corporations: Fraud.** A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
17. **Corporations.** A corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.
18. **Corporations: Proof: Fraud.** A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights.
19. **Corporations: Liability: Proof: Fraud: Debtors and Creditors.** A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed as modified.

John C. Hahn and Brett T. Daee, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant and for appellee Bert Smith IV.

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellees Chris W. Christian and Tabitha Christian.

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

MCCORMACK, J.

I. NATURE OF CASE

This case involves an oral contract. The dispute involves the terms of the oral contract and whether the oral contract was between Chris W. Christian and Bert Smith IV

or between Christian and B4 Cattle Company, Inc. (B4), Smith's corporation. Smith claims that the oral agreement was between Christian and B4. Under the terms of the oral agreement, Christian would borrow money from the Citizens National Bank of Wisner, Nebraska (CNBW), to purchase and feed cattle on behalf of Smith or B4. In exchange for the use of Christian's credit line, Smith or B4 promised to pay Christian a fee for each lot of cattle purchased. Christian's line of credit was also used to purchase feed for the cattle, and the debt incurred from the purchase of feed was to be paid using the money from the eventual sale of the cattle. The parties disagree whether Smith or B4 promised to pay the line of credit should the proceeds from the sale of the cattle be insufficient for Christian to do so. The cattle sales were insufficient to pay the lines of credit, Christian defaulted on the loan, and CNBW obtained a judgment against him. Smith and B4 refused to indemnify Christian, and Christian filed this breach of contract claim. Christian contends that B4 was the alter ego of Smith and that the corporate existence of B4 should be disregarded.

II. BACKGROUND

Christian and Smith were longtime friends who grew up together in Tennessee. Christian is a full-time physical therapist who occasionally hauls hay or cattle. Smith has been in the cattle business all of his life. Smith claims that in entering into the oral agreement with Christian, he was acting on behalf of B4. Smith incorporated B4 in 2001 in Virginia. He is the president and sole stockholder of B4. Smith testified that he is the sole member of the board of directors of B4 and holds "[a]ll positions" of B4. Smith divides his time between Tennessee and Virginia. Christian lives in Tennessee.

1. Oral Agreement

It is undisputed that in the spring of 2003, Christian and Smith had a telephone conversation about a possible arrangement in which Smith or B4 would use Christian's line of credit to purchase, feed, and care for cattle. Christian testified that Smith or B4 wanted to use Christian to borrow money because

Smith or B4 could not get any more credit. Smith proposed that in exchange for the use of Christian's credit line, Smith or B4 would pay Christian a fee, that the parties call a "commission," for each lot of cattle purchased. The exact amount of the fee is disputed. Smith claims the fee was $250, while Christian claims it was $500. The debt on Christian's line of credit was to be paid off using the money from the eventual sale of the cattle.

Under their agreement, Christian would borrow the money from CNBW. The loans for the purchase of the cattle would be in Christian's name, and the cattle would also be titled in Christian's name. The cattle would be kept and cared for at feedlots owned and operated by Max Kant in Norfolk, Nebraska. Smith would make all management decisions concerning the purchasing and feeding of the cattle.

According to Christian, he "just wanted the commission off of it" and Smith would take "all profit and all loss." Smith, on the other hand, testified that there was never a meeting of the minds on profits and losses. Smith testified that they agreed to talk about profits and losses later. In his deposition, however, portions of which were read into the record at trial, Smith stated that Christian "'assumed that if I was getting the profit that I would take the loss.'"

Pursuant to their oral agreement for the Nebraska-fed cattle, Christian established three lines of credit with CNBW as follows: (1) August 2003, $925,000 accruing interest immediately at 6.25 percent; (2) August 2003, $178,000 accruing interest immediately at 6.25 percent; and (3) October 2003, $112,850 accruing interest immediately at 6.5 percent. All three lines accrued interest at maturity of 16 percent per annum.

Once the first line of credit was established, Smith, or Smith on behalf of B4, began using it to fund the location and purchase of cattle. Under the usual procedure, Smith would locate, select, and sort cattle. Once the cattle were chosen, Smith would fax a handwritten invoice to Christian, who would write a check for the purchase price. Smith's father would usually pick up Christian's check and send it to the seller. Christian would then be reimbursed plus the "commission." Christian testified that his account was often overdrawn because Smith

was slow in sending the reimbursement checks. After about 3 months, Smith or B4 stopped buying cattle.

Christian's line of credit continued to be used to pay for the ongoing care of the cattle on Kant's feedlot. Kant had the authority to draw on Christian's credit line to pay for feed. If any of the fattened cattle were sold, Kant would apply the proceeds to pay down Christian's credit line.

If there was excess money remaining after the credit line was paid, the arrangement was that Kant would send the profits "back to Tennessee." Kant testified that on only one occasion were there excess profits after paying the credit line. Kant testified that he sent those profits, around $28,000, to Smith. Christian testified that he was never informed of nor received any portion of those profits. He thought this was proper because, under their agreement, the profits were Smith's. Christian stated that "it was defined to me that [Smith] got all profits and all losses and all I got was the commission per load." Smith acknowledged at trial that he had testified in his deposition that he was to receive the profits, if any, from the arrangement with Christian.

The cattle were titled in Christian's name, and the signed CNBW loan documents stated that Christian was not acting as a straw man for anyone. Nevertheless, Christian testified that the agreement was that Smith owned the cattle. Smith likewise admitted at trial that the cattle were actually owned by him. In his testimony, Smith would not refer to B4 as owning the cattle, but would always say that they were owned by him.

Kant, the feedlot owner, also testified that Smith was the owner of the cattle purchased with Christian's line of credit. To ensure that the feedlot record of ownership was correct, Smith had sent a fax to Kant requesting the feedlot to change all cattle titled in Christian's name to Smith's name. After receiving the written request, Kant updated his records to reflect that Smith was the owner of the cattle.

Eventually, all the cattle that had been financed using Christian's line of credit were sold. The sales were insufficient to pay the lines of credit, and Christian defaulted. Christian testified that after CNBW called to inform him that he owed

$168,000, Christian alerted Smith. Christian testified that Smith said, "Don't worry about it, they'll probably just role [sic] it over into my debt." Christian had no further discussions with Smith until CNBW sued Christian on June 7, 2004. Upon receiving the complaint, Christian faxed it to Smith. Although Smith was not a party to the action, he told Christian he would help Christian find an attorney in Nebraska and assist Christian "with some money." Christian and CNBW settled the case, and on January 5, 2006, CNBW took judgment of $168,000 with 16-percent interest.

After the judgment was entered, CNBW began to execute on the judgment by levying Christian's bank accounts and garnishing his wages. At the time of trial, $20,060.29 had been taken from Christian. Because Christian did not have enough money to pay the judgment, CNBW pursued Kant, who was a signed guarantor on Christian's line of credit. Eventually, Kant paid CNBW $130,000 and was assigned the $169,379 judgment against Christian. Kant also received the ongoing garnishment against Christian's checking account.

2. Trial

Christian brought a claim against Smith and B4 in the district court for Cuming County, Nebraska, for breach of the alleged agreement to hold him harmless for any losses resulting from the cattle transactions. Christian styled his complaint as against "Bert Smith IV and B4 Cattle Company." In the body of the complaint, it alleges that Smith and B4 "wanted to increase the number of cattle they had on feed in Nebraska" and that Smith, "in his personal capacity, asked his life long friend, Chris Christian, to enable him to do this."

On the day before the trial, B4 moved to dismiss, arguing that the suit was not brought under the correct choice of law. B4 argued that Tennessee law, not Nebraska law, was the appropriate law to govern this action, because Tennessee had a more significant relationship to the transaction and the parties. Christian responded that most of the contacts surrounding the case were in Nebraska and that therefore Nebraska law was the correct choice of law. Christian also argued that regardless of the choice of the law, the statutes of frauds in Nebraska and

Tennessee are essentially the same. The district court overruled B4's motion regarding choice of law and applied Nebraska law to the claim.

B4 also filed a motion to dismiss under the doctrine of forum non conveniens on the day before trial. The court overruled the motion, because the parties and witnesses were already in Nebraska ready for trial. The court noted that the motion might have had more weight if it had been raised earlier in the case.

B4 had previously filed a motion in limine to exclude evidence showing that Smith offered to pay the legal fees of Christian in the CNBW suit or evidence of indemnification of Christian by Smith. That motion was overruled. At trial, however, the judge sustained B4's objection that evidence of a settlement offer by Smith had no probative value. The court still allowed the jury to consider, over B4's objection, evidence that Smith had offered to help Christian with legal fees in relation to CNBW's suit against him.

At the close of the evidence, Christian filed three motions: (1) a motion for directed verdict against both Smith and B4 for $168,000 plus interest, (2) a partial directed verdict that B4 and Smith were jointly liable because B4 was merely the alter ego of Smith, and (3) a motion to advise the jury that the agreement between Smith and Christian did not need to be in writing. The court overruled the motion for directed verdict, because the existence of a contract was "clearly a jury question . . . . So as to what the amount would be is certainly premature." The court granted a motion made by Smith for a directed verdict, stating: "I'm going to sustain the motion for directed verdict filed by the defendant Bert Smith IV so that the party remaining as defendant in this action that will go to the jury is B4 Cattle Company, Inc." As a result, B4 was the only defendant whose liability was submitted to the jury. Finally, the court determined that the alleged oral agreement was outside the statute of frauds as a matter of law. Therefore, the court did not instruct the jury on the defense.

The jury returned a verdict in favor of Christian in the amount of $130,000. Christian made a motion to amend the judgment to award $168,000 instead of $130,000. The court

overruled the motion, stating that there was "no reason to go in and affect the jury's verdict," because the $130,000 amount was "within the evidence that was offered." B4's motion for a new trial was overruled.

B4 appealed the judgment, and Christian cross-appealed.

III. ASSIGNMENTS OF ERROR

B4 assigns, consolidated and restated, that the district court erred in (1) overruling its motion to dismiss and a motion for directed verdict under the doctrine of forum non conveniens, (2) applying Nebraska law rather than Tennessee law, (3) finding that the statute of frauds did not bar the breach of contract action, (4) failing to submit to the jury an instruction regarding the statute of frauds, and (5) overruling its motion in limine concerning Smith's payment of Christian's attorney fees in Christian's litigation with CNBW.

On cross-appeal, Christian assigns that the district court erred in (1) not ruling as a matter of law that the damages in this case were set by the $168,000-plus-interest judgment against Christian in prior litigation with CNBW and (2) not finding Smith, individually, jointly liable with B4 for the breach of contract.

IV. STANDARD OF REVIEW

[1] Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the discretion of the trial court.[1]

[2,3] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.[2] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[3]

[4,5] Proceedings seeking disregard of corporate entity, that is, piercing the corporate veil to impose liability on a

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[1] *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994).

[2] *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

[3] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

shareholder for a corporation's debt or other obligation, are equitable actions.[4] 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.[5]

[6] 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.[6]

[7,8] A civil jury verdict will not be disturbed on appeal unless clearly wrong.[7] Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.[8]

V. ANALYSIS

1. Forum Non Conveniens

B4 first argues that the district court erred when it overruled B4's pretrial motion to dismiss and motion for directed verdict under the doctrine of forum non conveniens. B4 contends that Tennessee provided a better and more appropriate forum for the action to be heard.

The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.[9] Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case.[10] Unless the balance is strongly

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[4] *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986).

[5] *Reed v. Reed*, 275 Neb. 418, 747 N.W.2d 18 (2008).

[6] *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008).

[7] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[8] *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[9] *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

[10] *Woodmen of the World Life Ins. Soc. v. Kight, supra* note 1.

in favor of the defendant, however, the plaintiff's choice of forum should rarely be disturbed.[11] The doctrine of forum non conveniens provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff.[12]

[9] In this case, Christian chose to file this action in Cuming County, Nebraska. B4 failed to challenge the purportedly inconvenient forum until the day before trial. We have held that a forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.[13] And the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.[14] Here, B4 was not effectively deprived of a meaningful day in court because, as the district court noted, on the day of the trial, all the parties and a number of witnesses were already present and prepared for trial in Nebraska. Stated another way, by the time B4 made its objection, Nebraska was the only convenient forum in which to proceed. We determine that the district court did not abuse its discretion in denying B4's motion to dismiss under the doctrine of forum non conveniens.

2. Choice of Law

We next consider which state's law governs the issues at hand: Nebraska's or Tennessee's. B4 argues that the district court erred in overruling a pretrial motion to dismiss regarding choice of law and asserts that Tennessee law rather than Nebraska law should have applied. Specifically, B4 contends that the district court should have decided the case under the Tennessee statute of frauds. We disagree. We first note that

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[11] *Ameritas Invest. Corp. v. McKinney, supra* note 9.

[12] *Id.*

[13] *Polk Cty. Rec. Assn. v. Susquehanna Patriot Leasing*, 273 Neb. 1026, 734 N.W.2d 750 (2007).

[14] *Ameritas Invest. Corp. v. McKinney, supra* note 9.

because choice-of-law principles are not a bar to jurisdiction,[15] the applicability of Tennessee law would not support B4's motion to dismiss in any event. But because B4 also argues that Tennessee law should have been applied by the Nebraska court, we consider its choice-of-law argument.

[10] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.[16] Before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.[17] In this case, we find no difference in the relevant law of the two states, and we therefore conclude that the district court did not err by applying Nebraska law.

First, the two statutes of frauds are virtually identical. Nebraska's statute of frauds provides in pertinent part as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: . . . (2) every special promise to answer for the debt, default, or misdoings of another person."[18] Tennessee's statute of frauds provides in pertinent part, "No action shall be brought . . . [t]o charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the promise or agreement . . . or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith."[19]

But, more important, both Tennessee[20] and Nebraska[21] recognize the common-law "leading object rule" exception to the

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[15] See *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006).

[16] *Heinze v. Heinze, supra* note 2.

[17] *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

[18] Neb. Rev. Stat. § 36-202 (Reissue 2004).

[19] Tenn. Code Ann. § 29-2-101 (Supp. 2008).

[20] See *Wolff Ardis, P.C. v. Kimball Products, Inc*., 289 F. Supp. 2d 937 (W.D. Tenn. 2003).

[21] See, *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007); *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N.W. 233 (1883).

statute of frauds. As will be discussed further below, it is this exception that determines the statute of frauds issue alleged by B4. And we can find no meaningful difference between the leading object rule in the two states. Because there is no meaningful conflict between the relevant principles of Nebraska and Tennessee law, we find no merit to B4's assignment of error.

3. Statute of Frauds

B4 argues that the district court erred in finding that the statute of frauds did not bar the breach of contract claim and in failing to submit any statute of frauds instruction to the jury. B4 specifically claims that even assuming the alleged oral contract was an agreement by B4 to pay for Christian's debt, it would be unenforceable because it was not in writing. Under the undisputed facts of this case, we determine, for the reasons set forth below, that the statute of frauds would not apply and that, as a result, the district court did not err in failing to instruct the jury on the issue.

[11] While instructions withdrawing consideration of material issues of fact presented by the pleadings and evidence are erroneous, the trial court must eliminate all matters not in dispute and submit only the controverted questions of fact on which the verdict must depend.[22] Here, the district court properly found that the benefit to B4 was so plainly apparent from the evidence adduced at trial that the alleged oral promise would be outside the statute of frauds under the leading object rule. As a result, the district court correctly withheld a statute of frauds instruction.

As mentioned above, Nebraska's statute of frauds provides that "every special promise to answer for the debt, default, or misdoings of another person" "shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith."[23] Nevertheless, under the leading object rule, a promise to answer for the debt of another will be valid, although not

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[22] *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

[23] § 36-202.

in writing, when the principal object of the party promising to pay the debt is to promote his own interests—and not to become a guarantor or surety—and when the promise is made on sufficient consideration.[24] Under this "leading object exception" to the statute of frauds, the consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor. It also must place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.[25]

The Restatement (Second) of Contracts[26] explains that when the leading object of the promise is to promote the promisor's own interests, then the promisor does not need the protection against his own generous impulses afforded by the statute of frauds. Where the promisor's main objective is to serve his own pecuniary or business advantage, the gratuitous element of the suretyship is eliminated, the likelihood of disproportion in the values exchanged is reduced, and the context of commercial dealings provides its own evidentiary safeguards.[27]

For the "leading object" of the promise to be the promisor's own interests, the promisor need not receive cash in hand from the promise. Nevertheless, the path of benefits flowing to the promisor must not be so circuitous or uncertain that obtaining those benefits cannot be said to have been his main purpose in making the promise.[28] As a matter of practicality, the promisor's advantage must be served in a straightforward way in order for the main purpose rule to apply.[29] We treat the terms "leading object" and "main purpose" synonymously.

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[24] *In re Estate of Dueck*, *supra* note 21; *Fitzgerald v. Morrissey, supra* note 21; 4 Caroline N. Brown, Corbin on Contracts § 16.1 (Joseph M. Perillo ed., rev. ed. 1997).

[25] *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989). See, also, *VSC, Inc. v. Lilja*, 203 Neb. 844, 280 N.W.2d 901 (1979).

[26] Restatement (Second) of Contracts § 116 (1981).

[27] *Id.*

[28] *Graybar Elec. Co. v. Sawyer*, 485 A.2d 1384 (Me. 1985) (citing Restatement, *supra* note 26).

[29] *Id.*

Here, the evidence establishes that Smith, or Smith on behalf of B4, intended by his agreement with Christian to procure an immediate and substantial benefit flowing directly to himself or B4. The immediate and substantial benefit Smith intended was the ownership of the cattle and the potential profits from the sale of the cattle. Smith admitted at trial that it was he, and not Christian, who actually owned the cattle purchased with the line of credit. And in his deposition, Smith admitted, albeit reluctantly, that he was to receive any profits from the sale of the cattle that were purchased with the CNBW funds. This was consistent with the other testimony presented at trial and was not contradicted by any of the evidence presented. Christian testified that under the oral agreement, "it was defined to me that [Smith] got all profits and all losses and all I got was the commission per load." And Kant, the feedlot owner, testified that he understood that the cattle belonged to Smith, and Kant actually sent Smith all profits from the sale of cattle.

Thus, the evidence establishes that the main purpose of any oral promise by Smith, or Smith on behalf of B4, to pay Christian's debt was to serve his own interests. Smith's principal object in agreeing to the deal was to garner profits from the sale of fattened cattle—and not to become Christian's guarantor. The oral agreement, therefore, falls within the ambit of the leading object rule, and the agreement need not be in writing to be enforceable. Because the benefit to Smith or B4 was so plainly apparent from the record and therefore outside the statute of frauds, the district court correctly withheld a statute of frauds instruction. Because the evidence was insufficient as a matter of law to support a finding that Christian's claim was barred by the statute of frauds, we find no merit to B4's third or fourth assignments of error.

4. Motion in Limine

Finally, B4 argues that the district court erred in admitting evidence of Smith's offer to pay the attorney fees Christian incurred in the CNBW litigation. At trial, Smith testified that he offered to help Christian fight the CNBW suit and find him an attorney. Christian testified, over the objection of B4's counsel, that Smith told him he would help get Christian an

attorney and would help pay for the litigation. B4 asserts that the evidence regarding the attorney fees was irrelevant and prejudicial.

[12] But the only objection B4 made at trial was based on foundation and the form of the question. A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence.[30] And because overruling a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection or offer of proof during trial.[31]

[13,14] B4's brief does not direct us to any objection made to the disputed testimony at trial that was based on relevance, nor can we find such in the record. It is well established that a litigant must specify the grounds for an objection at trial to preserve the issue for appeal.[32] An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.[33] Because B4 did not preserve its arguments with respect to relevance or unfair prejudice by objecting on those grounds at trial, we do not consider its assignment of error to that effect.

5. Cross-Appeal

(a) Smith's Individual Liability

On cross-appeal, Christian contends that the district court erred when it ruled as a matter of law that only B4 was liable.

Christian pled his case as a claim against Smith and B4. The complaint alleges that

> Bert Smith IV and B4 Cattle Company wanted to increase the number of cattle they had on feed in Nebraska. Bert

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[30] See *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[31] See *id.*

[32] *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

[33] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

> Smith IV, in his personal capacity, asked his life long friend, Chris Christian, to enable him to do this by way of the following oral agreement:
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> . . . .
>
> (d) The equity in the cattle would be owned by Bert Smith IV and B4 Cattle Company. All profits would go to Bert Smith IV and B4 Cattle Company.
>
> (e) Bert Smith IV and B4 Cattle Company would hold [Christian] harmless on any loss.
>
> (f) Bert Smith IV and B4 Cattle Company would pay [Christian] a commission . . . .

In their answer, Smith and B4 "[a]ffirmatively alleges [sic] that the Defendant, Bert Smith IV, is not a proper party to this action as said Defendant B4 Cattle Company, Inc. is a separate and distinct entity free of the Defendant, BERT SMITH IV, which followed corporate formalities and had no dealings with [Christian]."

Christian had only one oral agreement, and it was with either Smith or B4. The only way both Smith and B4 could be liable would be if B4 was found to be liable and the corporate veil was pierced to make Smith also liable. The pleadings and the evidence adduced do not indicate in any way that Smith and B4 could be jointly liable without piercing the corporate veil. It is obvious from the record that the only issue before the district court as to Smith's individual liability was whether Christian had proved a piercing of the corporate veil of B4.

In granting Christian's motion for a directed verdict as to Smith, the district court reasoned that because Christian failed to present sufficient evidence to pierce the corporate veil, only B4 should be submitted to the jury as a defendant. Proceedings seeking disregard of corporate entity, that is, piercing the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions.[34] 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.[35] We agree with the district court

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[34] *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra* note 4.

[35] *Reed v. Reed, supra* note 5.

that Christian failed to present sufficient evidence to pierce the corporate veil.

[15-17] Generally, a corporation is viewed as a complete and separate entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation.[36] A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.[37] A corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.[38]

[18,19] A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights.[39] A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff.[40]

Some of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.[41]

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[36] *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

[37] *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993).

[38] *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

[39] *Baye v. Airlite Plastics Co., supra* note 36; *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

[40] *Southern Lumber & Coal v. M. P. Olson Real Est., supra* note 38.

[41] *Wolf v. Walt, supra* note 39.

The first element of the test, inadequate capitalization, means capitalization very small in relation to the nature of the business of the corporation and the risks entailed.[42] Inadequate capitalization is measured at the time of incorporation.[43] A corporation which was adequately capitalized when formed but which has suffered losses is not necessarily undercapitalized.[44] Undercapitalization presents a question of fact that turns on the nature of the business of the particular corporation.[45] In the case at hand, the record does not establish any evidence regarding undercapitalization at the time of incorporation.

The second factor used to determine whether a corporation's identity should be disregarded is whether the corporation was insolvent at the time the debt was incurred.[46] A corporation is insolvent if it is unable to pay its debts as they become due in the usual course of its business, or if it has an excess of liabilities of the corporation over its assets at a fair valuation.[47] Whether a corporation is insolvent is usually a question of fact.[48] In this case, the record does not contain any evidence indicating that B4 was insolvent.

The third factor of the test to determine whether the corporate veil should be pierced is evidence of a diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses. When a principal shareholder appropriates and uses corporate funds and property for his personal purposes and thereby defrauds and causes damages to creditors, the shareholder can be held individually liable for corporate debt.[49] There was no evidence adduced at

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[42] *Id.*

[43] *Id.*

[44] *Southern Lumber & Coal v. M. P. Olson Real Est., supra* note 38.

[45] *Id.*

[46] *Wolf v. Walt, supra* note 39.

[47] *Id.*

[48] *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra* note 4.

[49] See *Scribner Grain & Lumber Co. v. Wortman*, 204 Neb. 92, 281 N.W.2d 394 (1979).

trial to show that Smith diverted funds from B4 for his personal purposes.

We turn now to the fourth prong of the test. If the corporation is a facade for the personal dealings of the shareholder and the operations of the corporation are carried on by the shareholder in disregard of the corporate entity, the shareholder may be individually liable for corporate debt.[50] The separate entity concept of the corporation may be disregarded where the corporation is a mere shell, serving no legitimate business purpose, and is used as an intermediary to perpetuate fraud on the creditors.[51] In this case, Smith testified that he is the sole shareholder, officer, and member of the board of directors of B4. But this, in itself, is insufficient to show that B4 was a mere shell to perpetrate fraud.

We conclude that Christian presented insufficient evidence at trial to show that B4's corporate entity should be disregarded. Therefore, we find no merit to Christian's assignment of error.

(b) Damages

We next turn to the issue of damages. Christian claims that the district court erred in not ruling as a matter of law that the damages were set by the $168,000-plus-interest judgment against Christian in prior litigation with CNBW. We agree.

Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.[52] In this case, the uncontroverted evidence established that the damages Christian suffered as a result of the breach of the oral agreement were equal to the CNBW judgment of $168,000 plus interest at 16 percent. Evidence on damages was not in dispute. The jury, however, awarded only $130,000 to Christian. As a result, we conclude as a matter of law that the verdict should be in

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[50] *Wolf v. Walt, supra* note 39. See *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra* note 4.

[51] *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989).

[52] *Springer v. Bohling, supra* note 8.

the sum of $168,000 plus interest at 16 percent from January 5, 2006.

VI. CONCLUSION

For each of the above reasons, we affirm as modified.

AFFIRMED AS MODIFIED.

JEREMIAH C. JOHNSON, APPELLEE, V. BEVERLY NETH, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

758 N.W.2d 395

Filed December 12, 2008. No. S-07-530.

1. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on 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: Police Officers and Sheriffs.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Affidavits: Words and Phrases.** Sworn reports in administrative license revocation proceedings are, by definition, affidavits.
4. **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.
5. **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.
6. **Public Officers and Employees: Evidence.** The certification of a notary public's official duties, over his or her signature and official seal, is received by the courts as presumptive evidence of the facts certified.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Jurisdiction.** A sworn report that fails to fully comply with the requirements of the administrative license revocation statutes does not confer jurisdiction upon the director of the Department of Motor Vehicles to revoke a motorist's license.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

Greg C. Harris for appellee.

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

WRIGHT, J.

NATURE OF CASE

The director of the Nebraska Department of Motor Vehicles (DMV) appeals from the judgment of the Buffalo County District Court which vacated the director's order revoking the driver's license of Jeremiah C. Johnson. The court found that because the notary failed to insert the name of the acknowledging party in the attestation clause on the sworn report, the DMV did not have jurisdiction to proceed with the administrative license revocation procedures. We affirm.

SCOPE 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. *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

FACTS

On December 17, 2006, Johnson was stopped by Sgt. Colin Wilke, a police officer with the Kearney Police Department, after Johnson made an improper U-turn. Upon contacting Johnson, Wilke noticed that the odor of an alcoholic beverage was coming from the vehicle and that Johnson's eyes were glassy and watery. Wilke asked Johnson to submit to field sobriety tests. While Wilke was explaining the "one-leg stand," Johnson repeatedly picked up his foot, even after Wilke told him to wait for the explanation. On the nine-step, heel-to-toe test, Johnson took nine steps in each direction, but Wilke said Johnson did not turn as asked and did not touch heel-to-toe at least two or three times. Johnson was able to correctly recite the alphabet.

Based on Johnson's driving, the appearance of his eyes, the field sobriety tests, and the odor of alcohol, Wilke asked Johnson to submit to a preliminary breath test and explained that if Johnson refused, he would be arrested. Johnson refused. Wilke arrested Johnson, read the postarrest chemical advisement form, and asked him to submit to a blood test. Wilke explained that refusal to submit to a blood test would result in a separate charge. Johnson indicated that he understood, and he refused to submit to the test. Wilke took Johnson to jail.

Wilke completed a "Notice/Sworn Report/Temporary License" (sworn report). He testified that he signed it in the presence of a notary. The notary placed her seal on the original. Wilke read the verbal notice of revocation to Johnson and placed a copy of the sworn report with Johnson's property at the jail. The sworn report was received by the DMV within the 10-day statutory timeframe.

Johnson filed a petition for an administrative hearing, at which hearing the sworn report was received into evidence. It indicates that Johnson was arrested because he made an improper U-turn, smelled of alcoholic beverage, failed field sobriety tests, and refused preliminary breath and blood tests. The form also indicates that Johnson refused to submit to a chemical test and was read the verbal notice of revocation. The attestation block states:

> This foregoing instrument was acknowledged before me this 17 day of Dec, 2006 by
>
> _____
>
> Peace Officer name and badge number
>
> _____
>
> Peace Officer name and badge number
>
> NOTARY PUBLIC'S SIGNATURE /s/ Robbi L. DeWeese

The notary seal is stamped beneath the signature and states that her commission expires October 20, 2008.

The hearing officer recommended that the director revoke Johnson's driver's license for the statutory period. The director adopted the recommendation and ordered Johnson's license revoked for 1 year, effective January 16, 2007.

Johnson appealed from the order of revocation to the Buffalo County District Court. He alleged that the officer lacked probable cause to require him to submit to a chemical test or to arrest him. Johnson also alleged that the sworn report was not completed in conformity with the statutory laws applicable to notarized documents.

During the administrative hearing, the DMV offered the testimony of Wilke, the arresting officer, who testified that he was physically in the presence of the notary when he signed the sworn report. The district court found that although Wilke stated that the notary acknowledged his signature, the notary made no specific reference to the person who appeared before her. The court concluded that without the testimony of the notary, the State was, in effect, offering evidence that allowed Wilke to serve as his own notary. "It is the officer testifying as to the acts and intents of the notary and not the notary." It found that the failure to properly complete the notary requirements was not a minor error. The court vacated the director's order revoking Johnson's driving privileges, and the director appeals.

ASSIGNMENT OF ERROR

The director assigns as error the district court's vacating the order revoking Johnson's driving privileges.

ANALYSIS

The issue is whether the sworn report was properly acknowledged, because the notary did not insert the acknowledging party's name in the attestation clause.

A sworn report must be forwarded to the director by the arresting officer if a person who has consented to chemical testing is found to be under the influence of alcohol or if a person refuses to consent to chemical testing. See Neb. Rev. Stat. § 60-498.01 (Reissue 2004). The sworn report must state that the person was arrested pursuant to Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) and the reason for the arrest, that the person was requested to submit to the required test, and either that the person submitted to the required test and the

results of the test or that the person refused to submit to the required test. See § 60-498.01.

[2] In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). Johnson argued, and the district court agreed, that the report was not properly sworn because it did not state that Wilke had acknowledged it before the notary.

[3-6] Sworn reports in administrative license revocation proceedings are, by definition, affidavits. *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008). 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. *Id*. 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. *Id*. However, 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. *Id*. See, also, *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006). The certification of a notary public's official duties, over his or her signature and official seal, is received by the courts as presumptive evidence of the facts certified therein. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). See, also, Neb. Rev. Stat. § 64-107 (Reissue 2003).

In *Moyer, supra*, the district court determined that the "sworn report" was never sworn because the notary did not place the arresting officer under oath. This court held that the signature of the arresting officer and the notarization of the signature were sufficient to make the sworn report valid. We noted that the arresting officer signed the report and testified it was signed in the presence of a notary and that the report was notarized.

> No other action was required by either [the arresting officer] or the notary. The notary was not required to confirm the truth of the statements; the very fact that [the arresting

> officer] 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 v. Nebraska Dept. of Motor Vehicles, 275 Neb. at 692, 747 N.W.2d at 927.

The case at bar presents a different question: Did the failure to include the name of Wilke as the acknowledging party invalidate the sworn report? We conclude that it did. Wilke signed the report, as did the notary. The notary affixed a stamp indicating her name and the expiration date of her commission. She indicated that the "foregoing instrument was acknowledged before me this 17 day of Dec, 2006 by." Between the acknowledgment phrase and the notary's signature are two lines which are labeled "Peace Officer name and badge number." These lines are blank.

[7] A sworn report that fails to fully comply with the requirements of the administrative license revocation statutes does not confer jurisdiction upon the director to revoke a motorist's license. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). There, the arresting officer did not check the box stating that the driver was requested to submit to the required test and we found that the report did not comply with the requirements of Neb. Rev. Stat. § 60-6,205(3) (Cum. Supp. 2002) (now at § 60-498.01). In considering at what point an omission on a sworn report becomes a jurisdictional defect, as opposed to a technical one, we concluded that "the test should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute." *Hahn v. Neth*, 270 Neb. at 171, 699 N.W.2d at 38. Therefore, the sworn report must, at a minimum, contain the information specified in the applicable statute in order to confer jurisdiction. "The statutory requirements are not onerous; an arresting officer need only complete a form designed to convey the required information and swear to the information thus conveyed." *Id.*

In this case, the attestation clause is not complete because there is no name listed in the acknowledgment. Statutes governing acknowledgments provide that the person taking an acknowledgment shall certify that

> (1) [t]he person acknowledging appeared before him and acknowledged he executed the instrument; and
>
> (2) [t]he person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.

Neb. Rev. Stat. § 64-203 (Reissue 2003).

The form of a certificate of acknowledgment used by a notary is recognized in Nebraska if the certificate is in a form prescribed by the laws of this state or of the place in which the acknowledgment is taken, or the certificate contains the words "acknowledged before me," or their substantial equivalent. Neb. Rev. Stat. § 64-204 (Reissue 2003). The words "acknowledged before me" mean that the person acknowledging appeared before the person taking the acknowledgment, that he or she acknowledged he or she executed the instrument, that the instrument was executed for the purposes stated in the instrument, and that the person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate. Neb. Rev. Stat. § 64-205 (Reissue 2003).

State law also prescribes the forms to be used for acknowledgment in Neb. Rev. Stat. § 64-206 (Reissue 2003). An acknowledgment completed by a public officer should state:

> State of _____
>
> County of _____
>
> The foregoing instrument was acknowledged before me this (date) by (name and title of position).
>
> (Signature of Person Taking Acknowledgment)
>
> (Title or Rank)
>
> (Serial Number, if any)

This court has not previously addressed the requirements for proper acknowledgment of a signature. The U.S. Court of Appeals for the Sixth Circuit held that an acknowledgment for a deed of trust was invalid because the bankruptcy debtors' names were omitted from the notarization section. *In re Biggs*, 377 F.3d 515 (6th Cir. 2004). The *In re Biggs* court

cited *In re Crim*, 81 S.W.3d 764 (Tenn. 2002), a Tennessee case in which a wife attempted to sign a deed of trust on behalf of her husband using a power of attorney. There, the notary used an acknowledgment form indicating that both the husband and the wife had personally appeared before him and that the notary had acknowledged their signatures. *In re Crim, supra*. The Tennessee Supreme Court found that because the notary did not use the prescribed statutory form, the certificate of acknowledgment did not comply with state law. *Id*.

The *In re Biggs* court stated that the omission of the names in the acknowledgment form placed in doubt the integrity of the acknowledgment. "[W]ho, if anyone, is doing the acknowledging? Failing to name the individuals who signed the deed of trust bears directly on the ability of a subsequent purchaser of real property to verify that the instrument was signed by the true property owners." *In re Biggs*, 377 F.3d at 519. The acknowledgment did not comply with Tennessee law. "The 'substantial compliance' test 'addresses the unintentional omission of *words* by the officer taking an acknowledgment,' [citation omitted], not the unintentional omission of the *names* of the acknowledging individuals." *Id.* (emphasis in original).

The argument was made that the names of the individuals were included in the deed of trust, which should satisfy the requirement of including the names in the acknowledgment. The Court of Appeals disagreed, finding that allowing such omission would eliminate the acknowledgment requirement.

> No one doubts that the names of the individuals on the deed of trust are the names of the individuals who *should* appear on the acknowledgment. The very point of the acknowledgment is to have their signatures confirmed in the presence of a notary. When notaries, however, merely take pre-printed forms and purport to notarize them without stating whose signatures they have notarized and who, if anyone, appeared before them, they not only undermine the Tennessee legislature's salutary purpose in creating

> statutorily-approved forms but also fail to accomplish the signal reason for having an acknowledgment in the first place.

In re Biggs, 377 F.3d at 520 (emphasis in original).

Recognizing the presumption that a sworn public official has acted lawfully, the Sixth Circuit determined that the presumption applies "when notaries perform the core functions of their job, not when they fail to perform them." *Id*. The court held that the deed of trust could be voided because the acknowledgment was not valid.

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. *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008). As noted earlier, a sworn report in an administrative license revocation proceeding is, by definition, an affidavit, which 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. See *id*. The report in this case does not show that it was sworn to by the law enforcement officer.

We conclude that the acknowledgment on the sworn report, which did not set forth the name of the individual making the acknowledgment, i.e., the arresting officer, did not substantially comply with the requirements of Nebraska law, and therefore, the acknowledgment was fatally defective. Because the report was not properly acknowledged, it is not a sworn report as required by statute. Thus, the DMV has not made a prima facie case for license revocation.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., concurring.

We have yet another case requiring us to clarify what constitutes a valid sworn report. Under Neb. Rev. Stat. § 60-498.01 (Reissue 2004), once an officer timely submits a sworn report, the DMV has established a prima facie case for

revoking a driver's license.[1] In *Hahn v. Neth*,[2] we discussed cases holding that a completed but unsworn statement is a jurisdictional defect. We explained these courts' reasoning as follows:

> [W]here revocation was automatic upon receipt of a sworn report if the licensee did not request a hearing, the requirement that the report be "sworn" was essential to the legislative purpose of providing a reliable basis for administrative action and was therefore mandatory. . . . "By requiring a sworn report, the [legislative body] affords some measure of reliability and protection to a licensee, and the director's ignoring this mandate thwarts this protection. The sworn report, therefore, is essential to the validity of the director's subsequent actions. If the director does not receive a sworn report, his subsequent actions are void."[3]

We recently emphasized the above reasoning in *Arndt v. Department of Motor Vehicles*.[4] Finally, in *Hass v. Neth*,[5] we held that the sworn statement, as an affidavit, must show on its face evidence that it was duly sworn to by the officer making the report.

These statements clearly put the DMV on notice that a proper certification, as an essential component of the arresting officer's sworn report, is a jurisdictional requisite in an administrative law review proceeding. And we have stated more than once that because of the significant procedural benefit the Legislature has conferred on the DMV under § 60-498.01, we require strict compliance with the applicable

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[1] See *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), *disapproved on other grounds, Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

[2] *Hahn, supra* note 1.

[3] *Id.* at 170, 699 N.W.2d at 37-38 (citations omitted).

[4] *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005).

[5] *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

rules and regulations.[6] Thus, the certification is subject to strict compliance because the sworn statement is the only procedural protection afforded to a driver that a proper basis exists for the revocation. The multitude of appeals that have arisen regarding sworn reports have proved the necessity of a strict compliance rule.[7] And yet four more cases related to certification await the Court of Appeals.[8] The DMV's repeated failure to comply with the requirements of a sworn report is a source of both frustration and wonder. The requirements are not an onerous burden, given the benefit the DMV receives in establishing its prima facie case by simply complying with this requirement. In golf parlance, the sworn report is a "gimme."

Furthermore, I do not believe this court should tortuously characterize material omissions in a certificate of acknowledgment as a technical defect. Such reasoning could have unintended consequences in other areas of law. Under the "law of unintended consequences," if this court were to conclude that the certification here was sufficient under a rule of strict compliance, it would be hard to conclude that a material omission in other types of sworn instruments was a fatal defect. Nor do I believe that our case law in other contexts supports the dissent's position that the omission of the acknowledger's name is a technical defect.

It is true that a notary's certification accompanied by the notary's signature and official seal is presumptive evidence of

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[6] See *Hahn, supra* note 1, quoting *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), *disapproved on other grounds, Hahn, supra* note 1.

[7] See, e.g., *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008); *Hass, supra* note 5; *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008); *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007); *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006); *Valeriano-Cruz v. Neth*, 14 Neb. App. 855, 716 N.W.2d 765 (2006).

[8] See, *Armstrong v. Neth*, case No. A-07-531; *Hubbard v. Neth*, case No. A-07-787; *Brown v. Department of Motor Vehicles*, case No. A-08-133; and *Downing v. Neth*, case No. A-08-351.

the facts stated in the certification.[9] But there is a critical difference between presuming that a notary took an acknowledgment from the person whose name is stated on the certification and supplying by presumption essential statutory requisites omitted in the certification.[10] Other courts have explicitly held that the identity of the party making the acknowledgment is an essential element that must appear in the certificate.[11] We have implicitly held the same.

McMaster v. Wilkinson[12] is illuminating. There, an election result was contested, and some issues involved the validity of absentee ballots. The law required the ballots to be sealed in an envelope bearing voter information, including the voter's name and the notary public's certificate of acknowledgment. For one ballot, the notary signed the envelope attesting that the voter had signed and sworn to its execution in his presence. But the notary failed to identify the voter in the appropriate certification line and failed to affix his seal and official title in that part of the certification. We held there was not substantial compliance with the law. The fact that the ballot could be identified as the voter's did not change our judgment that the ballot was properly excluded.

It is also correct that we have accepted substantial compliance with certification rules in some contexts.[13] But an acknowledgment is fatally defective if "[i]t is wanting in that

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[9] See, Neb. Rev. Stat. § 64-107 (Reissue 2003); *Moyer, supra* note 7; *Smith v. Johnson*, 43 Neb. 754, 62 N.W. 217 (1895).

[10] See, *Keeling v. Hoyt*, 31 Neb. 453, 48 N.W. 66 (1891); *Becker v. Anderson*, 11 Neb. 493, 9 N.W. 640 (1881); *Dorsey v. Brunswick Corp.*, 69 Wash. 2d 511, 418 P.2d 732 (1966); 1 Am. Jur. 2d *Acknowledgments* § 33 (2005).

[11] See, *In re Biggs*, 377 F.3d 515 (6th Cir. 2004); *In re Order of Sammons, Co. Superintendent of Schools*, 242 Minn. 345, 65 N.W.2d 198 (1954); *Cannon et al. v. Deming, Sheriff, et al.*, 3 S.D. 421, 53 N.W. 863 (1892); *Goad v. Walker*, 73 W. Va. 431, 80 S.E. 873 (1914).

[12] *McMaster v. Wilkinson*, 145 Neb. 39, 15 N.W.2d 348 (1944), *overruled in part on other grounds, State ex rel. Brogan v. Boehner*, 174 Neb. 689, 119 N.W.2d 147 (1963).

[13] See, e.g., *Powers v. Spiedel*, 84 Neb. 630, 121 N.W. 968 (1909); *Buck v. Gage*, 27 Neb. 306, 43 N.W. 110 (1889).

which is evidently of the very essence of the statutory requirement . . . ."[14] As the majority opinion states, under Neb. Rev. Stat. § 64-203 (Reissue 2003), certification of the acknowledger is of the very essence of the statutory requirements for a valid acknowledgment.

Before quitting the subject, I believe that the dissent's reliance on the Idaho Supreme Court case is misplaced. While that court was willing to overlook the omission of the acknowledger's name in a certificate of acknowledgment accompanying a deed,[15] clearly, not all courts agree with that position.[16] Nor does this court's case law point in that direction.[17]

More important, the reasoning of the Idaho Supreme Court does not apply here. The court concluded that the purpose of an acknowledgment accompanying a mortgage "is to provide protection against the recording of false instruments."[18] Regardless whether we agree with the Idaho Supreme Court's conclusion in a case involving the recording of deeds, the purpose of the acknowledgment here is different—to ensure a proper basis for a license revocation and thereby confer jurisdiction for the DMV's action.

In sum, compliance with § 60-498.01 is not astrophysics. We should hold the DMV to strict compliance.

GERRARD and MILLER-LERMAN, JJ., join in this concurrence.

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[14] *Spitznagle v. Vanhessch*, 13 Neb. 338, 340, 14 N.W. 417, 417-18 (1882).

[15] See *Farm Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980).

[16] See, *In re Biggs, supra* note 11; *Seale Motor Co. Inc. v. Stone*, 218 S.C. 373, 62 S.E.2d 824 (1950); *Dorsey, supra* note 10.

[17] See, *McMaster, supra* note 12; *Dawson County State Bank v. Durland*, 114 Neb. 605, 209 N.W. 243 (1926); *Keeling, supra* note 10; *Spitznagle, supra* note 14.

[18] See *Carney, supra* note 15, 100 Idaho at 750, 605 P.2d at 514.

HEAVICAN, C.J., dissenting.

I respectfully dissent. The majority concludes that because the acknowledgment on the sworn report did not set forth the name of the arresting officer, such acknowledgment failed to substantially comply with Nebraska law. As such, the majority holds that the sworn report was insufficient to confer

jurisdiction on the DMV. For the reasons stated in my dissent in *Snyder v. Department of Motor Vehicles*,[1] I do not believe the technical defect in this sworn report would divest the DMV of jurisdiction. But even assuming that a technical defect in a sworn report could prevent the DMV from revoking a license, I do not believe any defect exists in this case.

It is well established that deficiencies in the certificate of acknowledgment will not render a certificate of acknowledgment defective if the alleged deficiency can be cured by reference to the instrument itself.[2] And in this case, it is possible to determine whose signature was being acknowledged in the certificate of acknowledgment simply by reference to the remainder of the sworn report. Wilke is the only signatory to the sworn report. Wilke's printed name, badge number, signature, and address appear just above the certificate of acknowledgment on the sworn report. It is clear from a review of the sworn report that the only signature the notary could have been acknowledging was Wilke's. There is no contention that Wilke did not sign the document or that his signature was not affixed in the presence of the notary. And Wilke himself testified that he signed the document in the presence of the notary. Given this, I would conclude that the certificate of acknowledgment substantially complied with Nebraska law.

The majority's conclusion that the omission of Wilke's name was fatal to the sworn report appears to be rooted in the fear that such omission places in doubt the integrity of the notary's acknowledgment. While I agree there is case law, including that cited by the majority, which could give rise to the fears of the majority, I do not share that concern in this case.

As an initial matter, while I agree that the cases cited by the majority conclude that an omission such as the one in

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[1] *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

[2] See, e.g., *Farm Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980); *Gardner v. Incorporated City of McAlester*, 198 Okla. 547, 179 P.2d 894 (1946); *Coates v. Smith*, 81 Or. 556, 160 P. 517 (1916); *Milner v. Nelson*, 53 N.W. 405 (Iowa 1892). See, also, 1A C.J.S. *Acknowledgments* § 59 (2005); 1 Am. Jur. 2d *Acknowledgments* § 49 (2005).

this case would be fatal to an instrument, I also note that these cases may be distinguishable. Both *In re Biggs*[3] and *In re Crim*[4] involved a mortgage or a deed. In such instances, because the rights of subsequent purchasers could hinge on the validity of the signatures in question, it might be of more import to have an acknowledgment more fully comply with applicable law. Such concern is not present in cases involving sworn reports.

With respect to concerns about the integrity of the notarial duty, I would agree with the Idaho Supreme Court in *Farm Bureau Fin. Co., Inc. v. Carney*.[5] In that case, the court touched on the integrity of a notary's acknowledgment:

> The *sine qua non* of this statutory requirement is the involvement of the notary, a public officer in a position of public trust. If the notary faithfully carries out his statutory duties, it makes little difference whether he remembers to fill in the blanks in the certificate. Similarly, if the notary conspires with a forger, or fails to require the personal appearance of the acknowledger, or is negligent in ascertaining the identity of the acknowledger, the statutory scheme is frustrated whether the form is completely filled in or not.
>
> . . . .
>
> . . . Whether the certificate blanks are empty or full is not the significant fact. The key to the statutory safeguard is the integrity of the notary in the proper discharge of notarial duties by requiring the signatories to personally appear before him and acknowledge that they did in fact execute the document.[6]

Concerns about the integrity of the notarial process could conceivably be present each time a notary acknowledges a signature. The notarial process works because we presume that the notary is fulfilling his or her notarial duties. The *Farm Bureau*

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[3] *In re Biggs*, 377 F.3d 515 (6th Cir. 2004).

[4] *In re Crim*, 81 S.W.3d 764 (Tenn. 2002).

[5] *Farm Bureau Fin. Co. v. Carney, supra* note 2.

[6] *Id.* at 750, 605 P.2d 514.

Fin. Co., Inc. court also highlights this presumption of regularity which is afforded to the actions of public officials, including notaries, and concludes that the notary's acknowledgment was subject to such a presumption.[7] In Nebraska, like in Idaho, in the absence of evidence to the contrary, it may be presumed that public officers faithfully perform their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is also presumed.[8] As discussed above, there is no evidence showing that Wilke did not sign the document in the presence of the notary. There is simply no showing of any misconduct or disregard of law with respect to the notary's actions.

For the above reasons I would conclude that the certificate of acknowledgment in this case substantially complies with Nebraska law and would apply the presumption of regularity to the actions of the notary. As such, I would find that the omission of Wilke's name from the certificate of acknowledgment was not fatal to the sworn report in this case. I would therefore reverse the decision of the district court and uphold the DMV's revocation of Johnson's driver's license.

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[7] See *id.*

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

STATE OF NEBRASKA, APPELLEE, V.
MARVIN R. WENKE, APPELLANT.
758 N.W.2d 405

Filed December 12, 2008. No. S-07-1036.

1. **Motions to Suppress: Search and Seizure: Appeal and Error.** In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether the search was illegal. If so, the court must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search.
2. **Motions to Suppress: Appeal and Error.** An appellate court will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes

the trial court as the finder of fact and considers that the trial court observed the witnesses testifying in regard to such motions.

3. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
4. **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.
5. **Arrests: Warrants: Search and Seizure: Probable Cause.** The validity of a search incident to a lawful arrest depends on the legality of the arrest itself. Where an arrest is pursuant to a warrant, the validity of the arrest turns on whether the county court had probable cause to issue the arrest warrant.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Affirmed.

Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

STEPHAN, J.

The issue in this case is whether Marvin R. Wenke was lawfully arrested for nonpayment of fines, thereby justifying a warrantless search of his person incident to the arrest.

BACKGROUND

In December 2004, Wenke was cited in Holt County for operating a motor vehicle without a valid license. He pled guilty and was sentenced to pay a fine and court costs totaling $91.50. After paying $25.50, Wenke applied for and was granted an extension of time to pay the remaining $66. In the extension agreement, he agreed to pay in full by January 26, 2005. The agreement provided that if the judgment was not paid by that date, Wenke would be required to appear before the county court "to show cause why [he] should not be

committed to jail and/or fined for contempt for non-payment of judgment."

On January 27, 2005, the Holt County Court mailed written notice to Wenke that he had failed to pay the amount due. The notice required him to either pay the fine immediately or appear before the court on February 9. The notice stated that failure to comply with its provisions could result in a warrant being issued for Wenke's arrest.

On February 10, 2005, the county court issued a "Warrant/Order of Commitment" directed to the Holt County sheriff or any duly authorized law enforcement officer. This document stated that Wenke had failed to pay the judgment and costs or show cause why he should not be committed to jail for failing to make payment as ordered. The document further stated:

> [Wenke] shall be allowed to pay all judgments for fines and costs set out below. [Wenke] shall be released from custody upon payment of the same, PLUS the cost of service of this warrant. Upon failure to make payment of the fines and costs [Wenke] shall be delivered to the jailer of Holt County to stand committed to serve [his] judgment(s) and costs at the rate provided by law.

On February 12, 2005, Officer Mike Parks of the O'Neill Police Department was dispatched to a local bar to investigate a report of minors consuming alcohol. Parks, who had issued the December 2004 citation to Wenke, observed him in the bar and recalled seeing a copy of the warrant described above at the police station. Parks understood the document to be "a warrant for . . . Wenke's arrest" for "[f]ailing to make payment on fines and costs in the County Court of Holt County." Parks asked Wenke to step outside with him, and Wenke complied. Outside the bar, Parks informed Wenke of the warrant, told him that he was under arrest, and placed him in handcuffs. Parks did not give Wenke an opportunity to pay the fine prior to arresting him, because, in Parks' words, "I don't collect money; I arrest people." His standard procedure when arresting someone on a warrant for nonpayment of fines is to transport the person to the county jail, where payment of the fine can be made.

Immediately after arresting Wenke, Parks conducted a search of his person. Inside a cigarette box which he removed from Wenke's trouser pocket, Parks found a small straw containing a substance later confirmed to be methamphetamine. Wenke was subsequently charged by information with one count of possession of a controlled substance, methamphetamine, a Class IV felony.[1] He filed a motion to suppress the evidence seized by Parks during the search of his person.

After conducting an evidentiary hearing, the district court denied the motion. In its order, the court noted that Wenke "does not argue the court lacked authority to issue the warrant or that the warrant itself was invalid. . . . [Wenke] argues the officer should have given [him] the opportunity to refuse to make payment before he was arrested." The court found this argument to be without merit, because Wenke had already been given ample opportunity to pay or show cause why he did not pay the fine before the warrant was issued.

Wenke was convicted after a bench trial, sentenced to imprisonment for 60 days, and fined $250 plus court costs. His appeal was dismissed due to his lawyer's failure to file a brief. Wenke was granted a new direct appeal in a postconviction proceeding, and execution of the sentence was stayed pending appeal. This appeal was then timely filed. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENT OF ERROR

Wenke's sole assignment of error is that the trial court erred in overruling his motion to suppress.

STANDARD OF REVIEW

[1] In considering a trial court's ruling on a motion to suppress evidence obtained by a search, we first determine whether the search was illegal. If so, we must determine whether the

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[1] See Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2006).

[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search.[3]

[2] We will uphold the trial court's ruling on a motion to suppress unless the trial court's findings of fact are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider that the trial court observed the witnesses testifying in regard to such motions.[4]

[3] In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.[5]

ANALYSIS

[4,5] Parks did not have a warrant authorizing a search of Wenke's person. 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.[6] One such exception is a search incident to a lawful arrest.[7] The validity of a search incident to a lawful arrest depends on the legality of the arrest itself.[8] Where an arrest is pursuant to a warrant, as in this case, the validity of the arrest turns on whether the county court had probable cause to issue the arrest warrant.[9]

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[3] *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[4] *Id.*

[5] *Id.*

[6] *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

[7] *Id.*

[8] *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[9] See, U.S. Const. amend. IV; Neb. Const. art. I, § 7; *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

On its face, the warrant pursuant to which Wenke was arrested affirmatively states facts giving rise to probable cause based upon the issuing judge's personal review of the court file. This is sufficient to establish probable cause.[10] Wenke does not contest this, but nevertheless argues that he was not lawfully arrested. His reasoning for this assertion has evolved. In the district court, he contended that Parks was required to give him an opportunity to pay the judgment before arresting him. The district court rejected this argument in overruling Wenke's motion to suppress. On appeal, he argues as "a matter of first impression" that pursuant to Neb. Rev. Stat. § 29-2206.01 (Reissue 1995), the document titled "Warrant/Order of Commitment"

> was not an "arrest warrant" which authorized the "arrest" of [Wenke] but was . . . simply an Order issued by the County Court to authorize the limited seizure of [Wenke] for the purpose of having [him] either pay the fine and costs, including the service of the document, or be committed to jail to serve his Judgment by "sitting it out."[11]

We find neither argument persuasive. Neb. Rev. Stat. § 29-2206(1) (Reissue 1995) allows courts imposing fines and costs to require that "the party stand committed and be imprisoned in the jail of the proper county until the same is paid or secured to be paid or the defendant is otherwise discharged according to law." Section 29-2206(2) provides that notwithstanding this power, a court may allow an offender to pay fines and costs in installments if a showing is made that the offender is unable to make payment in a lump sum. Section 29-2206.01 provides that a person who does not make installment payments when ordered to do so "shall be liable for punishment for contempt, unless he has the leave of the court in regard to such noncompliance." Pursuant to these statutes, Wenke was permitted to pay his fine and costs over time. The agreement which he signed specifically provided that the balance was to be paid by January 26, 2005, and that if it was not paid, he was to appear at 8:30 a.m. on that date "to show cause

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[10] See *State v. Davidson, supra* note 9.

[11] Brief for appellant at 9.

why [he] should not be committed to jail and/or fined for contempt for non-payment of judgment." Wenke neither paid his judgment nor appeared on the appointed date to show cause for nonpayment.

It was after Wenke's failure to comply with the terms of the extension agreement that the court issued the warrant/order of commitment. In *State v. Davidson*,[12] we recognized the power of a court to issue an arrest warrant in these circumstances. The warrant in that case ordered that the defendant be "'immediately arrest[ed]'" and provided that he could be released upon payment of the fine and costs, but otherwise he should be committed to the county jail "'to serve [his] judgment(s) and costs at the rate provided by law.'"[13] The warrant in Wenke's case differs only in that it does not specifically command "immediate arrest." But within its four corners, it clearly requires a series of events in which Wenke would first be taken into custody, then be given an opportunity to pay fines and costs due and "released from custody upon payment of the same," but committed to jail if payment was not made. Clearly, Wenke could not be "released from custody" upon payment of the fine and costs, as the warrant requires, without first being placed in custody, i.e., arrested. Wenke acknowledges that the warrant authorized a "limited seizure" of his person,[14] but offers no explanation of how this would differ from an "arrest," which involves "'the taking, seizing, or detaining of the person of another'" under "'real or pretended legal authority.'"[15]

We conclude that the warrant/order of commitment issued by the county court was a valid arrest warrant, that Wenke was lawfully arrested pursuant to such warrant, and that the warrantless search disclosing contraband in his possession was constitutionally permissible as a search incident to a lawful arrest. Accordingly, the district court did not err in overruling

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[12] *State v. Davidson, supra* note 9.

[13] *Id.* at 423, 618 N.W.2d at 424.

[14] Brief for appellant at 9.

[15] See *State v. White*, 209 Neb. 218, 220-21, 306 N.W.2d 906, 909 (1981). Accord *State v. Ellingson*, 13 Neb. App. 931, 703 N.W.2d 273 (2005).

Wenke's motion to suppress and receiving as evidence the methamphetamine found in his possession. We affirm Wenke's conviction and sentence.

AFFIRMED.

MARY M. VAN ERT, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD VAN ERT, DECEASED, APPELLEE AND CROSS-APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

758 N.W.2d 36

Filed December 12, 2008. No. S-07-1121.

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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.
4. **Insurance: Contracts: Parties.** The 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 obligation under the contract not inconsistent with public policy or statute.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

Stephanie F. Stacy and John J. Heieck, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Justin Herrmann, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Keith A. Harvat and Amy L. Patras, of Waite, McWha & Harvat, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

State Farm Mutual Automobile Insurance Company (State Farm) appeals the Lincoln County District Court's grant of summary judgment to Mary M. Van Ert (Van Ert), the personal representative of the estate of Leonard Van Ert (Leonard). Leonard was killed in a motor vehicle accident on June 18, 2005, while driving his 1996 Nissan pickup. Leonard had a policy from State Farm on both the pickup and his 1988 Jeep Wrangler, and Van Ert sought the full amount of uninsured/underinsured motorist (UM/UIM) benefits under each policy. State Farm claimed the policy excluded collecting benefits from the policy on the Jeep, because Leonard was not driving the Jeep at the time of the accident.

The district court granted summary judgment to Van Ert, finding that the exclusion in State Farm's policy was more restrictive than allowed by state law. State Farm appeals. We reverse the decision of the district court and remand with directions to grant summary judgment to State Farm.

BACKGROUND

Leonard was killed by a drunk driver in a motor vehicle accident on June 18, 2005. At the time of the accident, Leonard was driving a Nissan pickup insured by State Farm. The owner of the other vehicle had insured her automobile through Progressive Northern Insurance Company. That insurance policy had a bodily injury liability limit of $50,000, which did not cover the amount of Leonard's damages. Van Ert received the amount of the insurance policy limits from Progressive Northern Insurance Company and then demanded payment of the UM/UIM benefits from State Farm under the insurance policy on the Jeep.

The insurance policy on the Nissan had UM/UIM coverage of up to $25,000, which was also insufficient to cover Leonard's damages. The insurance policy on the Jeep had UM/UIM coverage of up to $100,000. Van Ert claimed that State Farm was statutorily required to compensate her up to the highest limit of any one of the insurance policies under Neb. Rev. Stat. § 44-6411 (Reissue 2004).

State Farm refused to pay out to the limits of the insurance policy on the Jeep, but did pay Van Ert $25,000, the UM/UIM liability amount under the insurance policy on the Nissan. In denying Van Ert's claim, State Farm relied on language in the Jeep's insurance policy that specifically excluded coverage for bodily injury if the insured was driving a vehicle that he or she owned but was not covered under that insurance policy. Van Ert brought an action for the entire amount of UM/UIM coverage under the second insurance policy. Each party filed a motion for summary judgment, alleging there were no genuine issues of material fact.

The district court awarded summary judgment to Van Ert, determining that the exclusion under the insurance policy was more restrictive than allowed by Nebraska law. The district court then awarded Van Ert the full amount of the UM/UIM insurance under the insurance policy for the Jeep, plus costs and attorney fees. State Farm appealed.

Van Ert cross-appealed, claiming that the insurance policy was vague and ambiguous, and also that the district court erred in not granting prejudgment interest. We granted Van Ert's petition to bypass.

ASSIGNMENT OF ERROR

State Farm's three assignments of error can be consolidated as one: that the district court erred when it granted summary judgment to Van Ert by determining the insurance policy exclusion violated Neb. Rev. Stat. § 44-6413 (Reissue 2004).

STANDARD OF REVIEW

[1] 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.[1]

[2] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an

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[1] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

independent, correct conclusion irrespective of the determination made by the trial court.[2]

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.[3]

ANALYSIS

Insurance Policy Does Not Violate § 44-6413

We first address whether the insurance policy was more restrictive than allowed under the statute. The Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA) requires an insurance company to provide coverage for those injured or killed in a motor vehicle accident with an uninsured or underinsured motorist.[4] Section 44-6413 provides exceptions to the requirement that insurance companies provide UM/UIM coverage. Section 44-6413(1)(b) provides an exception for "[b]odily injury, sickness, disease, or death of an insured while occupying a motor vehicle owned by, but not insured by, the named insured or a spouse or relative residing with the named insured."

Leonard was driving the Nissan at the time of the accident, and Van Ert collected the UM/UIM insurance under that insurance policy. Van Ert also wanted to recover under the UM/UIM insurance policy on the second vehicle, the Jeep. The Jeep's UM/UIM insurance policy contained the following exclusion: "FOR *BODILY INJURY* TO AN *INSURED*: . . . WHILE *OCCUPYING* A MOTOR VEHICLE OWNED BY *YOU*, *YOUR SPOUSE* OR ANY *RELATIVE* IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY." Van Ert claimed, and the district court agreed, that the provision violated the statute because it was more restrictive than § 44-6413(1)(b).

In essence, Van Ert asserts that by adding the words "this policy" to the exclusionary statement, State Farm rendered its

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[2] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[3] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[4] Neb. Rev. Stat. § 44-6408 (Reissue 2004).

insurance policy more restrictive than allowed under the statute. State Farm argues that its provision is congruent with the statute and that § 44-6413(1)(b) can be read as "owned by the insured, but not insured by that policy." We find that the insurance policy can be read in harmony with that statute.

We recently addressed whether an insurance policy was more restrictive than the UUMICA in *Steffen v. Progressive Northern Ins. Co.*,[5] and the Court of Appeals addressed the same issue in *Danner v. State Farm Mut. Auto. Ins. Co.*[6] *Steffen* and *Danner* are inapplicable to the present case, because the language in those insurance policies was in direct conflict with the statute. Such is not the case here. The statutory language "owned by, but not insured by" can be interpreted as "owned by, but not insured by that policy." We agree with State Farm that a commonsense reading of the statute would allow an insurance company to restrict coverage to the vehicle insured under the insurance policy in question.

[4] We have stated that the 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 obligation under the contract not inconsistent with public policy or statute.[7] As discussed below, prior case law supports reading the insurance policy in harmony with the statute. Such a reading does not violate the public policy underpinning the UUMICA.

Restriction Does Not Violate Public Policy

The public policy behind requiring UM/UIM insurance is to protect the insured from an uninsured or underinsured motorist.[8] State Farm argues that under Van Ert's reasoning,

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[5] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[6] *Danner v. State Farm Mut. Auto. Ins. Co.*, 7 Neb. App. 47, 578 N.W.2d 902 (1998).

[7] *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

[8] *Herrick v. Liberty Mut. Fire Ins. Co.*, 202 Neb. 116, 274 N.W.2d 147 (1979); *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968).

an insured would be able to insure one vehicle for the maximum amount while underinsuring all other owned vehicles. State Farm cites two cases in support of its position that it can restrict UM/UIM coverage to the vehicle named in the insurance policy: *Shipley v. American Standard Ins. Co.*[9] and *Herrick v. Liberty Mut. Fire Ins. Co.*[10]

In *Shipley*, the plaintiff was injured while operating his uninsured motorcycle. The plaintiff's insurance policy covered his automobile, but not the motorcycle. The insurance policy restricted coverage to the "'Described Automobile.'"[11] This court determined that the insurance policy's restriction to the named automobile in the insurance policy did not violate Nebraska law, because "[t]he statute was designed to protect innocent victims of negligent and financially irresponsible motorists. . . . An overriding public policy of protecting an owner-operator who inexcusably has no applicable bodily injury liability coverage is not presently discernible."[12] The court determined that the insurance policy language controlled and that the motorcycle was not covered.

We affirmed that reasoning in *Herrick*, stating that "[i]t is difficult to find a policy in the statute to protect one uninsured motorist from another uninsured motorist."[13] Although the statutory provisions cited in these two cases have since been superseded by the current UUMICA, the requirement that an insurance carrier provide UM/UIM coverage has not changed. Both *Shipley* and *Herrick* involved plaintiffs who suffered injuries from a collision with an uninsured or underinsured motorist and who attempted to recover from their UM/UIM policies for injuries received. In both cases, neither insurance policy covered the vehicle the plaintiff was driving at the time of the accident. The reasoning of this court, that the statute was not meant to protect one uninsured or underinsured motorist from another, applies to Van Ert's case as well.

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[9] *Shipley, supra* note 8.

[10] *Herrick, supra* note 8.

[11] *Shipley, supra* note 8, 183 Neb. at 111, 158 N.W.2d at 240.

[12] *Id.* at 112, 158 N.W.2d at 240.

[13] *Herrick, supra* note 8, 202 Neb. at 119, 274 N.W.2d at 149.

As previously noted, we have generally allowed limitations on liability unless those limitations violate statutory provisions or public policy.[14] We have also consistently enforced unambiguous insurance contracts.[15] Allowing Van Ert to recover under the Jeep's insurance policy would encourage drivers to insure one vehicle while underinsuring any other vehicles they own. We therefore reverse the district court's order and remand with directions to grant summary judgment for State Farm. Because we reverse the district court's award to Van Ert, we need not address Van Ert's cross-appeal.

CONCLUSION

Our prior case law has allowed insurance companies to limit their liability as long as those limitations do not violate statutes or public policy. We find that the language of the State Farm insurance policy is not more restrictive than the statute, nor does it violate the public policy of this state. We therefore reverse the decision of the district court with directions to enter judgment in favor of State Farm.

REVERSED AND REMANDED WITH DIRECTIONS.

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[14] See, *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008); *Hemenway, supra* note 7; *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998); *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993).

[15] See, *Jones, supra* note 3; *Ostransky v. State Farm Ins. Co.*, 252 Neb. 833, 566 N.W.2d 399 (1997); *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

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

758 N.W.2d 622

Filed December 19, 2008. No. S-07-533.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.

2. **Disciplinary Proceedings: Proof.** The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** 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.
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. We also consider an attorney's acts both underlying the offenses and throughout the disciplinary proceeding and any aggravating and mitigating circumstances.
5. ____. The Nebraska Supreme Court considers the propriety of a sanction with reference to the sanctions imposed in similar cases.
6. ____. The Nebraska Supreme Court evaluates each attorney discipline case individually, in light of its particular facts and circumstances.

Original action. Judgment of suspension.

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

Robert A. Finney, pro se.

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

PER CURIAM.

SUMMARY

The Counsel for Discipline of the Nebraska Supreme Court, relator, charged attorney Robert A. Finney with violating his oath of office under Neb. Rev. Stat. § 7-104 (Reissue 2007) and the following provisions of the Nebraska Rules of Professional Conduct as now codified: § 3-501.5(a) and (f)(1) and (2) (failing to provide accounting for fees and costs when requested); § 3-501.15(a) and (c) through (e) (failing to hold property of clients in his possession separate from his own property in separately maintained account); § 3-501.16(a)(1) and (d) (practicing law without license and failing to protect clients' interests upon termination of representation); § 3-505.5(a) and (b)(2) (engaging in unauthorized practice of law); and § 3-508.4(a) and (d) (engaging in conduct that is prejudicial to administration of justice).

Four counts of misconduct compose relator's charges against Finney. Counts one and two arise from grievances filed by two former clients. Those counts allege that Finney failed to provide an accounting of his time and services after they had requested it. Count two also includes the allegation that Finney failed to timely refund the unearned portion of his advance fee payment. During investigations for this disciplinary proceeding, relator expanded count two to also include allegations that Finney failed to deposit the client's advance fee payment into his trust account.

Counts three and four arose after Finney failed to respond to correspondence from relator's office regarding these grievances. Because of Finney's failure to respond, we temporarily suspended his license to practice law in Nebraska. The two other charges against Finney arose from allegations that he provided legal advice to two clients after we suspended his license.

The referee found clear and convincing evidence to support all four counts. He recommended that Finney's suspension remain in place until we render a final judgment. We agree with the referee's findings that clear and convincing evidence supports counts one and two. But we find that Finney did not engage in the authorized practice of law and dismiss counts three and four. We suspend Finney for 2 years with credit for the time he has been temporarily suspended.

BACKGROUND

Finney's Actions Leading Up to the Suspension

Finney was admitted to practice law in Nebraska on September 18, 1989. Finney is also licensed to practice law in Iowa and South Dakota. After law school, Finney initially worked at the Pottawattamie County public defender's office. After that, for 2½ years, he was a law clerk for a federal judge in U.S. District Court for both the Northern and the Southern Districts of Iowa. Later, in January 1993, Finney was hired by the Dakota County Attorney's office as chief deputy county attorney. In 1996, Finney was appointed as county attorney for Dakota County. He was elected for his own term in 1998 and again for a second term in 2002. Finney was removed

as county attorney by recall in 2003, after which he entered private practice. Finney's private practice is located in Sioux City, Iowa, and consists primarily of criminal defense and family law.

The referee found that on November 21, 2006, relator received a grievance letter from Raul Hurtado, a former client of Finney's. Hurtado alleged that he paid Finney a flat fee of $8,000 for representation in a criminal matter. Hurtado claimed that Finney failed to provide an accounting of his services and failed to refund any unearned portion of the fee payment.

In response to relator's letter regarding Hurtado's grievance, Finney wrote to relator on December 22, 2006, indicating that he would meet with Hurtado's family members to discuss their concerns. Hurtado's family had retained Finney on behalf of Hurtado, and the record indicates that Hurtado's family was financing his defense. The record is clear that no meeting ever occurred. Also, Finney never gave any accounting to Hurtado or anyone acting on his behalf.

The record is also clear that after his December 22, 2006, letter, Finney failed to respond to later inquiries by relator regarding Hurtado's complaint. Finney received and responded to the first letter sent by relator informing Finney of Hurtado's grievance. Finney also acknowledged that he received the second letter requesting information regarding Finney's fee arrangement with Hurtado. Finney testified that he instructed his secretary to mail the requested information to relator but admits that he never followed through on whether the information was sent. Relator never received the information. Regarding Hurtado's complaint, Finney also did not respond to six subsequent letters from relator, dating from January 22 to April 23, 2007. Finney denied ever receiving any of these subsequent letters. However, a letter dated March 2, 2007, was sent by certified mail and the signature reads "Robert A. Finney." Finney testified that it was not his signature.

Because of the lack of response, relator eventually upgraded Hurtado's complaint to a formal grievance. Even after the formal grievance notice was sent on March 2, 2007, Finney failed to respond. So relator applied to this court for a temporary

suspension. Finney claims that he did not receive notification of relator's application to suspend his license or the order from this court to show cause why his license should not be suspended. Because Finney failed to respond to this court's order, on June 20, we suspended Finney from the practice of law in Nebraska. Finney did admit that he received this court's order of suspension on June 22.

Finney claims that he did not respond to the correspondence from relator because of faulty office procedures and his absence from the office. Finney also testified that when relator was attempting to communicate with him, Finney had an assistant who may have absconded with his mail. Finney and another attorney whom he shared office space with had jointly hired an assistant who they believe hid letters and documents from them. Finney acknowledged that he had no reason to believe that his office did not receive the letters—especially those sent via certified mail. Yet, he claimed he was never aware of the letters and testified that the signatures on the certified mail receipts were not his. Finney accepted full responsibility for the alleged deficiencies of his office.

Hurtado's complaint was not the only grievance filed against Finney. On January 8, 2007, relator received a complaint from Jerry Kast, who retained Finney to represent him on a driving under the influence charge. Kast had given Finney an advance fee payment of $1,000. Under their written fee arrangement, Finney was to charge Kast $150 per hour. Kast later terminated Finney's representation, at which time he requested an accounting of Finney's time and a refund of any unearned portion of the advance fee payment. Finney did not provide any of the requested information to Kast at that time.

Relator forwarded Kast's complaint to Finney on January 9, 2007, and gave him 15 business days to file an appropriate written response. Finney did not file a response, and on February 15, relator sent another letter. On February 16, Finney faxed a response. Finney blamed his delay in responding on his inability to find Kast's file.

In his response to relator, Finney admitted that he represented Kast and had been paid an advance fee payment of $1,000. Finney claimed to have sent an itemized statement to Kast on

August 18, 2006, which showed a $452.50 credit. Finney failed to explain why he did not refund the money sooner; however, Finney did refund the money to Kast on February 16, 2007.

Despite the refund, the referee found that Finney failed to provide sufficient evidence that he had maintained Kast's $1,000 fee in Finney's trust account. His trust account statements showed that he made deposits on July 21 and September 22, 2006. The deposit slips, however, do not indicate which client's funds were being deposited and in what amount; the records show only the total deposit. Because he did not properly maintain his records, Finney cannot state with certainty exactly when he deposited Kast's fee advancement into his trust account or even if he deposited it.

Finney's Actions After the Suspension

On June 20, 2007, we suspended Finney. We based the suspension primarily upon Finney's lack of response to the grievance filed by Hurtado and his failure to properly maintain Kast's advance fee payment in his trust account. At the time the suspension took effect, Finney was representing Bobby Jo Giersdorf in a custody, visitation, and support case. The court scheduled a hearing on Giersdorf's case for July 31. After his suspension, and before the hearing, Finney advised Giersdorf to appear in court on the scheduled date. He also advised Giersdorf to ask the judge to approve his requested visitation rights and to continue the hearing until Finney could get his license back. Relator claims that because Finney advised his client to ask for visitation, he was engaged in the unauthorized practice of law.

At the hearing, Giersdorf followed Finney's advice. The judge, however, recognized that this court had suspended Finney's license and agreed to continue the case so that Giersdorf could obtain counsel. But the judge stated that he would not base the length of the continuance upon the reinstatement of Finney's license. The judge forwarded a copy of his order to relator, because he believed Finney had engaged in the unauthorized practice of law.

At the time of his suspension, Finney was also representing Jordon Dvorak in a criminal case. The court scheduled Dvorak

to enter a plea on July 9, 2007. Before the hearing, Finney impressed upon Dvorak that it was essential that he appear for his court date. Finney also advised Dvorak to ask the judge to continue his hearing until after Finney's license was reinstated. Dvorak followed Finney's advice and asked the court for a continuance. Recognizing that Finney's license was suspended, the judge appointed a public defender to represent Dvorak and reported the matter to relator.

Finney stated that in both Dvorak's and Giersdorf's cases, he believed that he had a duty to prevent prejudice to his clients and that he was acting in their best interests. In Dvorak's case, Finney believed that Dvorak could receive a jail sentence; Finney testified that he impressed upon his client the importance of attending the court date. In Giersdorf's case, the client primarily wanted visitation rights, so Finney advised him to ask the judge for visitation. Finney testified that in both instances, he believed he was giving commonsense advice to his clients and not engaging in the practice of law.

Referee Hearing

Finney was the only witness at the hearing. Besides the facts and testimony outlined above, Finney testified that he was suffering from major depressive disorder and dysthymia. These ailments stemmed from his recall in 2003 when he was removed as county attorney for Dakota County. During that time, he was under professional care, was receiving counseling, and was taking antidepressant medication.

Finney admitted that his health and personal problems were not excuses for his behavior, but he believed they affected how he had managed his office and how he responded to relator's inquiries.

Referee's Findings

The referee found that Finney displayed troublesome behavior regarding his own clients and also in how he handled, or failed to handle, these disciplinary proceedings. Regarding count one, the referee found clear and convincing evidence supporting Hurtado's grievance. He further concluded that Finney had violated the Nebraska Rules of Professional

Conduct when he failed to provide an accounting of his services to Hurtado (§ 3-501.5(f)(1)) and when he failed to timely and adequately respond to inquires from relator (§ 3-508.4(a) and (d)).

Regarding count two, the referee found clear and convincing evidence that Finney violated the Nebraska Rules of Professional Conduct when he failed to give Kast an accounting of his time and services. He also found that Finney failed to timely refund the unearned portion of the advance fee payment, conduct which violated § 3-501.5(a) and (f)(1) and (2). Finally, the referee found that Finney did not deposit Kast's $1,000 fee advancement into his trust account, which violated §§ 3-501.15(a) and (c) through (e) and 3-501.16(d).

Regarding counts three and four, the referee found clear and convincing evidence that Finney engaged in the unauthorized practice of law. He reasoned that after Finney was suspended, he advised Giersdorf and Dvorak how to proceed at their hearings, violating §§ 3-505.5(a) and 3-508.4(d). In both cases, however, the referee stated that he did not find Finney's failure to file a formal motion to withdraw a violation of the Nebraska Rules of Professional Conduct, because the rules do not explicitly require an attorney to file a formal motion of withdrawal (§ 3-501.16(a)(1) and (d)).

Neither Finney nor relator has filed an exception to the referee's findings of fact. The referee recommended that Finney's suspension, which began on June 20, 2007, continue until the time that this court reached its final decision and that the suspension not continue past that time. After the suspension is lifted, the referee recommended that Finney be on probation for 1 year and that this court appoint a mentor to observe Finney.

ASSIGNMENT OF ERROR

Relator takes exception to the referee's recommended sanction. He argues that Finney's current suspension should be extended beyond the time this court reaches its final decision, because the gravity of Finney's violations requires a more severe sanction than that recommended by the referee.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which we reach a conclusion independent of the findings of the referee.[1] The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence.[2]

ANALYSIS

Finney Did Not Engage in the Unauthorized Practice of Law

The only exception filed relates to the recommended sanction. The parties filed no exceptions regarding the referee's factual findings. We agree with the referee's factual findings regarding counts one and two. But after a de novo review, we find that the record does not establish by clear and convincing evidence that Finney engaged in the unauthorized practice of law.

The referee determined that Finney engaged in the unauthorized practice of law in two ways while he was suspended. First, he advised two clients to attend their court dates and ask for a continuance. Second, Finney told Giersdorf to ask for visitation rights at his hearing. Although an attorney cannot engage in the practice of law during his or her suspension, we recognize that attorneys must handle their suspension in a manner that is not prejudicial to clients. Here, the evidence shows Finney's actions were intended to protect his clients' interests rather than to practice law. The advice Finney gave was necessary to protect his client's interests, because after Finney received notification of his suspension, there was not time to employ another attorney before the clients' court dates.

Sanctions for Violations

[3] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so,

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[1] *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

[2] *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999).

the type of discipline appropriate under the circumstances.[3] Here, the primary question before us is whether the discipline should be that recommended by the referee or something else. Under Neb. Ct. R. § 3-304, we may consider and impose the following public sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation instead of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.[4]

[4,5] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[5] We also consider an attorney's acts both underlying the offenses and throughout the disciplinary proceeding and any aggravating and mitigating circumstances.[6] In addition, we consider the propriety of a sanction with reference to the sanctions imposed in similar cases.[7]

[6] We evaluate each attorney discipline case individually, in light of its particular facts and circumstances.[8] The evidence shows Finney displayed an indifferent attitude toward his practice of law. He ignored requests by his clients for an accounting of his time and services, he failed to timely return his client's

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[3] *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007), citing *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

[4] See, *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008); *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008).

[5] See *id.*

[6] See *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999).

[7] See *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[8] See *id.*

unearned advance fee payment, he failed to maintain unearned client funds in a separate trust account, and he continuously neglected to respond to demands made by relator.

Additionally, Finney's lack of cooperation with relator has continued after the hearing on these charges. Because Finney failed to cooperate with his own lawyer, his lawyer withdrew from these proceedings. Furthermore, after his lawyer withdrew, Finney failed to submit to the referee a posthearing brief and a medical report outlining his alleged medical conditions. This conduct undermines Finney's claims that he was unaware of relator's correspondence and this court's order to show cause. Instead, this shows that Finney is either unable or unwilling to cooperate with this disciplinary process.

As mitigating factors, we recognize that during the relevant time, Finney was contending with personal and health issues that undoubtedly caused him mental and financial stress. Since his suspension, Finney entered a rehabilitation facility to address his issues with alcohol and depression. He has sought counseling and is involved in Alcoholics Anonymous. There is also no record of other complaints against Finney.

Relator requests that we suspend Finney for 2 years after we enter a final order in this appeal. Relator has requested a more severe sanction than did the referee because, absent mitigating circumstances, the appropriate discipline in cases of misappropriation of clients' funds is disbarment.[9] That the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[10]

In the discipline cases where we have approved disbarment, the attorneys involved had engaged in numerous occasions of misappropriation of clients' funds.[11] In Finney's case, it appears that there is only the single incident. Furthermore, the record indicates there were sufficient funds in Finney's trust account

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[9] *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

[10] See, *id.*; *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996).

[11] See *Howze, supra* note 9.

to cover the refund and that the refund, while untimely, came from the trust account.

After a de novo review, it is the judgment of this court that Finney be suspended from the practice of law for 2 years with credit to be given for the time he has been temporarily suspended. At the end of the 2-year suspension period, Finney may apply for reinstatement, provided that he has demonstrated his compliance with Neb. Ct. R. § 3-316. It is further provided that his reinstatement, if granted, shall be conditioned on the following: (1) a showing, confirmed by relator, that there are no pending or unresolved disciplinary charges against Finney; (2) a showing that Finney has completed a course on law firm management or a business practices course that has been approved by relator; and (3) a showing by independent, third-party proof that Finney has continued active participation in an alcohol recovery program. If Finney is approved for reinstatement, he shall be on probation for 1 year following reinstatement, during which period Finney will:

(1) be monitored by an attorney approved by relator;

(2) enter into engagement letters with each client, which letter will describe, at a minimum, the services to be provided by Finney to the client, the fee arrangement between Finney and the client, and any requirements imposed by Finney upon the client; and

(3) work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner.

In addition, during the period of probation, the monitoring attorney will review any trust account maintained by Finney on a monthly basis and report any trust account irregularity or other disciplinary violation to relator.

Finney is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., participating on briefs.

MCCORMACK, J., not participating.

LEE APPLEBY, PERSONAL REPRESENTATIVE OF THE ESTATE OF OPAL SHEPARD, DECEASED, APPELLANT, V. STANLEY ANDREASEN AND NEW YORK LIFE INSURANCE/NEW YORK LIFE INSURANCE AND ANNUITY COMPANY, APPELLEES.

758 N.W.2d 615

Filed December 19, 2008. No. S-07-780.

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. **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.
4. ____: ____. 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.

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

Gail E. Boliver, of Boliver Law Firm, for appellant.

Kevin R. McManaman and Jocelyn W. Golden, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., and Joseph A. Wilkins, of Heinisch Law Office, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Opal Shepard filed an action against Stanley Andreasen and New York Life Insurance/New York Life Insurance and Annuity Company (New York Life) asserting various causes of action premised on her allegation that Andreasen and New York Life gave her improper financial advice regarding multiple life

insurance products. The district court for Burt County granted summary judgment in favor of Andreasen and New York Life on various bases, including its determinations that Shepard's claims were previously disposed of in a national class action and that Shepard had failed to submit evidence preventing judgment in favor of Andreasen and New York Life. Shepard appeals the summary judgment.

We note that this court was informed that Shepard died after this appeal was filed. We granted a motion to substitute the estate of Opal Shepard, by the personal representative, Lee Appleby, as the plaintiff-appellant in this case. Hereinafter, we use "Shepard" to refer to both Opal Shepard and the estate.

Because we conclude that the settlement in the class action released Andreasen and New York Life from liability on Shepard's claims and that Shepard failed to introduce evidence to the contrary, we affirm the summary judgment in favor of Andreasen and New York Life.

STATEMENT OF FACTS

In 1987, when she was 72 years old and a widow living in Oakland, Nebraska, Shepard met with Andreasen, a general agent for New York Life who was licensed to sell both insurance and securities. Over the following years, Andreasen sold Shepard various life insurance policies, as well as shares of various mutual funds and other investment products.

On April 11, 2005, Shepard filed the present action against Andreasen and New York Life, generally asserting that Andreasen misrepresented certain facts and improperly advised her that certain life insurance products were suitable investments for her. In her complaint, Shepard asserted various causes of action and theories of recovery, including negligence, breach of fiduciary duty, misrepresentation, negligent misrepresentation, negligent supervision, and breach of contract. She generally alleged that Andreasen and New York Life failed to give her proper financial advice concerning the investment of her resources and, in particular, that they recommended purchases and sales of multiple insurance products which caused her to incur significant losses. Shepard sought compensation for her losses.

Andreasen and New York Life answered and generally denied most of Shepard's allegations. They also asserted affirmative defenses, including statutes of limitations and laches.

On March 15, 2007, Andreasen and New York Life moved for summary judgment on the bases of (1) class action preclusion, (2) statutes of limitations, and (3) lack of evidence to support Shepard's claims. With regard to class action preclusion, they asserted that Shepard's claims against them had already been litigated and resolved pursuant to a nationwide class action in *Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y. Sup. Nov. 8, 1995) (*Willson*). With regard to statutes of limitations, Andreasen and New York Life asserted that Shepard's claims were premised on 15 life insurance policies purchased from 1987 through 1992, 12 of which were surrendered or canceled between 1993 and 1997. They argued that Shepard's action filed in 2005 was barred by the applicable statutes of limitations.

A hearing on the motion for summary judgment was held April 16, 2007. The court received evidence offered by Andreasen and New York Life in support of their motion, including a letter from Shepard's counsel clarifying and listing the policies that were the subject of Shepard's claims. The evidence also included the affidavit of a New York Life officer setting forth, inter alia, the policy date and type of insurance plan for each of the policies listed. The affidavit indicated that each of the policies was issued in the period from 1987 through 1992. The affidavit further indicated that a class notice regarding the *Willson* class action had been mailed to Shepard and that the class notice applied to all the policies listed by Shepard. The undisputed affidavit states that Shepard did not opt out of the class action. The affidavit finally indicated that a postsettlement notice inclusive of election forms had been mailed to Shepard in connection with the class action. Andreasen and New York Life's evidence also included the affidavit of counsel for New York Life regarding the history and settlement of the *Willson* class action. Attached to the counsel's affidavit were documents related to the *Willson* action, including a copy of the class notice, which indicated that the class included those who owned whole life policies and universal life policies,

including target life policies, issued by New York Life during the period from January 1, 1982, through December 31, 1994. The attachments also indicated that in the settlement agreement in the *Willson* action, the class members agreed to release and discharge New York Life and its agents from various types of claims arising from the issuance of policies included in the class action.

The court also received evidence offered by Shepard in opposition to the summary judgment, including Andreasen's deposition. In the deposition, Andreasen described his dealings with Shepard. Shepard's evidence also included an unsworn, unsigned letter by a self-described "expert," who opined that Andreasen and New York Life breached certain duties owed to Shepard "by mischaracterizing life insurance as an investment and repeatedly selling it to her instead of more appropriate investments." The record of the summary judgment hearing contains mention of a deposition given by Shepard; however, Shepard's deposition was not offered into evidence at the summary judgment hearing and is not in the record on appeal.

The district court granted the motion for summary judgment on all three bases asserted by Andreasen and New York Life. The court first concluded that "all of [Shepard's] claims were previously disposed of in a nationwide class action rendering the claims res judicata, released, and enjoined by the prior court." The court determined that all of Shepard's claims in this action related to claims previously adjudicated and resolved in *Willson* and that Shepard's claims were precluded by the release of claims in the *Willson* settlement and final judgment and the New York court's permanent injunction against lawsuits such as Shepard's. The court next concluded that all of Shepard's claims were barred by the applicable statutes of limitations and the doctrine of laches. The court determined that Shepard's claims accrued when she purchased life insurance policies between 1987 and 1992 and that therefore her claims were barred by 4-year statutes of limitations under Neb. Rev. Stat. §§ 25-206 and 25-207 (Reissue 1995). Finally, the court concluded that Andreasen and New York Life were entitled to summary judgment because Shepard "has

not submitted any evidence that show[s] Defendants breached a duty owed to" Shepard. The court therefore granted the motion for summary judgment and dismissed Shepard's claims with prejudice.

Shepard appeals.

ASSIGNMENTS OF ERROR

Shepard asserts that the district court erred in granting summary judgment and dismissing her complaint (1) based on the class action settlement when material facts were in dispute concerning conduct outside the class period, (2) based on statute of limitations grounds when material facts were in dispute concerning the accrual of her claims, and (3) based on a "failure of proof."

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. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (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

The Willson Settlement Releases Andreasen and New York Life From Liability on the Claims Asserted by Shepard, and Shepard Failed to Offer Evidence to Support Claims Not Covered by the Release.

Shepard asserts that the district court erred by granting summary judgment based on its conclusion that the class action settlement in *Willson* released Andreasen and New York Life from liability on all of the claims asserted by Shepard in this case. Shepard argues that her claims encompass misconduct that occurred after the period covered by the class action. Even giving Shepard the favorable inferences from the evidence, we conclude that Shepard failed to present evidence at the

summary judgment hearing of conduct or representations that were not covered by the class action.

We note first that other courts have found certain tort claims against New York Life and its agents to be encompassed within and thus barred by the settlement in *Willson*. See, *Manji v. New York Life Ins. Co.*, 945 F. Supp. 919 (D.S.C. 1996); *New York Life Ins. Co. v. Robinson*, 735 So. 2d 463 (Ala. 1999). In *Manji*, the federal District Court for the District of South Carolina determined that the plaintiffs' claims were identical to claims in the *Willson* class action and that because the plaintiffs did not opt out of the *Willson* class, the final judgment in *Willson* was res judicata as to the plaintiffs' action in federal district court. In *Robinson*, the Alabama Supreme Court noted that

> the *Willson* Stipulation of Settlement released New York Life and its agents from liability for claims "connected with, arising out of, or related to, in whole or in part, . . . representations allegedly made . . . relating to: . . . the fact that the Policies were or were not life insurance . . . [or] whether the Policies were, would operate or could function as an Investment Plan."

735 So. 2d at 467. The court in *Robinson* rejected the plaintiffs' argument that their misrepresentation claims fell outside the scope of the settlement agreement. By contrast, in *New York Life Ins. Co. v. Griffin*, 794 So. 2d 1072 (Ala. 2001), the Alabama Supreme Court determined that although certain of the plaintiff's claims were precluded by the *Willson* settlement, other claims of fraud concerning a replacement policy issued after the period covered by the *Willson* settlement, regardless of their merit, were not necessarily precluded by the *Willson* settlement and, on the record, not suitable for summary judgment.

The district court in the present case found that all of Shepard's claims were encompassed within the *Willson* settlement. The court's determination was based on the list of policies that Shepard identified as being at issue in this case and evidence provided by Andreasen and New York Life that all the policies listed by Shepard were of the type covered by the class action and were issued during the time period covered

by the class action. Shepard's claims were all generally based on allegations that Andreasen advised her that purchasing the life insurance policies would be a good investment plan for her. As noted in *Robinson, supra*, the settlement in *Willson* releases New York Life and its agents from claims based on such representations with regard to policies covered by the class action.

On appeal, Shepard does not dispute that the *Willson* settlement releases New York Life and Andreasen to the extent her claims relate to policies issued during the time period covered by the class action. Instead, Shepard argues on appeal that her lawsuit is intended to encompass additional claims related to activity subsequent to the class action period. We note in this regard that while at the trial level Shepard listed several policies that were the subject of her claims, on appeal, she argues that there was activity outside the class period with respect to only three of the policies. Shepard does not dispute the district court's findings that she was covered by the class action and that she failed to opt out of the class action. Thus, to the extent Shepard's claims relate to policies issued during the class period and to representations Andreasen and New York Life made in selling those policies, Shepard does not dispute the district court's finding that Andreasen and New York Life were released from such claims, and we find no error in such finding.

Shepard argues on appeal that there was misconduct with respect to three of the policies after the end of the period covered by the *Willson* class action and that Andreasen and New York Life were not released from liability to the extent her claims relate to such alleged misconduct. Shepard concedes that each of the three policies was "sold and incurred initial premium costs within the class period" of *Willson*, which ran from January 1, 1982, through December 31, 1994. Brief for appellant at 17. However, because the three policies remained in effect after December 31, 1994, Shepard argues in her brief that when she paid additional premiums in 1995 and succeeding years, "additional new money was 'invested' in each of these 'investments' (life insurance contracts) based upon the recommendations of" Andreasen and New York Life. *Id.*

Although not articulated as such, it appears that Shepard's argument is based on an analogy to the "continuing investment doctrine" which has been applied to statute of limitations questions in federal securities cases. See *In re Prudential Ins. Co. of America Sales Prac.*, 975 F. Supp. 584 (D.N.J. 1996). See, also, *Lampf v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991) (considering statutes of limitations in securities actions). We believe the continuing investment concept is helpful in the present context. As stated by the court in *In re Prudential Ins. Co. of America Sales Prac.*, under the continuing investment doctrine, "investors who make periodic discretionary payments are held to make a new investment decision, and enter a new investment transaction, with each payment." 975 F. Supp. at 604 n.15. However, the court specifically held that even applying the continuing investment doctrine, "plaintiffs must also tie such payments to a misrepresentation or omission occurring within [the limitations] period." *Id.*

Shepard's argument in this case appears to be similar to the continuing investment doctrine, in that she argues that when she made premium payments on policies after December 31, 1994, or when the proceeds of other policies were used to make such payments, she was making a new "investment" and that therefore a new claim had arisen. Even assuming such premium payments are new investments, Shepard must by a showing of evidence tie new investment decisions to misconduct or misrepresentations made after December 31, 1994, in order to establish new claims arising outside the *Willson* class period.

[3,4] 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. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). 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.* Andreasen and New York Life presented evidence in support of their motion for summary judgment which, if

unrefuted, entitled them to judgment as a matter of law. We have examined the record, and we determine that Shepard thereafter failed to meet her burden.

The evidence Shepard offered in opposition to summary judgment does not support an assertion that Andreasen and New York Life made new misrepresentations after the *Willson* class period. Shepard's evidence of claimed new investments after December 31, 1994, mainly consisted of a chart which showed that as a factual matter, premiums continued to be paid on certain policies, and that proceeds of other policies were used to fund money market accounts from which such premiums were paid. However, Shepard offered no evidence that Andreasen or New York Life made new misrepresentations regarding the nature of these transactions after December 31, 1994. Shepard offered Andreasen's deposition, in which he testified generally about investment advice he had given Shepard. The deposition does not indicate when advice regarding the policies was given, and the deposition does not indicate, even giving Shepard favorable inferences, that it was given after the class period.

For completeness, we note that there is reference in the record to the existence of a deposition of Shepard which may or may not relate to the errors assigned on appeal. However, Shepard's deposition was not offered into evidence at the summary judgment hearing and thus is not part of the record on appeal. Because the deposition was not offered at the hearing, it cannot be considered by this court on appeal. See, *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003); *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). In addition, we notice that there is also an unsworn, unsigned letter by a self-described expert in the record. This document is not a pleading, deposition, admission, or affidavit and, accordingly, is of no effect in the proper consideration of a summary judgment motion. See, Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2006); *Kulhanek v. Union Pacific RR.*, 8 Neb. App. 564, 598 N.W.2d 67 (1999).

In summary, Shepard does not argue that the district court erred in concluding that the *Willson* settlement released Andreasen and New York Life from liability to the extent her

claims related to policies issued and misrepresentations made during the period covered by the class action. Instead, Shepard argues that Andreasen and New York Life were not released from liability on her claims to the extent that her claims related to misconduct or misrepresentation after the period covered by the class action. However, Shepard offered no evidence at the summary judgment hearing to support an assertion that specific misconduct occurred or misrepresentations were made after December 31, 1994. We therefore conclude that the district court did not err in determining that the *Willson* settlement released Andreasen and New York Life from liability on the entirety of Shepard's claims in this action and in granting summary judgment on such basis.

Other Assignments of Error Need Not Be Considered.

In addition to concluding that the *Willson* settlement released Andreasen and New York Life from liability on Shepard's claims, the district court also concluded that her claims were barred by the statute of limitations and the doctrine of laches and that Andreasen and New York Life were entitled to summary judgment because Shepard "has not submitted any evidence that show[s] Defendants breached a duty owed to" Shepard. Shepard assigns error on appeal to such additional conclusions. We determined above that the district court did not err in granting summary judgment as to all of Shepard's claims based on the release and preclusive effect provided by the *Willson* settlement. Because such determination was sufficient to justify the district court's granting of summary judgment in favor of Andreasen and New York Life, we need not consider Shepard's assignments of error relating to the other bases the district court added to support its decision.

CONCLUSION

Andreasen and New York Life offered evidence that they were released from liability on Shepard's claims because of the *Willson* settlement, which entitled them to judgment. Shepard failed to present evidence supporting her allegation that her claims encompassed activity not covered by the *Willson* release. We conclude the district court did not err in granting summary

judgment in favor of Andreasen and New York Life, and we, therefore, affirm.

AFFIRMED.

STEPHAN, J., not participating.

DOROTHY M. LOVES, APPELLANT, V. WORLD INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

758 N.W.2d 640

Filed December 19, 2008. No. S-07-1067.

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 was 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. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Statutes.** In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
6. **Employer and Employee: Wages: Termination of Employment.** The Nebraska Wage Payment and Collection Act does not prohibit an employer from providing a sick leave benefit which may be used only in the event of illness or injury and which has no monetary value upon termination of employment if it is not so used.

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

Steven J. Riekes and Howard N. Epstein, of Marks, Clare & Richards, L.L.C., for appellant.

Mary Kay O'Connor and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

STEPHAN, J.

In 2003, Dorothy M. Loves retired after working for World Insurance Company (World) for approximately 47 years. In this action brought under the Nebraska Wage Payment and Collection Act (NWPCA),[1] the issue is whether she is entitled to be paid for unused sick leave which accrued during her employment. The district court for Douglas County resolved the issue in the negative, and we affirm.

BACKGROUND

Loves was employed by World from November 12, 1956, until her retirement on November 3, 2003. During her employment, World offered certain fringe benefits to its employees, including a sick leave plan. Prior to January 1, 1996, World's sick leave plan permitted employees to accumulate unused sick leave and cash out accrued but unused sick leave at termination or retirement.

On December 7, 1995, World sent a memorandum to all full-time employees explaining that effective January 1, 1996, the sick leave policy would change. Under the new policy, accumulated but unused sick leave would no longer be cashed out upon "termination" of employment. It could, however, be placed into an emergency reserve account for extended employee illness or disability. Any unused time would be forfeited. This new policy was included in employee handbooks dated May 4, 1998, and May 18, 2000, which specifically stated that "[u]nused personal and sick time can not be cashed in at time of termination." Loves acknowledged receipt of the revised policy and signed a notice to that effect on May 18, 1998.

Loves claimed that at the time of her November 2003 retirement, she had accumulated at least 794.35 unused hours of sick leave. Loves asked World to cash out her sick leave at the time of her retirement, but it refused to do so. Loves then filed this action, claiming at least $13,956.73 in compensation for the unused sick leave. World answered, alleging that its policy at

[1] Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004).

the time of Loves' retirement disallowed the accumulation and cashing out of sick leave and that such a policy did not violate the NWPCA. World also alleged that Loves' claim was barred by the applicable statute of limitations.

Both parties moved for summary judgment with supporting evidence. The district court granted World's motion and denied Loves' cross-motion. It determined that Loves did not meet the conditions stipulated by the World sick leave policy in effect at the time of retirement, because she did not have an illness preventing her from working. Distinguishing our decision in *Roseland v. Strategic Staff Mgmt.*,[2] which held that earned but unused vacation time constituted wages within the meaning of the NWPCA, the court stated that "World's sick leave policy is not vacation time masquerading under another name, but a provision put in place by an employer for the benefit of employees unable to work due to illness." In further holding that Loves had no vested right to payment of sick leave accumulated prior to the 1996 change in World's policy, the district court concluded: "Even ignoring the fact that World reserved the right to amend or terminate any of its policies, the undisputed facts show that the statute of limitations has long since run on this particular claim."

Loves timely appealed from the district court's decision, and we moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENTS OF ERROR

Loves assigns that the district court erred in (1) granting World's motion for summary judgment and overruling her cross-motion and (2) holding that the statute of limitations barred her claim.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as

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[2] *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434, 722 N.W.2d 499 (2006).

[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

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]

[2] In reviewing a summary judgment, an appellate court views the evidence in a 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.[5]

[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.[6]

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

ANALYSIS

The NWPCA requires an employer to pay "unpaid wages" to an employee who separates from the payroll "on the next regular payday or within two weeks of the date of termination, whichever is sooner."[8] A sick leave plan is considered a fringe benefit under the NWPCA.[9] The NWPCA defines "wages" as

> compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time,

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[4] *Ehlers v. State, ante* p. 605, 756 N.W.2d 152 (2008); *Gavin v. Rogers Tech. Servs., ante* p. 437, 755 N.W.2d 47 (2008).

[5] *Ehlers v. State, supra* note 4.

[6] *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

[7] *Borrenpohl v. DaBeers Properties, ante* p. 426, 755 N.W.2d 39 (2008); *Scofield v. State, ante* p. 215, 753 N.W.2d 345 (2008); *Niemoller v. City of Papillion, ante* p. 40, 752 N.W.2d 132 (2008).

[8] § 48-1230(2)(a).

[9] § 48-1229(3).

> task, fee, commission, or other basis. *Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise.*[10]

Applying these statutory provisions, we have held that a payment will be considered a wage subject to the NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.[11]

[5] In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[12] Under the plain language of § 48-1229(4) quoted above, unused sick leave is not a part of wages payable to a separating employee unless there is a specific agreement otherwise. Such an agreement existed in *Professional Bus. Servs. v. Rosno*,[13] where the employee handbook provided, "'Any sick leave not used will be paid to the employee at the time of termination.'" But in this case, it is undisputed that at the time of Loves' retirement, the employee handbook provided that sick leave could be used "for employee illness or that of a dependent child" and that "[u]nused sick time cannot be carried over but will be placed in an emergency reserve account to be used for extended periods of illnesses, greater than 3 days, or disability." It also provided that "[u]nused personal and sick time can not be cashed in at time of termination. Any unused balance will be forfeited."

[6] Clearly, under § 48-1229(4), accrued but unused sick leave is treated differently than accrued but unused vacation leave for purposes of determining unpaid wages when

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[10] § 48-1229(4) (emphasis supplied).

[11] *Pick v. Norfolk Anesthesia, ante* p. 511, 755 N.W.2d 382 (2008).

[12] *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[13] *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 115, 680 N.W.2d 176, 188 (2004).

employment ends. Other courts have recognized an employer's right to treat sick leave as a "contingent benefit due only in the event an employee misses work due to illness."[14] We conclude that the NWPCA does not prohibit an employer from providing a sick leave benefit which may be used only in the event of illness or injury and which has no monetary value upon termination of employment if it is not so used. In this case, the agreement of the parties at the time of Loves' retirement, as reflected in the employee handbook, contemplated a benefit of this nature. Loves did not contend that she was entitled to the value of sick leave based on a qualifying illness or injury, and she did not present any medical evidence to that effect.

The remaining question is whether Loves was entitled to a "vested" sick leave benefit based upon World's pre-1996 policy. On this point, the record is quite sparse. The pre-1996 sick leave policy itself is not in the record. We have before us only two brief references to the policy: one in Loves' affidavit and the second in a copy of a December 7, 1995, memorandum that World issued to all full-time employees. This memorandum stated that effective January 1, 1996, there would no longer be a "cash out of benefits at termination, as i[s] the case under our current policy." The subsequent copies of the employee handbooks in the record, dated May 4, 1998, and May 18, 2000, reflect this policy change.

The 1998 and 2000 handbooks state that employment was at will, and there is no evidence that Loves ever had any other employment status with World. The handbooks also specifically reserve World's right to change its policies, and there is nothing in the record either restricting World's right to change its pre-1996 sick leave policy or supporting a claim that it created any vested contractual rights when it did so. The record reflects that Loves was informed of the 1996 change in the sick leave policy, but there is no indication that she protested or claimed any vested rights at the time. Courts have held that

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[14] *Teamsters, Local 117 v. NW Beverages*, 95 Wash. App. 767, 768, 976 P.2d 1262, 1263 (1999). See, also, *Simpson v. City of Blanchard*, 797 P.2d 346 (Okla. App. 1990).

when an at-will employee continues working with knowledge of changed sick leave policies, the employee gives up any rights under a superseded policy.[15]

We conclude that the record before us does not provide a basis for determining that World's pre-1996 sick leave policy created any vested contractual right entitling Loves to payment of unused sick leave at the time of her retirement in 2003. Accordingly, we need not address the statute of limitations issue presented in this appeal.

CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting World's motion for summary judgment and denying Loves' cross-motion. We therefore affirm the judgment of the district court in favor of World.

AFFIRMED.

WRIGHT, J., not participating.

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[15] *National Rifle Ass'n v. Ailes*, 428 A.2d 816 (D.C. 1981); *Werden v. Nueces County Hosp. Dist.*, 28 S.W.3d 649 (Tex. App. 2000); *Gamble v. Gregg County*, 932 S.W.2d 253 (Tex. App. 1996); *Willets v. City of Creston*, 433 N.W.2d 58 (Iowa App. 1988).

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA L. ALBERS, APPELLANT.
758 N.W.2d 411

Filed December 19, 2008. No. S-07-1322.

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. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
3. **Prosecuting Attorneys: Presentence Reports.** Under the first sentence of Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2006), a prosecutor is included in the category of "others entitled by law to receive" the information in the presentence report and therefore the sentencing court is not required to make a determination

of the defendant's best interest before allowing the prosecutor to review the presentence report.

4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **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.
6. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Dodge County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Dodge County, KENNETH VAMPOLA, Judge. Judgment of District Court affirmed.

Steven J. Twohig, of Twohig Law Office, P.C., L.L.O., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Joshua L. Albers pled no contest in the county court for Dodge County to misdemeanor charges of attempted terroristic threats, false reporting, and third degree assault. Prior to sentencing, Albers sought unsuccessfully to preclude the prosecutor from reviewing the presentence investigation report (PSI). Albers was sentenced to imprisonment for 365 days on each of the counts, with the sentences to be served concurrently. Albers appealed to the district court for Dodge County, which affirmed the county court's rulings. Albers appeals to this court and asserts that his sentences are excessive. He also asserts

that the county court erred in overruling his motion to preclude review of the PSI by the prosecuting attorney and that the district court erred in affirming such ruling. Finding no error, we affirm.

STATEMENT OF FACTS

The charges against Albers arose from an incident that occurred on February 11, 2007, in Fremont, Nebraska. Dale White, his wife, and their 7-year-old daughter were in a pickup stopped at a sign inside a mall parking lot. Albers turned into the parking lot driving his car at a high rate of speed and nearly hit White's pickup. White responded by "flipping off" Albers. White drove his pickup out of the parking lot and onto an adjoining road. Albers turned his car around to follow White. White stopped on the side of the road and got out of the pickup. White saw Albers' car approaching and threw a frozen plastic pop bottle at Albers' car, breaking the passenger side mirror. Albers stopped his car and approached White's pickup with a gun. Albers pointed the gun at White's wife and daughter, who were still inside the pickup. Albers pointed the gun in White's direction and fired but told White that the gun was not real. The record indicates that the gun was a "starter pistol" that fired blanks. Albers returned to his car and left after hearing sirens from a police car that was responding to a call placed to the 911 emergency dispatch service by White's wife. After leaving, Albers hid the gun and called the police to make his own report. Police found Albers in the mall parking lot.

The State charged Albers with attempted terroristic threats, false reporting, and third degree assault in connection with the incident. Albers pled no contest, and the county court found Albers guilty on all three counts.

Prior to the sentencing hearing, Albers moved for closed proceedings on the basis that private mental health information would be disclosed at the hearing and public dissemination of such information would be unduly prejudicial to him. Albers also moved for an order to preclude "the prosecuting authority from reviewing, receiving or obtaining any privileged

information contained within the [PSI]" prepared in Albers' case. The county court sustained Albers' motion for closed proceedings, but overruled his motion to preclude the county attorney from reviewing the PSI. The court stated, however, that any information in the PSI that should not be discussed in open court could be identified and would be protected. The court thereafter sentenced Albers to jail for 365 days on each of the three convictions and ordered the sentences to be served concurrent with one another.

Albers appealed to the district court. In his statement of errors, Albers asserted that the county court imposed excessive sentences and erred in overruling his motion to preclude review of the PSI by the prosecuting authority. The district court affirmed Albers' sentences after concluding that the county court did not abuse its discretion by imposing the sentences. The district court further concluded that the PSI had been properly submitted to the county court and that therefore any comment the county attorney made at the sentencing with regard to the PSI merely repeated information already available to the court.

Albers appeals the district court's affirmance of the rulings by the county court.

ASSIGNMENTS OF ERROR

Albers asserts that the district court erred in (1) affirming the county court's overruling of his motion to preclude review of the PSI by the prosecutor and (2) finding that the sentences imposed by the county court were not excessive.

STANDARDS 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. *State v. Hense, ante* p. 313, 753 N.W.2d 832 (2008).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Draganescu, ante* p. 448, 755 N.W.2d 57 (2008).

ANALYSIS

Prosecutors Are "Others Entitled by Law" to Receive Information in Presentence Investigation Report.

The statute at issue in this case is Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2006), which provides in relevant part as follows:

> Any presentence report . . . shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, the probation administrator or his or her designee, or others entitled by law to receive such information, including personnel and mental health professionals for the Nebraska State Patrol specifically assigned to sex offender registration and community notification for the sole purpose of using such report or examination for assessing risk and for community notification of registered sex offenders. . . . The court may permit inspection of the report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender.

Albers asserts that under § 29-2261(6), a court must find that it is in the best interest of a defendant before the court allows a prosecutor to review the PSI. Albers claims that the county court erred when it failed to make such a determination in this case and that the district court erred when it affirmed the county court's ruling. We conclude that there is no merit to Albers' argument.

[3] In the lower courts and on appeal, Albers' argument focuses on the last portion of § 29-2261(6), which provides that a "court may permit inspection of the [PSI] by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender." Relying on this language, Albers claims that before permitting the prosecutor to inspect the PSI, the county court was required but failed to consider whether such inspection was in Albers' best interest. Contrary to Albers' reading of the statute, we conclude that under the first sentence

of § 29-2261(6), a prosecutor is included in the category of "others entitled by law to receive" the information in the PSI and that therefore the sentencing court is not required to make a determination of the defendant's best interest before allowing the prosecutor to review the PSI.

The first sentence of § 29-2261(6) sets forth the general proposition that information in a PSI is privileged and is not to be disclosed to anyone other than those persons listed. As we read the statute, it provides that those persons listed are exceptions to the general rule of nondisclosure and are entitled to disclosure without a determination of whether such disclosure is in the best interest of the defendant. The portion of the statute on which Albers focuses gives the court discretion to allow inspection of the PSI by additional individuals having a proper interest only after the court has found that such disclosure is in the best interest of the defendant. This latter portion of the statute applies only to those individuals who are not already entitled to disclosure under the first sentence of § 29-2261(6). The individuals "entitled by law" to review the PSI are not subject to a best interest analysis.

In view of the foregoing, the issue before us is whether a prosecutor is a person "entitled by law" to disclosure under the first sentence of § 29-2261(6). The first sentence of the statute specifically lists, inter alia, judges, probation officers, and mental health professionals for the Nebraska State Patrol as persons entitled to disclosure. Prosecutors are not specifically listed.

In analyzing § 29-2261(6), we note first that in *State v. Owen*, 1 Neb. App. 1060, 1086, 510 N.W.2d 503, 520 (1993), the Nebraska Court of Appeals stated that "[n]either the legislative history nor the case law citing § 29-2261 sheds any light on who might comprise the group of 'others entitled by law to receive such information.'" In *Owen*, the Court of Appeals determined that jurors in a criminal trial were not "others entitled by law to receive such information." We agree that neither the legislative history of § 29-2261 nor the case law prior to *Owen* sheds light on who might comprise the group of "others entitled by law to receive such information." We further observe that case law since *Owen* is not helpful.

[4] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008). Because we cannot reject the phrase "others entitled by law to receive such information" as superfluous or meaningless, we determine that a group of such "others" was intended by the Legislature to exist. For the reasons discussed below, we conclude that prosecutors are included in the group comprising "others entitled by law" to disclosure of the information in the PSI.

It has been observed that the PSI serves several functions, including providing information to the court to assist in the imposition of a appropriate individualized sentence based on knowledge of the convicted person's background and character which may not otherwise be available to the sentencing court, especially in a plea-based conviction. See, generally, *State v. Grandberry*, 619 N.W.2d 399 (Iowa 2000); *Buchea v. Sullivan*, 262 Or. 222, 497 P.2d 1169 (1972); *State v. LeClaire*, 175 Vt. 52, 819 A.2d 719 (2003); Stephen A. Fennell and William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615 (1980). The sentencing hearing has been identified as a critical stage of the criminal proceedings. *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). At sentencing, the defendant is entitled to counsel, *id.*, and the prosecutor is expected to participate in a meaningful manner. See *Burns v. United States*, 501 U.S. 129, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991).

While we have not been directed to definitive authority in Nebraska stating that the PSI should be disclosed to the prosecution, we note that treating prosecutors as individuals entitled to access to the PSI is commonplace. In the federal courts, Fed. R. Crim. P. 32(e)(2) requires that the "probation officer must give the presentence report to the defendant, the defendant's attorney, *and an attorney for the government* . . . ." (Emphasis supplied.) We further observe that it is common in other states for a statute or court rule to specifically provide that prosecutors are allowed or required to have access to a PSI. See, Ala. R. Crim. Proc. 26.3(c) (2003); Alaska R. Crim. Proc.

32.1(b)(3) (2007); Ariz. R. Crim. Proc. 26.6(a) (2008); Colo. Rev. Stat. Ann. § 16-11-102(1)(a) (West 2006); Conn. R. Crim. Proc. § 43-7 (2008); Del. Super. Ct. R. Crim. Proc. 32(c)(3) (2008); D.C. Super. Ct. R. Crim. Proc. 32(b)(3) (2008); Fla. R. Crim. Proc. 3.713 (West 2007); Haw. Rev. Stat. § 706-604(2) (Cum. Supp. 2007); Idaho Crim. R. 32(g)(1) (2008); 730 Ill. Comp. Stat. Ann. 5/5-3-4(b)(2) (LexisNexis 2007); Ind. Code Ann. § 35-38-1-12(a) (LexisNexis 1998); Iowa Code Ann. § 901.4 (West 2008); Kan. Stat. Ann. § 21-4605(a)(1) (2007); La. Code Crim. Proc. Ann. art. 877(A) (2008); Md. Code Ann., Corr. Servs. § 6-112(a)(3)(iii) (2008); Mass. R. Crim. P. 28(d)(3) (West 2006); Mich. Comp. Laws Ann. § 771.14(5) (West 2006); 49 Minn. R. Crim. Proc. 27.03, subd. 1 (West 2006); Mont. Code Ann. § 46-18-113(1) (2007); Nev. Rev. Stat. § 176.156(1) (2007); N.M. Rules Ann. 5-703 (2008); N.C. Gen. Stat. § 15A-1333(b) (2007); Ohio Rev. Code Ann. § 2951.03(D)(1) (LexisNexis 2006); Okla. Stat. Ann. tit. 22, § 982(D) (West 2003); Or. Rev. Stat. § 137.079(1) (2007); Pa. R. Crim. P. 703(A)(2) (West 2008); R.I. Super. Ct. R. Crim. P. 32(c)(3); S.D. Codified Laws § 23A-27-7 (2004); Tenn. Code Ann. § 40-35-208 (2006); Tex. Code Crim. Proc. Ann. art. 42.12, sec. 9(f) (Vernon 2008); Vt. R. Crim. P. 32(c)(3) (2003); Wash. Super. Ct. Crim. R. 7.1(a)(3) (West 2008); W.V. R. Crim. P. 32(b)(6); and Wis. Stat. Ann. § 972.15(4m) (West 2008).

In a case that involved Fed. R. Crim. P. 32, the U.S. Supreme Court stated that the rule "contemplates full adversary testing of the issues relevant to a . . . sentence and mandates that the parties be given 'an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.'" *Burns v. United States*, 501 U.S. at 135. Thus, the apparent purpose of allowing or requiring access to the PSI by the prosecutor is to improve the sentencing process by allowing the prosecutor to be informed of all relevant considerations when advocating for a particular sentence and, if appropriate, to challenge information within the report.

We believe that Nebraska law also contemplates an adversary testing of issues relevant to sentencing and our appellate

rules of practice so indicate. Where the PSI is material to issues on appeal, this court's rules allow the prosecutor access to the PSI. Neb. Ct. R. App. P. § 2-116(B) provides:

> In all cases where a presentence report may be material on appeal, the defendant, his or her counsel, or counsel for the State may request the sentencing judge to forward it to the Supreme Court Clerk. In each instance, the sentencing judge shall cause a copy of the report to be forwarded to the Clerk in a separate sealed envelope. The defendant, his or her counsel, or counsel for the State may examine the report, but it may not be removed from the office of the Clerk.

Rule 2-116(B) allows the "State," as prosecutor, access to the PSI to facilitate the prosecutor's preparation of its appellate arguments regarding material issues relevant to the PSI and sentencing. It logically follows that information in a PSI would be material to issues relating to sentencing at the trial level, and it is reasonable that the prosecutor should have access to such information at the time of sentencing.

Sentencing is a critical stage of a criminal proceeding, *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), and the information in a PSI is relevant to sentencing. In order to facilitate full adversary testing of issues relevant to sentencing, it is necessary for the prosecutor to have access to information in the PSI in order to evaluate factors relevant to sentencing and make informed arguments to the court regarding the proper sentence. For these reasons, we conclude that prosecutors are among the "others entitled by law to receive" the information in a PSI under § 29-2261(6).

We conclude as a matter of law that because prosecutors are "entitled by law to receive" the information in the PSI, it is not necessary under § 29-2261(6) for a court to determine whether it is in the best interest of the defendant before allowing the prosecutor access to the PSI. We therefore conclude that the county court did not err in overruling Albers' motion to preclude review of the PSI by the prosecuting authority and that the district court did not err in affirming such decision.

The Sentences Imposed Are Not Excessive.

Albers asserts that the county court imposed excessive sentences and that the district court erred in affirming such sentences. The sentences were within statutory limits, and we conclude that the sentences imposed were not an abuse of discretion and therefore not excessive. See *State v. Draganescu, ante* p. 448, 755 N.W.2d 57 (2008).

Albers was convicted of attempted terroristic threats under Neb. Rev. Stat. § 28-311.01 (Reissue 1995) (terroristic threats) and Neb. Rev. Stat. § 28-201 (Cum. Supp. 2006) (criminal attempt), false reporting under Neb. Rev. Stat. § 28-907 (Cum. Supp. 2006), and third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1995). Terroristic threats is a Class IV felony under § 28-311.01(2), and therefore attempted terroristic threats is a Class I misdemeanor under § 28-201(4)(e). False reporting and third degree assault are also Class I misdemeanors under § 28-907(2)(a) and § 28-310(2), respectively. The maximum sentence of imprisonment for a Class I misdemeanor is 1 year. Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 2006). Albers was sentenced to imprisonment for 365 days on each count with the sentences to be served concurrently. Therefore, Albers' sentences were within statutory limits.

[5,6] 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. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Albers argues that the county court failed to adequately consider factors including his age and background and certain

aspects of the incident that gave rise to the charges against him. He notes that he was 18 at the time of the incident and had gone through an "extraordinary struggle" in his youth, including numerous juvenile placements and an undiagnosed head injury. With regard to the circumstances of the offense, Albers places a significant amount of blame for the incident on White, asserting that White fueled Albers' actions by flipping him off and by throwing a projectile at Albers' vehicle and breaking the side passenger mirror. Albers also states that he used a "cap gun" to threaten White rather than using "an actual firearm capable of inflicting actual damages." Finally, Albers compares his sentencing to other cases which he claims are roughly comparable and in which lesser sentences were imposed.

At the sentencing hearing, the county court made little comment regarding the reasons behind its sentencing; however, in response to a comment made by counsel for Albers in which the court was urged to consider Albers' "juvenile issues" and "medical issues," the court responded that such issues were "the reason why I'm not going to give him three years." We read this comment to indicate that the factors urged by Albers were in fact considered by the court and prompted the court to order the sentences to be served concurrently rather than consecutively.

The PSI includes other information relevant to the court's sentencing decision. The PSI indicates that Albers' history included juvenile dispositions over 6 years which will not be repeated here. Albers' adult criminal history included convictions for criminal trespass, disturbing the peace, second degree criminal trespass, and third degree assault, all of which occurred within the year prior to the incident giving rise to the charges in this case. Albers' adult criminal history also included several traffic offenses, including a charge of engaging in a speed contest which occurred after the incident in this case. The probation officer who prepared the PSI opined that the risk was substantial that Albers would engage in additional criminal conduct during a period of probation and that Albers was in need of correctional treatment that could be provided most effectively by commitment to a correctional facility. The

probation officer strongly recommended that Albers be given a straight sentence and asserted that a lesser sentence would depreciate the seriousness of the offense. The PSI also included statements from White, his wife, and his daughter regarding the effect the incident had on the family, particularly the effect on the 7-year-old daughter.

With regard to Albers' argument that the county court imposed a lesser sentence in another case, we have stated that in an appeal that does not involve a death sentence, "the issue in reviewing a sentence is not whether someone else in a different case received a lesser sentence, but whether the defendant in the subject case received an appropriate one." *State v. Philipps*, 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993). The other case to which Albers referred does not control our evaluation of the appropriateness of the sentence in this case.

Finally, Albers makes no argument that the county court factored improper considerations into its sentencing decision. Based on the factors noted above, we determine that the county court did not abuse its discretion by imposing concurrent sentences of 365 days' imprisonment for the three convictions, and we conclude that the district court did not err in affirming such sentences.

CONCLUSION

We conclude that prosecutors are among the "others entitled to receive" information from the PSI under § 29-2261(6) and that therefore the county court did not err in overruling Albers' motion to preclude review of the PSI by the prosecuting authority. We further conclude that the county court did not abuse its discretion and that the sentences imposed are therefore not excessive. We therefore conclude that the district court did not err in affirming the foregoing rulings, and we affirm the decision of the district court.

AFFIRMED.

RANDY L. YODER AND CHERYL YODER, HUSBAND AND WIFE, APPELLANTS, V. JOEL T. COTTON, M.D., APPELLEE.

758 N.W.2d 630

Filed December 19, 2008. No. S-07-1337.

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 resolves questions of law independently of the trial court's conclusions.
4. **Negligence: Actions: States: Appeal and Error.** In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law.
5. **Jurisdiction: States.** In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.
6. **Negligence: Jurisdiction: States.** In virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct.
7. **Torts: Battery.** The tort of battery requires actual infliction of unconsented injury upon or unconsented contact with another.
8. **Torts: Words and Phrases.** Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
9. **Torts: Intent: Words and Phrases.** If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.
10. **Physician and Patient.** A physician conducting an independent medical examination is performing a professional service.
11. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.
12. **Malpractice: Physicians and Surgeons: Affidavits: Proof.** A self-supporting affidavit from a defendant physician suffices to make a prima facie case that the defendant did not commit malpractice.
13. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** In a medical malpractice case, expert testimony is almost always required to prove causation.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

David A. Domina and Linda S. Christensen, of Domina Law Group, P.C., L.L.O., for appellants.

David J. Cripe, Thomas J. Shomaker, and Michael G. Monday, of Sodoro, Daly & Sodoro, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Randy L. Yoder (Yoder) and Cheryl Yoder brought this claim against Joel T. Cotton, M.D., alleging battery and negligence as a result of an independent medical examination. Cotton filed a motion for summary judgment. The trial court granted the summary judgment motion and applied Nebraska law. The Yoders claim that there were genuine issues of material fact and that Iowa law should have applied. We affirm the decision of the district court granting summary judgment to Cotton.

II. BACKGROUND

Yoder is an insurance adjuster and resident of Lincoln, Nebraska. Yoder sustained an on-the-job injury while working in Iowa. As a result of that injury, Yoder filed a workers' compensation claim in Iowa. As part of that claim, Yoder was required to undergo an independent medical examination (IME) by a physician of the employer's choice. The physician chosen was Cotton, a neurologist practicing in Omaha, Nebraska.

The undisputed facts indicate that Yoder presented himself at Cotton's office for the IME on March 21, 2005. At that time, Yoder informed Cotton that he had surgery on his right shoulder less than a month before and that Cotton should exercise care during his examination of Yoder. Yoder also informed Cotton that he had surgeries on the same shoulder in 1999, 2001, and June 2003. Yoder claims that Cotton disregarded the warning and manipulated Yoder's right shoulder in such a way as to cause further, permanent injury. Cotton acknowledges that Yoder told him about the recent injury, but Cotton insists he did not manipulate the shoulder in any way that would cause the injury of which Yoder complains.

The Yoders filed a claim against Cotton for battery and negligence. The Yoders argued that because there was no physician-patient relationship, their claim cannot be defined as a malpractice action and therefore is not governed by the Nebraska Hospital-Medical Liability Act or any other statutory limitations on recoverable damages. The Yoders also argued that Iowa law should govern, because the circumstances requiring Yoder to undergo the IME arose under the Iowa workers' compensation law. Cotton contended that Nebraska law should apply and filed a motion for summary judgment.

The district court determined that Nebraska law applied and allowed discovery to proceed. After discovery was complete, Cotton once again filed a motion for summary judgment. The district court granted summary judgment on the negligence claim because the Yoders were unable to produce expert testimony on the issue of medical negligence or causation. The district court also granted summary judgment on the claim of battery, finding that Yoder had consented to the IME and therefore could not maintain a claim. The Yoders appealed. We moved this case to our docket pursuant to our authority to regulate the dockets of this court and of the Nebraska Court of Appeals.[1]

III. ASSIGNMENTS OF ERROR

The Yoders claim that the district court erred when it (1) applied Nebraska law rather than Iowa law, (2) granted summary judgment on their claim for battery, and (3) granted summary judgment on their claim for negligence.

IV. STANDARD OF REVIEW

[1] 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]

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[1] See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

[2] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[2,3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3] When reviewing questions of law, an appellate court resolves questions of law independently of the trial court's conclusions.[4]

V. ANALYSIS

1. Choice of Law in Personal Injury Action

[4,5] The Yoders first argue that Iowa law should have applied in this case and that the district court erred when it applied Nebraska law. In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law.[5] In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.[6] At oral argument, the Yoders essentially admitted that there is no difference between Iowa law and Nebraska law as it pertains to battery and negligence. We note that while Iowa law would allow the Yoders to collect punitive damages unavailable in Nebraska, no other substantial differences exist.[7]

Even if substantial differences did exist, however, Nebraska law would still apply. The Restatement (Second) of Conflict of Laws § 146[8] states that "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to

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[3] *Id.*

[4] See *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[5] *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

[6] See *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

[7] See, e.g., *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762 (Iowa 2006); *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960).

[8] Restatement (Second) of Conflict of Laws § 146 at 430 (1971). Accord *Malena, supra* note 5.

the particular issue, some other state has a more significant relationship . . . .”

[6] We have recently applied § 146. We noted that “‘in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct.’”[9] We went on to explain that every state has an interest in compensating its domiciliaries for their injuries.[10]

In this particular case, both the Yoders and Cotton are residents of Nebraska. The IME took place in Nebraska. The Yoders have given no reason to apply Iowa law other than arguing that Yoder was ordered to undergo the IME because of his Iowa workers’ compensation claim. We therefore apply Nebraska law to the Yoders’ claims.

2. Summary Judgment on Battery Claim

The Yoders next argue that the district court erred when it granted Cotton summary judgment on their claim of battery. The Yoders claim that Yoder’s consent was ineffective because he was required to undergo the IME in order to pursue his workers’ compensation claim. Alternatively, the Yoders argue that Cotton’s actions went beyond the scope of Yoder’s consent.

[7-9] The tort of battery requires actual infliction of unconsented injury upon or unconsented contact with another.[11] The Restatement (Second) of Torts § 892[12] states that “[c]onsent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.” And, “[i]f words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”[13]

Battery committed by a physician has been distinguished from claims of medical malpractice. Courts have generally

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[9] *Malena, supra* note 5, 264 Neb. at 769, 651 N.W.2d at 858.

[10] *Id.*

[11] *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

[12] Restatement (Second) of Torts § 892 at 362 (1979). Accord *Reavis, supra* note 11.

[13] *Id.*

noted that a claim for battery arises out of an action which "'depends on neither professional judgment nor the physician's surgical skill.'"[14] Battery actions in the medical context have been limited to situations where the physician did not gain consent for his or her actions or greatly exceeded the scope of that consent, e.g., operating on the wrong limb.[15] In all cases, consent to a procedure defeated a battery claim.

In Nebraska, battery cases against physicians have been largely limited to claims of sexual assault.[16] However, in *Jones v. Malloy*,[17] we found that a patient's consent to chiropractic services defeated her battery claim against the physician, even though the physician acted outside the explicit scope of her consent. In that case, the patient had asked the chiropractor not to work on her lower back and had even refused him permission to x-ray her lower back.[18] The patient alleged that the chiropractor disregarded her explicit instructions and that by adjusting her lower back, he committed a battery on her.[19]

We held that "[a]s a practical matter, health professionals cannot be required to obtain express consent before each touch or test they perform on a patient."[20] We further stated that "implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment."[21] Questions of whether a physician overstepped his or her bounds of the patient's initial consent by failing to inform the patient of the

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[14] *Andrew v. Begley*, 203 S.W.3d 165, 171 (Ky. App. 2006).

[15] See, e.g., *Unruh-Haxton v. Regents of Univ. of Cal.*, 162 Cal. App. 4th 343, 76 Cal. Rptr. 3d 146 (2008); *Saxena v. Goffney*, 159 Cal. App. 4th 316, 71 Cal. Rptr. 3d 469 (2008); *Andrew, supra* note 14; *Linog v. Yampolsky*, 376 S.C. 182, 656 S.E.2d 355 (2008); *Godbee v. Dimick*, 213 S.W.3d 865 (Tenn. App. 2006); *Haynes v. Beceiro*, 219 S.W.3d 24 (Tex. App. 2006).

[16] See, *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005); *Reavis, supra* note 11.

[17] *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 564, 412 N.W.2d at 841.

[21] *Id.*

risks of treatment is an issue of negligence properly addressed under a medical malpractice claim.[22]

Yoder gave implicit consent when he arrived at Cotton's office to undergo the IME. Yoder cooperated with Cotton's directions during the course of the examination and gave no indication that he was not giving his consent. In his deposition, Yoder testified that he tape recorded his visit, and a transcript of the tape was included in the record. Although much of the tape is indistinguishable, there is no indication that Yoder ever refused to give consent or that he asked Cotton to stop the examination. Yoder's argument that his consent was ineffective because he was required to attend the examination is unpersuasive.

We also find *Andrew v. Begley*[23] instructive. In that case, plaintiff was required to undergo a physical examination as part of her regularly scheduled review of disability benefits. Plaintiff claimed the physician punctured her skin during the sensory examination, tore her rotator cuff while testing range of motion in her arm, and caused further injury to her back and legs. Plaintiff then filed claims for negligence and battery. The battery claim was dismissed, because plaintiff could not show that she did not give consent or that she had withdrawn her consent.[24]

The court's analysis in *Andrew* addressed what constituted consent and stated that "where as in these circumstances, a physician is conducting an examination with express or implied consent, a plaintiff must prove that she withdrew her consent."[25] In a medical examination context, a court must first ask whether a party used language that unequivocally revoked his or her consent and was subject to no other reasonable interpretation. Second, a court must ask whether stopping the treatment or examination was medically feasible.[26]

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[22] *Id.*

[23] *Andrew, supra* note 14.

[24] *Id.*

[25] *Id.* at 172.

[26] *Id.*

The plaintiff in *Andrew* made no statement during the examination that could be interpreted as a request to stop, although she did protest that certain movements hurt. The court in that case stated that "[p]rotestations by a plaintiff of pain and discomfort . . . are not enough to meet the first prong of the test for effective withdrawal."[27] Without proof that she did not consent, or that she had unequivocally withdrawn her consent, the plaintiff could not pursue her battery claim.

As in *Andrew*, Yoder was required to undergo an IME and he complied with the requirement. Like the plaintiff in *Andrew*, Yoder stated that he felt some pain but he never asked Cotton to stop the examination. We find that Yoder implicitly consented to the IME. Whether Cotton acted beyond the scope of that consent is an issue of informed consent, a matter properly addressed in a medical malpractice claim, which we discuss below. Therefore, the district court did not err in granting summary judgment to Cotton on the battery claim.

3. Summary Judgment on Negligence Claim

[10] The Yoders finally argue that the district court erred in granting summary judgment on their negligence claim. Although Nebraska has not yet addressed the standard of care a physician owes someone undergoing an IME, we conclude that a physician conducting an IME is performing a professional service. Our law requires a plaintiff to present expert testimony of causation in a medical malpractice case in order to overcome summary judgment, and Yoder failed to do so.

The Yoders claim that their action sounds in ordinary negligence and that therefore, they were not required to present expert testimony as to causation. The Yoders also argue that they presented sufficient evidence to present genuine issues of material fact. We disagree for the following reasons.

(a) Standard of Care in IME

[11] The Yoders argue that this is not a medical malpractice case and that a general standard of care should apply. Because we hold that Cotton was rendering professional services, we

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[27] *Id.*

apply the requirements to establish a medical malpractice case to a physician performing an IME. To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.[28]

In Cotton's deposition, he stated that he felt he owed Yoder a professional duty in regard to the IME. When asked about that duty, Cotton replied, "I owe him the duty to be truthful, to do a comprehensive evaluation to the degree that I'm able to make a diagnosis, and had I felt that he had suffered any additional injury, I would have taken it upon myself to have that addressed immediately." The record contains a copy of an opinion by the American Medical Association's Counsel on Judicial and Ethical Affairs entitled "Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations." The opinion states that "a limited patient-physician relationship should be considered to exist during isolated assessments of an individual's health or disability for an employer, business, or insurer."[29]

The Yoders cite several cases from other jurisdictions addressing the duty owed by a physician performing an IME and for the proposition that expert testimony is not required to establish the standard of care.[30] However, only one of those cases supports the Yoders' position that an injury sustained during an IME sounds in ordinary negligence rather than medical malpractice.[31]

In fact, in *Dyer v. Trachtman*,[32] a case the Yoders cite as supporting their contention that expert testimony is not required to establish breach of the standard of care, the Michigan Supreme Court specifically found that a limited physician-patient

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[28] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[29] See, e.g., *Andrew, supra* note 14.

[30] *Smith v. Welch*, 265 Kan. 868, 967 P.2d 727 (1998); *Dyer v. Trachtman*, 470 Mich. 45, 679 N.W.2d 311 (2004); *Webb v. T.D.*, 287 Mont. 68, 951 P.2d 1008 (1997); *Ramirez v. Carreras*, 10 S.W.3d 757 (Tex. App. 2000).

[31] *Ramirez, supra* note 30.

[32] *Dyer, supra* note 30.

relationship exists for the purposes of an IME. The court pointed out that statutes governing medical malpractice were designed to protect physicians and that to allow physicians performing IME's to be held to ordinary negligence standards would result in those physicians being unwilling to perform IME's or serve as experts.[33] The Michigan Supreme Court found that a majority of courts recognized that an IME did not create an ordinary physician-patient relationship, but that there was a limited duty that reflects the standards set out by the American Medical Association.[34]

While the Yoders are correct in stating that Cotton had a duty not to harm, the relationship between a physician performing an IME and an examinee is that of a limited physician-patient relationship. We need not address whether the Yoders were required to present expert testimony regarding Cotton's alleged breach of the standard of care, because the Yoders failed to present expert testimony on proximate cause.

(b) Proof of Proximate Cause

[12] The record clearly demonstrates that the Yoders did not provide sufficient evidence of proximate cause to survive summary judgment. Our law is clear that a self-supporting affidavit from a defendant physician suffices to make a prima facie case that the defendant did not commit malpractice.[35] Cotton affirmatively alleged that he did not breach the standard of care of a physician, that nothing he did harmed Yoder, and that his actions were not the proximate cause of Yoder's injury.

[13] In a medical malpractice case, expert testimony is almost always required to prove causation.[36] Although an exception exists for matters where a layperson can infer negligence when causation is plain, such is not the case here. The Yoders allege that Cotton's actions tore the labrum in Yoder's right shoulder. Yoder had previously injured his shoulder and had undergone multiple surgeries when Cotton examined him, and it is not at

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[33] *Id.*

[34] *Id.*

[35] *Thone, supra* note 28.

[36] *Id.*

all clear that Cotton's actions caused Yoder's current problems. Furthermore, there is insufficient evidence in the record that Cotton's examination *could* have caused Yoder's injury, as was noted by the only expert the Yoders deposed.

Dr. Daniel P. Slawski, the expert deposed, stated that he would not provide expert testimony at trial. When asked his opinion on what caused the tear in Yoder's labrum, Slawski stated that "[i]t would be extremely difficult to determine exactly the cause. Especially when we see patients after surgery or two surgeries and episodes, we have to go strictly by the patient's history." Slawski stated that he could not determine from his examination whether Yoder's injury was caused by a one-time trauma or repetitive movements over a long period of time. Slawski went on to say that he could not determine whether the labrum was torn prior to the IME, because that part of the joint was never visualized before surgery, nor was it operated on during the surgery.

In essence, the only evidence that the Yoders offered regarding causation was Yoder's own statement that his shoulder did not hurt prior to the examination and that it did hurt following the examination. The Yoders' only other evidence regarding causation was Slawski's equivocal statement that he could not rule out the possibility that Cotton had caused the injury. Such was insufficient to rebut Cotton's affidavit stating that his actions were not the cause of Yoder's injury. For that reason, we find that the district court did not err when it granted summary judgment on the Yoders' negligence claim, because there was no genuine issue of material fact.

VI. CONCLUSION

In a personal tort case, we apply the law of the state where the injury took place, and so we find that the district court was correct in applying Nebraska law. We also find that the district court did not err in granting summary judgment in favor of Cotton on the battery and negligence claims. Yoder implicitly consented to the IME, and whether Cotton acted beyond the scope of that consent is an issue of informed consent, a matter properly addressed in a medical malpractice claim. In regard to medical malpractice, the Yoders failed to present expert

testimony on the issue of causation, which testimony was required to overcome summary judgment. We therefore affirm the decision of the district court.

AFFIRMED.

GERRARD and MILLER-LERMAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. STEVEN PARKER, APPELLANT.
767 N.W.2d 68

Filed January 2, 2009. No. S-06-1442.

SUPPLEMENTAL OPINION

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Robert B. Creager, of Anderson, Creager & Wittstruck, 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.

PER CURIAM.

This matter is before the court on the motion for rehearing filed by the State of Nebraska, appellee, regarding our opinion reported at *State v. Parker, ante* p. 661, 757 N.W.2d 7 (2008). We overrule the motion, but modify the opinion as follows:

1. That portion of the opinion designated "HEARSAY OBJECTION," *id.* at 675-77, 757 N.W.2d at 19-20, is withdrawn, and the following language is substituted in its place: "Because of this disposition, we do not reach Parker's remaining assignments of error."

2. The concurring opinion, *id.* at 677-78, 757 N.W.2d at 21, is withdrawn.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

IN RE ESTATE OF DEAN E. CHRISP, DECEASED. GAIL A. CHRISP, APPELLANT, V. LYNN E. CHRISP ET AL., APPELLEES.

759 N.W.2d 87

Filed January 2, 2009. No. S-07-1089.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
4. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.
5. **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.
6. ____: ____. An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.
7. **Decedents' Estates: Valuation.** Under Neb. Rev. Stat. § 30-2314 (Reissue 1995), the probate estate is augmented by first reducing the estate by specified obligations and liabilities and then increasing the estate by the value of specified properties and transfers.
8. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
9. **Decedents' Estates: Trusts.** Under Neb. Rev. Stat. § 30-2314 (Reissue 1995), a decedent's premarital transfers to a trust are excluded from the augmented estate.
10. **Decedents' Estates: Words and Phrases.** "The estate" under Neb. Rev. Stat. § 30-2314 (Reissue 1995) means "the probate estate."
11. **Decedents' Estates: Trusts.** Excluding premarital transfers to trusts from the augmented estate is not inconsistent with the protections afforded under Neb. Rev. Stat. § 30-3850 (Cum. Supp. 2006) of the Nebraska Uniform Trust Code.
12. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
13. **Decedents' Estates: Trusts.** Neb. Rev. Stat. § 30-3850 (Cum. Supp. 2006) of the Nebraska Uniform Trust Code does not apply in determining whether a settlor's trust assets should be included in the augmented estate for calculating the elective share of the settlor's surviving spouse.
14. **Decedents' Estates.** Under Neb. Rev. Stat. § 30-3850 (Cum. Supp. 2006), a surviving spouse's elective share is not a statutory allowance or a claim against the estate.
15. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.

16. **Decedents' Estates: Trusts.** The Nebraska Probate Code specifically authorizes the creation of nontestamentary, nonprobate transfers on death, including transfers through trusts.
17. ____: ____. A nontestamentary trust is not subject to the procedures for the administration of a decedent's estate.
18. ____: ____. A personal representative has no duty to take an inventory of or recover assets in the decedent's inter vivos trust when the trust created a valid nonprobate transfer of the trust assets.
19. ____: ____. Under Neb. Rev. Stat. § 30-3850 (Cum. Supp. 2006), a personal representative has no interest in the decedent's validly created nontestamentary trust except to assert the trust's liability for the statute's specified claims against the estate and statutory allowances that the decedent's estate is inadequate to satisfy.
20. **Attorney Fees.** Attorney fees and expenses may generally be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
21. **Decedents' Estates: Attorney Fees.** Under Neb. Rev. Stat. § 30-2481 (Reissue 1995) of the Nebraska Probate Code, attorney fees are awarded to the personal representative as part of the administration expenses.
22. ____: ____. There is no statute under the Nebraska Probate Code authorizing attorney fees for a surviving spouse.
23. **Decedents' Estates: Trusts.** A surviving spouse's efforts to have the decedent's nonprobate trust assets included in the augmented estate are personal to the surviving spouse.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.

Lowell J. Moore and James C. Bocott, of McCarthy, Pederson & Moore, for appellant.

Royce E. Norman and Stephen P. Herman, of Norman, Paloucek & Herman Law Offices, for appellees Lynn E. Chrisp and Kent A. Chrisp.

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

CONNOLLY, J.

I. SUMMARY

This is a dispute between Gail A. Chrisp, the surviving spouse of Dean E. Chrisp (Chrisp), and two of Chrisp's sons from his earlier marriage. The sons became the trustees of Chrisp's revocable trust after his death. Before his marriage to

Gail, Chrisp had transferred the bulk of his assets to the trust. In his will, Chrisp devised all his property to Gail. Gail, however, petitioned for an elective share of the augmented estate. She claimed that the premarital trust assets were included in the augmented estate.

This appeal presents the issue whether the assets from a premarital trust must be included in the augmented estate for calculating a surviving spouse's elective share. The district court concluded that the trust assets were not included. We agree. Under Neb. Rev. Stat. § 30-2314 (Reissue 1995), only the decedent's transfers to others during the marriage are included in the augmented estate for calculating a surviving spouse's elective share. We hold that Chrisp's premarital transfers to his revocable trust were not part of the augmented estate for calculating Gail's elective share. We affirm.

II. BACKGROUND

In November 2000, Chrisp created the Dean E. Chrisp Revocable Trust. The beneficiaries are his four children. He named his sons, Lynn E. Chrisp and Kent A. Chrisp, as successor cotrustees. In December 2002, Gail and Chrisp married without a prenuptial agreement. In April 2004, Chrisp amended his trust. First, he removed as trust beneficiaries two stepchildren from a previous marriage; second, he named Gail as a successor cotrustee also. Gail is not a trust beneficiary. Also in 2004, he created a new will devising all of his property to Gail. The will named Gail, Kent, and Lynn as copersonal representatives. Chrisp died in September 2004.

Kent and Lynn agreed to allow Gail to act as the sole personal representative in a supervised administration, but she was removed as a cotrustee. The record does not explain that action, but a provision in the trust permitted the beneficiaries to remove a cotrustee by vote. In February 2005, Gail filed a petition for formal probate in a supervised administration. In March 2005, the county court admitted Chrisp's will to probate, and Gail accepted appointment as the estate's personal representative. In May, she filed a petition for an elective share.

In July 2005, in the probate proceeding, Gail, acting as personal representative, notified the trustees that the probate

estate was inadequate to pay statutory allowances and that they would be liable for the obligation if they distributed assets from the trust.[1]

Later, in August 2005, the court ordered an assessment against the trust for the statutory allowances, but this issue is not part of this appeal. Also in August, the court discharged Gail as personal representative and appointed a third party, attorney Richard A. Birch.

In September 2005, Gail filed a demand against Birch to initiate a proceeding against the trust to determine its liability under § 30-3850(a)(3). This statute authorizes a personal representative to seek funds from the decedent's revocable trust for statutory allowances, expenses, costs, and claims against the estate if the estate is inadequate. Gail alleged that claims against the estate included a petition for an elective share. Birch timely commenced a proceeding against the trustees in September. But because he was not sure whether he should file a petition in the probate proceeding or the trust proceeding, he filed identical petitions in both. In each petition, he sought an order directing the trustees to pay for "claims, costs of administration, expenses, allowances, and elective share" to the extent that the estate's assets were inadequate.

In October 2005, at the hearing on the augmented estate, the parties disputed the estate's assets. They also submitted a stipulation acknowledging that Birch would file an amended inventory, valuing the estate's assets and the trust's assets. The stipulation showed that Birch valued Chrisp's estate at $842,185. But he included in that total $666,503 of trust assets.

In December 2005, in the probate proceeding, the court rejected Gail's argument that the augmented estate included the premarital trust assets. The court had reviewed the committee statements in the legislative history of Nebraska's augmented estate statute. It concluded that the Legislature had specifically drafted § 30-3850(a)(1) so that the assets of premarital trusts would not be included in the augmented estate. The court relied on committee statements that excluding premarital trusts

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[1] See Neb. Rev. Stat. § 30-3850(a)(5) (Cum. Supp. 2006).

would allow a father to leave his business to his sons before remarrying. This type of transfer would permit the sons to improve the business without worrying about the value of their efforts becoming part of the augmented estate.

In June 2006, the court conducted a final hearing on the remaining motions and issues. The court recognized that there was a separate trust proceeding, but it concluded it could merge the two cases for that hearing. In July, the court issued a consolidated order "[f]or judicial economy." It denied Gail's motion for continued support payments and took all other matters under advisement pending briefing.

1. County Court Issues Final Orders in Both Proceedings

In September 2006, the court issued separate but identical orders in the probate proceeding and the trust proceeding. In each order, the court specifically stated that it considered its order final. It adopted the trustees' calculation of the augmented estate; it granted Birch attorney fees, to be later assessed against the trust; and it awarded Gail $6,930 for attorney fees while she was the personal representative. Gail appealed from the probate order. The Court of Appeals dismissed the appeal for lack of a final order in a special proceeding.

In April 2007, in the trust proceeding, the trustees moved for a final order. The same month, the court entered a second final order in the trust proceeding, which was effectively the same as its September 2006 order. But in this order, the court specifically stated that all issues raised by Birch's petition had been resolved and that the trust proceeding was closed. Gail did not appeal from this order. In the probate proceeding, there remained some claims against the estate which the court resolved in May.

In August 2007, Birch filed a petition for a final settlement of the probate proceeding, a petition to determine inheritance taxes, and his final accounting. In October, the court assessed taxes, approved Birch's final accounting, awarded him attorney fees from the trust assets, and entered a decree of final discharge. Gail appealed from the final probate order.

On appeal, the trustees moved for summary dismissal, arguing that this court lacked jurisdiction because Gail had not appealed from the April 2007 final order in the trust proceeding. They argued that because the April 2007 order was final and Gail had failed to appeal from that order, res judicata precluded her appeal in the probate proceeding. In granting the trustees' motion to bypass, this court simultaneously denied their motion for summary dismissal, without prejudice, subject to reconsideration after hearing the appeal.

III. ASSIGNMENTS OF ERROR

Gail assigns, condensed and restated, that the county court erred in concluding that Chrisp's revocable trust was not part of the augmented estate. Gail also assigns that the court erred in awarding her only $6,930 for attorney fees.

IV. STANDARD OF REVIEW

[1-4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] Statutory interpretation is a question of law.[3] When reviewing questions of law in a probate matter, we reach a conclusion independent of the determination reached by the court below.[4] When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[5]

V. ANALYSIS

1. Appellate Jurisdiction

[5,6] The trustees contend that this court does not have jurisdiction because Gail failed to timely appeal from the final order in the trust proceeding. Before reaching the legal issues presented for review, it is the duty of an appellate

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[2] *Ahmann v. Correctional Ctr. Lincoln*, 276 Neb. 590, 755 N.W.2d 608 (2008).

[3] *Borrenpohl v. DaBeers Properties*, 276 Neb. 426, 755 N.W.2d 39 (2008).

[4] See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[5] See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

court to determine whether it has jurisdiction over the matter before it.[6] An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[7]

During these proceedings, the county court, under the Nebraska Probate Code, did not have jurisdiction over trusts.[8] This jurisdictional change was part of the Legislature's enactment of the Nebraska Uniform Trust Code in 2003.[9] Thus, the court did not have jurisdiction in the probate proceeding to consider the petition of the personal representative, Birch, against the trust under § 30-3850(a)(3) of the trust code. But because Birch was unsure whether he could raise a claim under this provision in the probate proceeding, he also commenced a trust proceeding in the county court under § 30-3850. The court therefore had jurisdiction in the trust proceeding to consider the issues that Birch properly raised under that statute. Under § 30-3850, Birch asked the court to determine the trust's liability for statutory allowances, costs, expenses, and claims against the estate, purportedly including Gail's "claim" for an elective share. In both the trust proceeding and the probate proceeding, the county court ruled that the trust assets were not part of the augmented estate for determining Gail's elective share. Thus, if § 30-3850 governed the augmented estate issue, Gail should have appealed from the final order in the trust proceeding. As we conclude below, however, § 30-3850 does not apply in determining an augmented estate. Section 30-2314 of the Nebraska Probate Code governs how the augmented estate is determined. So Gail's failure to appeal from the final order in the trust proceeding does not deprive this court of jurisdiction over her appeal from the probate order. Having disposed of the jurisdictional issue, we proceed to the merits.

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[6] *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

[7] See *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

[8] See, Neb. Rev. Stat. § 30-2211 (Cum. Supp. 2006); Neb. Rev. Stat. §§ 30-2801 to 30-2826 (Cum. Supp. 2006) (noting repeal or transfer of all sections under article 28); Neb. Rev. Stat. § 30-38,110 (Cum. Supp. 2006).

[9] See 2003 Neb. Laws, L.B. 130.

2. The Augmented Estate Does Not Include Premarital Trusts

[7] Under Neb. Rev. Stat. § 30-2313 (Reissue 1995), a surviving spouse has a right to a share of the "augmented estate" subject to conditions not at issue in this appeal. Section 30-2314 defines the augmented estate.[10] Under § 30-2314, the probate estate is augmented by first reducing the estate by specified obligations and liabilities and then increasing the estate by the value of specified properties and transfers.[11] Gail argues, however, that our reference to the "probate estate" in *In re Estate of Myers*[12] was dicta and inaccurate. She argues that the term "probate estate" does not appear in § 30-2314 and that the definition of "estate" in the Nebraska Probate Code includes more than a probate estate. Gail advances a creative but misguided argument.

(a) Section 30-2314(a) Excludes a Decedent's Premarital Transfers to a Revocable Trust

Section 30-2314(a), in relevant part, provides that

> [t]he augmented estate is the estate, first, reduced by the aggregate amount of funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims and, second, increased by the aggregate amount of the following items:
>
> (1) The value of property transferred by the decedent *at any time during marriage* to the surviving spouse to or for the benefit of any person other than a bona fide purchaser or the surviving spouse, but only to the extent to which the decedent did not receive adequate and full consideration in money or money's worth for such transfer, if such transfer is a transfer of any of the following types:
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> . . . .

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[10] See *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

[11] See, *id.*; *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), *abrogated on other grounds, In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996).

[12] See *In re Estate of Myers, supra* note 10.

> (ii) Any transfer to the extent to which the decedent retained at death a power alone or with any other person to revoke such transfer or to consume, invade, or dispose of the principal of the property for his or her own benefit.

[8] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[13] Section 30-2314(a)(1) lists all of a decedent's transfers of property the value of which may be used to increase the probate estate for calculating an elective share. We agree that the transfer described in § 30-2314(a)(1)(ii) would include a transfer to a revocable trust. But subsection (a)(1) clearly states that the decedent's transfers must have occurred during the decedent's marriage to the surviving spouse. Additionally, the statutory comments to the original § 30-2314 specifically stated that transfers under subsection (a)(1) "are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category."[14]

[9] Although in 1980 and 1985, the Legislature amended § 30-2314, it kept the requirement that the decedent's transfer of property must have occurred during the marriage to the surviving spouse.[15] Our conclusion that a decedent's premarital transfers to a trust are excluded from the augmented estate is not altered because § 30-2314 fails specifically to refer to the "probate estate."

(b) "Estate" in § 30-2314 Means "Probate Estate"

[10] Nebraska adopted the original 1969 Uniform Probate Code (UPC) in 1974,[16] and Nebraska's § 30-2314 tracks the

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[13] See *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[14] See § 30-2314 (Reissue 1975) (statutory comment). Accord Unif. Probate Code, prior art. II, § 2-202, comment, 8 (part I) U.L.A. at 299 (1998).

[15] See, 1985 Neb. Laws, L.B. 293; 1980 Neb. Laws, L.B. 694.

[16] See, 1974 Laws, L.B. 354; Unif. Probate Code, *supra* note 14, table of jurisdictions adopting UPC, 8 (part I) U.L.A. at 1.

language of the original UPC § 2-202.[17] Like Nebraska's § 30-2314, the original UPC provision does not include in the augmented estate a decedent's premarital transfer of property to a revocable trust. Also like Nebraska's § 30-2314, the UPC provision states that "[t]he augmented estate means *the estate* reduced by" the same specified obligations and liabilities and increased by the same specified nonprobate assets.[18] But contrary to Gail's contention, the definition of "estate" under the Nebraska Probate Code includes only the decedent's property that is subject to administration under the code—i.e., the "probate estate."[19] Thus, "the estate" under § 30-2314 means the "probate estate." The comments to Nebraska's original § 30-2314 and the UPC's original § 2-202 clarify that under § 30-2314, "the probate estate" is augmented to compute the surviving spouse's elective share.[20] We specifically cited this statutory comment in *In re Estate of Myers*,[21] although from a different compilation of Nebraska's statutes.

(c) Trust Code Protections Do Not Apply in Determining the Augmented Estate

[11] We do not agree that excluding premarital transfers to trusts from the augmented estate is inconsistent with the protections afforded under § 30-3850 of the trust code. Gail argues that the purpose of § 30-3850 is to protect the statutory rights of the surviving spouse. She further argues that the right to an elective share falls within the statute's "statutory allowances" and "claims." We disagree.

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[17] See, § 30-2314 (Reissue 1975) (source of law); Unif. Probate Code, *supra* note 14, § 2-202, 8 (part I) U.L.A. at 297.

[18] See Unif. Probate Code, *supra* note 14, 8 (part I) U.L.A. at 297.

[19] See Neb. Rev. Stat. § 30-2209(12) (Cum. Supp. 2006).

[20] See, § 30-2314 (Reissue 1975) (statutory comment); Unif. Probate Code, *supra* note 14, comment, 8 (part I) U.L.A. at 299. See, also, Restatement (Third) of Property: Wills and Other Donative Transfers § 9.1, comment *e.* and Reporter's Note comment 3 (2003).

[21] *In re Estate of Myers, supra* note 10.

[12] Again, absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[22] We will not read into a statute a meaning that is not there.[23] And reading § 30-3850(a)(3), we see no mention of a surviving spouse's elective share. That subsection, in relevant part, provides that

> the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

Nor is an elective share a statutory allowance. The statutes granting statutory allowances explicitly state that these rights are in addition to any shares passing to a surviving spouse or dependent child through a will, intestate succession, or elective share.[24]

Gail, however, relies on the definition of "claim" under the probate code to argue that an elective share is a claim against the estate. Section 30-2209(4) of the probate code provides:

> Claim, in respect to estate of decedents . . . , includes liabilities of the decedent . . . whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent . . . , including funeral expenses and expenses of administration. *The term does not include . . . demands or disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate*.

[13,14] Gail's argument lacks merit. Her interpretation of a claim to include a petition for an elective share would render the augmented estate statute nonsensical.[25] As stated above,

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[22] *McClellan v. Board of Equal. of Douglas Cty.*, *supra* note 13.

[23] See *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[24] See Neb. Rev. Stat. §§ 30-2322 to 30-2324 (Reissue 1995 & Cum. Supp. 2006).

[25] See *In re Estate of Cooper, supra* note 4.

the augmented estate must be reduced by *enforceable claims*.[26] Thus, if a "claim" included a petition for an elective share, the augmented estate would have to be reduced by whatever amount the surviving spouse properly claimed for an elective share. When viewed in context with other relevant statutes, it is clear that the trust code's § 30-3850(a)(3) does not apply in determining whether a settlor's trust assets should be included in the augmented estate for calculating the elective share of the settlor's surviving spouse. A surviving spouse's elective share is neither a statutory allowance nor a claim against the estate. Thus, the elective share statutes and trust code protections under § 30-3850 are not inconsistent.

(d) Legislature Has Chosen Public Policy

[15] Finally, Gail contends that excluding premarital trusts from the augmented estate would have a devastating effect on the elective share statutes. She argues that by transferring their property to a revocable trust before marrying, individuals can simply avoid the statutes meant to protect surviving spouses without the disclosure and consent that would be required for a prenuptial agreement. As we know, however, it is the Legislature's function through the enactment of statutes to declare what is the law and public policy of this state.[27] And the Legislature has declared its public policy choice by rejecting the revised article II of the UPC.

In 1990, article II of the UPC was significantly revised, including the elective share provisions.[28] Under the revised UPC article II, the augmented estate includes the value of the decedent's nonprobate transfer to others through a revocable trust, whether the trust was created before or during the marriage.[29] The Legislature, by adopting the original UPC and

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[26] See § 30-2314(a) (Reissue 1995).

[27] *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[28] See Unif. Probate Code, *supra* note 14, rev. art. II, prefatory note, 8 (part I) U.L.A. at 75.

[29] See Unif. Probate Code, *supra* note 14, rev. art. II, § 2-205 and comment, 8 (part I) U.L.A. 105, 107-08.

declining to adopt the revised article II of the UPC,[30] has made a clear policy choice in § 30-2314. It explicitly stated that policy choice in the statutory comments to Nebraska's original § 30-2314, which comments are largely identical to the UPC comments in the original § 2-202. Those comments provide that the exclusion of premarital trusts from the augmented estate was intended to permit a person "to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage."[31]

3. Attorney Fees

Gail argues that the county court erred in failing to award her more than $6,930 for the attorney fees she incurred as personal representative.

In February 2006, Gail requested attorney fees, under Neb. Rev. Stat. § 30-2481 (Reissue 1995) of the probate code and Neb. Rev. Stat. § 30-3893 (Cum. Supp. 2004) of the trust code, for "prosecuting various estate proceedings." She sought $59,438.58 in attorney fees for the period between October 2004 and January 2006. The billing statement attached to her request included fees for work performed both before and after she was the appointed personal representative. The county court appointed Gail personal representative on March 14, 2005, and removed her on August 23. During this time, her attorneys billed her $19,636 for 142.1 hours of work. In June 2006, under the same statutes, she sought an additional $9,923.41 in attorney fees for the period from February through May 2006.

At the final hearing, Birch agreed that by the time he was appointed in August 2005, Gail and her attorneys had opened the estate, sent out notices, filed an inventory, and obtained funding from the trust for statutory allowances. Birch stated

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[30] See Unif. Probate Code, *supra* note 14, table of jurisdictions adopting UPC, 8 (part I) U.L.A. at 1, and adoption of rev. art. II, 8 (part I) U.L.A. at 76.

[31] § 30-2314 (Reissue 1975) (statutory comment). See Unif. Probate Code, *supra* note 14, § 2-202, comment, 8 (part I) U.L.A. at 299.

that he did not bill hourly for estate work, but he estimated that this work would normally require about 20 hours. Birch stated that he charged $120 an hour and opined that the hourly rate for attorneys locally ranged from $100 to $150, depending on the attorney's experience. Another attorney for Gail testified that he believed the fees her attorneys charged were reasonable. The court stated that its concern was not the hourly rate of Gail's attorneys but the cutoff period for awarding expenses under the probate code.

In its dual September 2006 orders, the court adopted the trustees' recommendation to award Gail $6,930 in attorney fees while she was the personal representative. This award represented attorney fees for over 46 hours at $150 per hour. The court noted that Gail's award for attorney fees would have been no more than $3,000 if it had calculated it based on Birch's testimony. The court did not specifically state that it was awarding Gail attorney fees under the probate code's § 30-2481. But because the court limited Gail's attorney fees to the time when Gail was personal representative, it clearly awarded them under that section.

Gail contends that it was her duty as personal representative to seek funds from the trust for statutory allowances, costs, expenses, and claims, and to administer these sums once she obtained them. Relying on § 30-2209(12), Gail argues that because the definition of "estate" in the probate code includes a trust, administration of an estate necessarily includes any trust property in which the decedent had an interest. Relying on Neb. Rev. Stat. §§ 30-2464 (Cum. Supp. 2006) and 30-2470 (Reissue 1995), she argues that her duties as Chrisp's personal representative included taking possession of Chrisp's property for settlement and distribution, including commencing an action to recover Chrisp's property in the trust. Thus, she argues that the attorney fees she incurred to have the trust assets included in the augmented estate were not personal to her as the surviving spouse, but were part of her expenses in performing her duties as personal representative.

We agree that under § 30-2470, a personal representative has a duty to take possession of the decedent's property if necessary for administration of the estate. And under § 30-2464(a),

a personal representative has a duty to settle and distribute an estate "as expeditiously and efficiently as is consistent with the best interests of the estate." But we do not agree that because an "estate" under § 30-2209(12) can include a trust, a personal representative has a duty to take inventory of or recover assets from the decedent's nontestamentary trust.

We recognize that when the Legislature removed probate jurisdiction over trusts, it failed to amend the definition of "estate" to include trusts only in limited circumstances. But this provision must be read consistently with other provisions of the probate code and trust code. Under the trust code, a county court may authorize a settlor's guardian or conservator to exercise the settlor's powers over a trust with the approval of the court supervising the conservatorship or guardianship.[32] If, under the trust code, the county court so authorizes a conservator or guardian, then, under the probate code, the court supervises the guardian or conservator's exercise of power.[33]

Otherwise, a court in a probate proceeding could have jurisdiction over nontestamentary trust assets only in the unusual circumstance that they become probate assets. For example, this could occur when a settlor directs a trustee to pay over the undistributed principal and income of an inter vivos trust to the settlor's personal representative.[34] Also, when a testamentary trust is created by a valid will,[35] the court has jurisdiction over the probate assets until they are distributed to the trustee.[36]

[16,17] But we cannot interpret the inclusion of trusts in the definition of an estate to authorize probate administration of nontestamentary trust assets without frustrating the purpose

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[32] See Neb. Rev. Stat. § 30-3854(f) (Cum. Supp. 2006).

[33] See Neb. Rev. Stat. § 30-2628(4)(iii) (Cum. Supp. 2006).

[34] See *Rearden v. Riggs Nat. Bank*, 677 A.2d 1032 (D.C. App. 1996).

[35] See Restatement (Third) of Trusts § 17 (2003).

[36] See *id.*, comment *a.* and § 19. See, also, George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees § 583 at 357 (rev. 2d ed. 1980) ("Taking Over From Executor").

for creating the trusts. The Nebraska Probate Code specifically authorizes the creation of nontestamentary, nonprobate transfers on death, including transfers through trusts.[37] A nontestamentary trust is not subject to the procedures for the administration of a decedent's estate.[38] Avoiding the costs and delays of probate administration is a primary motivation for creating revocable trusts.[39]

[18,19] Because Chrisp's inter vivos trust could not be revoked after his death, those assets were not a part of his estate. So, Gail incorrectly argues that she had a duty as personal representative to take an inventory of the trust assets or recover those assets for probate administration. The persons responsible and potentially liable for the trust's administration were the trustees, Lynn and Kent—not the estate's personal representative. Under § 30-3850 of the trust code, a personal representative has no interest in the decedent's validly created nontestamentary trust except to assert the trust's liability for the statute's specified claims against the estate and statutory allowances that the decedent's estate is inadequate to satisfy. As discussed above, those potential liabilities do not include a surviving spouse's elective share. And commencing a proceeding against the trust under § 30-3850 did not shift the responsibility from the trustees to the personal representative to administer the trust's assets.

[20-22] Attorney fees and expenses may generally be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[40] Under § 30-2481 of the Nebraska Probate Code, attorney fees are awarded to the personal representative as part of the administration expenses.[41]

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[37] See, *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005); Neb. Rev. Stat. § 30-2715 (Reissue 1995).

[38] See Restatement, *supra* note 35, § 25(2).

[39] See *id.*, § 17, comment *a.*

[40] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[41] See *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988).

There is no statute authorizing attorney fees for a surviving spouse.

[23] Despite Gail's arguments, a surviving spouse's efforts to have the decedent's nonprobate trust assets included in the augmented estate are personal to the surviving spouse. Even if she had succeeded in having the court include Chrisp's nonprobate transfer in the augmented estate, that decision would not have benefited the estate because the trust was not a probate asset. We conclude that a surviving spouse is not entitled to attorney fees for legal actions that she took while she was not the personal representative[42] and that were directed at obtaining assets that did not benefit the estate or come under its administration.[43]

Gail does not argue that the county court's award of attorney fees for her administrative duties while personal representative was unreasonable, and we find no abuse of discretion in the court's award.

VI. CONCLUSION

We conclude that Gail's failure to appeal from the final order in the trust proceeding commenced under § 30-3850 did not deprive this court of jurisdiction over her appeal from the final probate order. Section 30-3850 of the trust code does not apply in determining whether a decedent's inter vivos transfers may be included in the augmented estate for calculating a surviving spouse's elective share. Section 30-2314 of the probate code governs this issue. Under § 30-2314, we conclude that the augmented estate does not include the decedent's premarital transfers to a revocable trust. Finally, we conclude that a surviving spouse is not entitled to attorney fees for legal actions that were taken while not acting as the personal representative and that were directed at obtaining assets that did not benefit the estate or come under its administration.

AFFIRMED.

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[42] See *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986).

[43] See, e.g., *Dowling v. Rowan*, 270 Va. 510, 621 S.E.2d 397 (2005); *Tillman v. Smith*, 526 So. 2d 730 (Fla. App. 1988).

OMAHA POLICE UNION LOCAL 101, IUPA, AFL-CIO, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, AND THE CHIEF OF POLICE, THOMAS WARREN, APPELLANTS.

759 N.W.2d 82

Filed January 2, 2009. No. S-07-1245.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Public Officers and Employees: Words and Phrases.** Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline.
3. **Labor and Labor Relations: Public Officers and Employees: Civil Rights.** Public employees who belong to a labor organization have the protected right to engage in conduct and publish statements concerning terms and conditions of employment, but not if the speech or conduct constitutes flagrant misconduct.

Appeal from the Commission of Industrial Relations. Affirmed.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellants.

Thomas F. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

This matter arose from the filing of a petition with the Commission of Industrial Relations (CIR) by the Omaha Police Union Local 101, IUPA, AFL-CIO (Union), against the City of Omaha and its chief of police, Thomas Warren (collectively the City). The CIR issued an order granting partial relief as requested by the Union, and the City appealed. This court found that the CIR erred in applying the "deliberate and

reckless untruth" standard, which applies to private sector labor relations cases, and that the "flagrant misconduct" standard applies to protected speech issues in public sector employment cases. See *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007). We affirmed in part, and in part reversed the judgment and remanded the cause with directions for the CIR to apply the flagrant misconduct standard. *Id.*

Applying the flagrant misconduct standard, the CIR determined that remarks made by an Omaha police officer in a Union newspaper were protected speech. The CIR again ordered the City to place a statement in the Union newsletter indicating that it will recognize the Union members' rights to protected speech and other activity. The City has appealed.

SCOPE OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Id.*

FACTS

During a meeting of the Union on December 14, 2004, the president of the Union, Omaha Police Department (OPD) Sgt. Timothy Andersen, was asked about the method OPD used to calculate its response times for 911 emergency dispatch calls. Andersen gave his opinion that the method used by OPD to calculate response times was misleading. Reports of Andersen's statements were relayed to Warren several days after the meeting. Warren initiated an Internal Affairs (IA) investigation to determine whether Andersen had advised officers to disregard departmental standard operating procedures. IA found that Andersen had neither violated departmental procedures nor acted unprofessionally. Warren adopted those findings and took no disciplinary action against Andersen.

In response to the events involving Andersen, OPD Sgt. Kevin Housh wrote an article in the February 2005 issue of the Union newspaper, "The Shield," which was distributed to members of the Union as well as to members of the community. Housh's article was generally critical of OPD procedures for two-officer 911 calls and the manner in which the City of Omaha and OPD calculated response time. Housh characterized city officials as "[a] bunch of grown men and women, supposedly leaders, acting like petty criminals trying to conceal some kind of crime."

Based on the article, Warren initiated an IA investigation of Housh. Warren alleged that Housh's conduct constituted gross disrespect and insubordination and was unbecoming an officer, in violation of OPD rules of conduct. Warren adopted IA's finding that the unprofessional conduct allegation against Housh should be sustained and terminated Housh's employment.

After the Union appealed Housh's termination to the City of Omaha Personnel Board, the City of Omaha and the Union reached an agreement and Housh was reinstated to OPD but was required to serve a 20-day suspension without pay and to discontinue working on the emergency response unit.

The Union filed a petition with the CIR, claiming that the City had engaged in prohibited labor practices under the Industrial Relations Act, Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2004) (Act). It alleged that the City's investigations of Andersen and Housh and the termination of Housh's employment had "'chilled'" other Union members' expression of opinions at Union meetings and in the Union publication. It claimed that the City had engaged in prohibited labor practices under § 48-824(2)(a) by interfering with, restraining, and coercing Union members in their exercise of rights granted under § 48-837. It asked that the City be restrained from interfering with Union members' rights to express their opinions at Union meetings or in Union publications relating to terms and conditions of their employment, the City of Omaha's administration, and OPD's management.

The CIR found that Housh's article was a protected Union activity if it was "concerted activity" falling under the protection

of § 48-824(2)(a). It relied on federal labor cases to find that employee speech is a protected concerted activity if it is related to working conditions. It determined that Housh's article pertained to officer safety, which was a working condition and a mandatory subject of bargaining, and that an employee loses protection for speech only if the speech is deliberately or recklessly untrue.

The CIR concluded that "Housh's statements, while certainly constituting intemperate, abusive and insulting rhetorical hyperbole, fall short of deliberate or reckless untruth. The comments were made in a union publication in the context of a management/union disagreement, and they were therefore protected from interference, restraint or coercion by management."

The City was ordered "to not interfere in any way" with statements made by employees in the Union publication which did not violate the standard of deliberate or reckless untruth. The City was required to place a statement in the Union newsletter indicating that it would recognize the Union members' rights to protected activity.

[2] On appeal to this court, we determined that the "deliberate and reckless untruth" standard of the National Labor Relations Act was inappropriate in the context of public sector employment. We concluded that the legal standard of flagrant misconduct should apply to the determination of whether public employees' speech is protected under the Act. "Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline." *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 86, 736 N.W.2d 375, 387-88 (2007).

We affirmed in part, and in part reversed the judgment and remanded the cause to the CIR so that it could apply the flagrant misconduct standard we prescribed for determining when Union speech is protected under the Act. On remand, the CIR again determined that Housh's conduct was protected, and it ordered the City not to interfere in any statements made in the Union publication which do not violate such standard. The City

was again ordered to place a statement in the Union newspaper indicating that it recognizes the rights of the Union members to protected activity.

ASSIGNMENT OF ERROR

The City assigns as error that the CIR erred in its evaluation of whether the speech of an employee of a law enforcement agency in a Union newspaper was flagrant misconduct and, thus, exceeded the protections of § 48-824(2)(a).

ANALYSIS

In its order following remand, the CIR noted that the newsletter in which Housh's article was published was primarily a Union newsletter, although it is not distributed exclusively to Union members. Housh's article was "designed, rather than impulsive," and the CIR could not say it was provoked by the employer's words or actions. Housh's conduct was, as previously determined, "intemperate, abusive and insulting." However, the CIR found that the remarks did not reach the level of flagrant misconduct. "They were in fact rhetorical hyperbole, which would not be reasonably believed by any reader as accusing of any crime or wrongdoing. They were intemperate, immature hyperbole, but they were nonetheless protected union speech in the context of the newsletter." The CIR found no evidence of any loss of discipline, respect, or ability to accomplish the police department's mission that could be attributed to the publication of the article, and the CIR doubted that the remarks would reflect poorly on anyone other than Housh and the newsletter's editor. The CIR concluded that Housh's remarks were protected speech.

[3] The issue is whether the CIR properly applied the standard of "flagrant misconduct." Public employees who belong to a labor organization have the protected right to engage in conduct and publish statements concerning terms and conditions of employment, but not if the speech or conduct constitutes flagrant misconduct. See *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007).

In our review of an order of the CIR, the decision may be modified, reversed, or set aside on one or more of the following grounds and no other: (1) if the CIR acts without or in

excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. See *id*.

Had this court conducted its own review of Housh's conduct, the result might have been different. Housh's article appeared in a newsletter circulated outside the Union. Housh stated that city officials were "acting like petty criminals trying to conceal some kind of crime."

We have defined flagrant misconduct as "statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline." *Omaha Police Union Local 101*, 274 Neb. at 86, 736 N.W.2d at 388. Although reasonable minds could differ as to whether Housh's statements were outrageous and insubordinate, given our standard of review, we conclude that the CIR's order is supported by the facts, and it is affirmed.

CONCLUSION

The decision of the CIR is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

JAMES D. VOKAL, APPELLEE, V. NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLANT.

759 N.W.2d 75

Filed January 2, 2009. No. S-07-1314.

1. **Public Officers and Employees: Property: Public Purpose.** The Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2004), bars a government official from the use of property under his or her official care and control for the purpose of campaigning.
2. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as

ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being a court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

4. ____: ____: ____. Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.
5. **Criminal Law: Statutes.** Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
6. ____: ____. A penal statute will not be applied to situations or parties not fairly or clearly within its provisions.
7. **Statutes: Public Officers and Employees: Intent.** The Nebraska Political Accountability and Disclosure Act was designed to establish requirements for the financing, disclosure, and reporting of political campaigns and lobbying activities and provide conflict of interest provisions for ensuring the independence and impartiality of public officials.
8. **Rules of the Supreme Court: Appeal and Error.** A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.
9. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

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

Jon Bruning, Attorney General, and Lynn A. Melson for appellant.

L. Steven Grasz and Henry L. Wiedrich, of Husch, Blackwell & Sanders, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

[1] The Nebraska Political Accountability and Disclosure Act (NPADA)[1] bars a government official from the use of property under his or her official care and control for the purpose of campaigning.[2] The issue in this case is whether a city official

[1] Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2004).

[2] See § 49-14,101.02.

violates that prohibition by being filmed in his city office for the purpose of creating a video advertisement for his reelection campaign.

FACTS

James D. Vokal was a member of the Omaha City Council running for reelection in 2005. As part of his campaign, Vokal approved the creation and distribution of a 30-second video advertisement wherein he was shown at various locations. Approximately 7 seconds of that video were recorded in Vokal's office in the city-county building in Omaha. That portion of the video shows Vokal sitting at his desk typing at a computer keyboard.

A complaint was filed with the Nebraska Accountability and Disclosure Commission (the Commission) by the director of the opposing political party, alleging that by videotaping part of his campaign advertisement in his government office, Vokal had violated the provision of the NPADA that prohibits a public official's "use of personnel, property, resources, or funds under his or her official care and control for the purpose of campaigning for or against the nomination or election of a candidate."[3] Vokal's office, desk, and the keyboard are public property. There was no allegation that Vokal expended public funds or used public employees or video equipment in making the video.

At a hearing before the Commission, Vokal alleged that he did not violate the plain meaning of § 49-14,101.02(1), because his actions were not "use" under that section. Vokal also alleged that because there was no lock on the door and the office was open to the public, the office was not under his "official care and control" and that his actions fell under an exception allowing that government facilities be made available for campaign purposes if the identity of the candidate is not a factor in granting such access. Finally, Vokal asserted that to the extent he could be found to have violated the

[3] See § 49-14,101.02(1) (now found at § 49-14,101.02(2) (Cum. Supp. 2006)).

NPADA, the statute was unconstitutionally vague and subject to arbitrary enforcement.

Vokal presented evidence to the Commission that at the time he filmed his advertisement, the Legislature's rules allowed its members to have photo or video sessions in the legislative chambers for political races in which the individual legislator was a candidate for public office. While Vokal's case was pending before the Commission, the Legislature amended its rules to prohibit the use of the legislative chambers for any campaign-related activities.

The Commission concluded that Vokal had violated § 49-14,101.02(1) and fined him $100. The Commission reasoned simply that Vokal did "use," for campaign purposes, an office, desk, and computer located on public property and which fell under his official care and control.

Vokal appealed to the district court, which reversed the Commission's decision. The district court found that the term "use" was an ordinary term properly understood by its common usage and understanding. However, that term had to be understood in the context of the NPADA. Viewed in this light, the district court concluded that § 49-14,101.02(1) contained the implicit requirement that, in order to be a violation, the conduct must result in a cost to the taxpayers or a financial gain to the public official. Since neither occurred in this case, the district court found no violation. The court refused to find the statute unconstitutional.

The Commission filed an appeal, and Vokal filed a purported cross-appeal.

ASSIGNMENTS OF ERROR

In summary, the Commission asserts that the district court erred in determining that Vokal's use of city property did not violate § 49-14,101.02. Vokal, on cross-appeal, asserts that the district court erred in failing to declare § 49-14,101.02 unconstitutionally vague.

STANDARD OF REVIEW

[2] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation

to reach an independent conclusion irrespective of the decision made by the court below.[4]

ANALYSIS

On appeal, the parties do not dispute that Vokal's office and its contents were "property" under his "official care and control," as defined by the NPADA, or that Vokal was "campaigning for or against the nomination or election of a candidate" when he filmed 7 seconds of his campaign advertisement in his office. The question is whether sitting at his desk touching the keyboard inside that office was "use" of these resources under § 49-14,101.02 and, thus, a violation of the NPADA.

[3,4] In answering that question, we are guided by several familiar principles of statutory construction. In discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself.[5] Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.[6]

[5,6] Moreover, because § 49-14,101.02 is penal in nature,[7] it must be strictly construed.[8] Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought

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[4] *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999).

[5] *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

[6] *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

[7] See § 49-14,126(1)(c). See, also, *Shamberg v. City of Lincoln*, 174 Neb. 146, 116 N.W.2d 18 (1962).

[8] See *Johnson Fruit Co. v. Story*, 171 Neb. 310, 106 N.W.2d 182 (1960).

to be served.[9] A penal statute will not be applied to situations or parties not fairly or clearly within its provisions.[10] So, with those principles in mind, we turn to the specific provisions of the NPADA.

[7] The NPADA was promulgated in 1976 to set up disclosure and accountability procedures concerning campaign finance.[11] Specifically, it was designed to establish requirements for the financing, disclosure, and reporting of political campaigns and lobbying activities and provide conflict of interest provisions for ensuring the independence and impartiality of public officials.[12] Section 49-1402 states in full:

> The Legislature finds:
>
> (1) That the public interest in the manner in which election campaigns are conducted has increased greatly in recent years, creating a need for additional disclosure and accountability;
>
> (2) That there is a compelling state interest in ensuring that the state and local elections are free of corruption and the appearance of corruption and that this can only be achieved if (a) the sources of funding of campaigns are fully disclosed and (b) the use of money in campaigns is fully disclosed;
>
> (3) That it is essential to the proper operation of democratic government that public officials and employees be independent and impartial, that governmental decisions and policy be made in the proper channels of governmental structure, and that public office or employment not be used for private gain other than the compensation provided by law; and
>
> (4) That the attainment of one or more of these ends is impaired when there exists, or appears to exist, a

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[9] See *State v. Hochstein and Anderson, supra* note 6.

[10] See, *Shamberg v. City of Lincoln, supra* note 7; *Johnson Fruit Co. v. Story, supra* note 8.

[11] Statement of Purpose, L.B. 987, Committee on Miscellaneous Subjects, 84th Leg., 2d Sess. (Feb. 26, 1976); *Neb. Account. & Disc. v. Citizens for Resp. Judges, supra* note 4.

[12] *Id.*

> substantial conflict between the private interests of a public official and his or her duties as such official; and that although the vast majority of public officials and employees are dedicated and serve with high integrity, the public interest requires that the law provide greater accountability, disclosure, and guidance with respect to the conduct of public officials and employees.

Section 49-14,101.02, enacted in 2001, falls under the conflicts of interest section of the act.

The broad term "use," found in § 49-14,101.02, is not specifically defined in the NPADA. The Concise Oxford American Dictionary defines "use" as to "take, hold, or deploy (something)" and to "take or consume."[13] The Commission acknowledged at oral argument that the office, desk, and computer in this case were only "props" for the video. There is no allegation that Vokal created or distributed campaign material using his office or the computer in that office. There is likewise no evidence that he used the office telephone to solicit votes or contributions. We question, even under the strict dictionary definition of "use," whether the mere fact that items under official control that are present in the background as "props" in an advertisement can be considered as a deployment or consumption of these items.

But, regardless, we do not view the term "use" in a vacuum. Instead, we must understand it in the context of the statute where it is found. And we consider the express goal of the NPADA's conflict of interest provisions, which is the independence and impartiality of public officials. We find the case of *Saefke v. Vande Walle*[14] illustrative of the meaning of "use" in this context.

In *Saefke*, the Supreme Court of North Dakota held that a judge running for reelection did not violate a corrupt practices act forbidding the "use" of state property for political purposes when he was filmed for a campaign advertisement wearing his judicial robe while seated at the bench in the courtroom.

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[13] Concise Oxford American Dictionary 1001 (2006).

[14] *Saefke v. Vande Walle*, 279 N.W.2d 415 (N.D. 1979).

Although the act specified that "state property" included "buildings," the court found the broad construction asserted by the contestant elector was simply unreasonable.

The court noted that because the statute was penal in nature, it must be strictly construed and given a reasonable construction. The court then explained that the primary intent of the legislature in passing the corrupt practices act was to prevent the misuse of public funds or a financial misuse of public property for political purposes. The court found no evidence of such misuse. Instead, by being filmed wearing his robe while seated at the bench in the courtroom, the court found that the judge was simply trying to express to voters that he already occupied the office to which he sought reelection. The court observed that it was common practice for state officials to be shown sitting at their desks in campaign literature. And it reasoned that given such common practice, "surely if the legislature intended such 'use' of state property to be a violation . . . , it would have so provided in specific and clear terms."[15]

We find the North Dakota court's reasoning to be persuasive. We simply find nothing in the statute indicating that we should stretch the meaning of "use" to its broadest possible application—to a case where nothing was "consumed" and the actions do not create any impression of a conflict of interest. A commonsense approach to the term, in the context in which it is presented, does not warrant such a broad understanding. In fact, the Commission has been unable to persuasively explain how Vokal's actions represented any of the problems the NPADA sought to address. The Commission admits that a much clearer violation would be present had Vokal, for instance, actually used a photocopier or other equipment to produce campaign flyers. While the Commission suggests that Vokal was utilizing an "unfair advantage" of his incumbency, as in *Saefke*, we find that Vokal was merely conveying something that most of the public already knew and that Vokal had a right to convey to those who did not. As the Commission

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[15] *Id.* at 417.

concedes, Vokal would not have been sanctioned had he simply rebroadcast news footage showing him working in his office. We see no meaningful distinction between such a scenario and what happened in this case.

We agree with the district court that Vokal's actions did not violate § 49-14,101.02. Therefore, we affirm the district court's decision reversing the Commission's judgment.

[8,9] We do not explicitly reach Vokal's contention that the district court erred in failing to find § 49-14,101.02 unconstitutional. Not only would it be unnecessary to our disposition of this appeal, but Vokal also failed to properly set forth any assignment of error in his cross-appeal. A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.[16] Thus, the cross-appeal section must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts.[17] In this case, Vokal's separate section entitled "Brief on Cross-Appeal" contains nothing more than an argument section. We have repeatedly said that errors argued but not assigned will not be considered on appeal.[18] Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of this court and the Nebraska Court of Appeals in presenting such claims.[19]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

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[16] See Neb. Ct. R. App. P. § 2-109(D)(4). See, also, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999).

[17] See § 2-109(D)(1). See, also, *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

[18] See, e.g., *Sturzenegger v. Father Flanagan's Boys' Home, ante* p. 327, 754 N.W.2d 406 (2008); *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). See, also, *Schindler v. Walker, supra* note 17.

[19] *In re Interest of Natasha H. & Sierra H., supra* note 16.

STATE OF NEBRASKA, APPELLEE, V. RICKY D. NELSON, APPELLANT.

759 N.W.2d 260

Filed January 2, 2009. No. S-08-203.

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. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Statutes: Appeal and Error.** It is not within an appellate court's province to read a meaning into a statute that is not there.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, the "judgment" is the sentence.
6. **Prisoners: Sentences.** Conditions of release are generally entrusted to the discretion of the judicial officer, who must consider the unique circumstances of each case.
7. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
8. **Judges: Words and Phrases.** The term "judicial abuse of discretion" means that the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
9. **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 violence involved in the commission of the crime.
10. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
11. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
12. **Sentences: Probation and Parole.** In considering a sentence of probation in lieu of incarceration, the court should not withhold incarceration if a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.

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

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

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Ricky D. Nelson's motor vehicle operator's license was revoked in 1992 for a period of 15 years, after Nelson was convicted of third-offense driving under the influence (DUI). Nearly 15 years later, Nelson was pulled over for speeding. He was convicted and sentenced for driving during his 15-year license revocation period.

Nelson alleges that his license revocation had expired by the time of the violation. Specifically, Nelson argues that he should have been given credit for the period he was not allowed to drive while on bail awaiting sentencing for the 1992 DUI, because the 15-year revocation period actually began to run during that time. Nelson also argues that although he was sentenced to 3 months' imprisonment in 1992 and a license revocation period does not run concurrently with a jail sentence, his jail sentence should not be excluded from his revocation period in this case because there is no evidence of how much time he actually spent in jail.

BACKGROUND

On March 6, 1992, Nelson was arrested for driving under the influence. This was his third-offense DUI. The statute under which Nelson was charged in 1992 provided that a person who had two or more prior convictions was guilty of a Class W misdemeanor and that "as part of the judgment of conviction," the court "shall"

> order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen

> years from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period. Such revocation shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. Such revocation shall not run concurrently with any jail term imposed.[1]

On May 29, 1992, Nelson pled guilty to the charges.

Sentencing was postponed due to Nelson's request that a presentence investigation be prepared. Pending sentencing, the court ordered Nelson released on a $2,500 bond. The court also ordered that Nelson turn his license over to the probation office and that he not drive a motor vehicle for any reason during the period he was on bail.

The record contains a journal entry dated September 4, 1992, reflecting that the court sentenced Nelson to 3 months' imprisonment, a $500 fine, and a 15-year license revocation. The jail term was originally typed as "___ days," but this was crossed out and handwritten over as "3 months," and Nelson admits he was sentenced to 3 months in jail. The court did not specifically set forth a date from which Nelson's revocation period would begin to run.

The record is unclear, however, as to how much of the jail sentence was actually served. An official abstract of record by the Nebraska Department of Motor Vehicles (DMV) printed in June 2007 appears to show that Nelson served 3 days' jail time for his third-offense DUI. The record also contains a certified "Order of Suspension" by the DMV sent to Nelson on September 15, 1992, stating that his license was revoked for a period of 15 years to begin on September 6, 1992—3 *days* after Nelson was sentenced—and to end on September 6, 2007.

Almost 15 years after the 1992 sentence for third-offense DUI, on June 18, 2007, Nelson was stopped for speeding. He was driving his employer's vehicle and did not have a license. Nelson had not, at that point, applied for reinstatement of his

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[1] Neb. Rev. Stat. § 39-669.07(2)(c) (Cum. Supp. 1990) (currently located at Neb. Rev. Stat. § 60-6,197.03(4) (Cum. Supp. 2006)).

revoked license. When the officer ran Nelson's name, he was informed that Nelson's license had been suspended and that Nelson was not eligible for reinstatement until September 6, 2007.

Nelson was charged with operating a motor vehicle during a period of revocation, in violation of Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2006). That section deals specifically with revocations pursuant to DUI offenses and states in relevant part that any person operating a vehicle on the highways or streets of this state while his or her operator's license has been revoked, pursuant to third-offense DUI, shall be guilty of a Class IV felony. A Class IV felony carries a maximum of 5 years' imprisonment, a $10,000 fine, or both, and has no minimum sentence.[2] It further provides that "the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years."[3]

In a bench trial on a stipulated record, Nelson argued that because of the period during which his license had been suspended while he was on bail in 1992, the 15-year suspension period had ended by the time he was pulled over in 2007. While he admitted he was driving without a license, he argued that he should be subject only to a misdemeanor offense of driving after a period of revocation but before issuance of a new license.[4] The district court rejected this argument and found Nelson guilty under § 60-6,197.03.

Nelson's counsel argued for leniency at the sentencing hearing, asking for probation instead of incarceration. In particular, counsel argued that another 15-year suspension would be unduly harsh, and counsel asserted that under § 60-6,197.06, Nelson would not be subject to another mandatory 15-year license suspension if he were only sentenced with probation instead of jail time. The Nebraska Probation System presentence investigation report (PSI), prepared for Nelson's sentencing for violating § 60-6,197.03, reveals three DUI convictions

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[2] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

[3] § 60-6,197.06. See, also, *State v. Hense, ante* p. 313, 753 N.W.2d 832 (2008).

[4] See Neb. Rev. Stat. § 60-4,108(2) (Reissue 2004).

that occurred in 1987, 1990, and 1992. In addition, the PSI shows one conviction for possession of drug paraphernalia in 1985, a conviction of possession of controlled substance in 1989, possession of marijuana in 1992, attempted conspiracy to deliver a controlled substance in 1993, and various misdemeanors up through 1992. The PSI also shows that Nelson was convicted of driving without a license in 1986. In 1993, he was convicted of driving under a suspended license and sentenced to 3 years' probation, from which he was unsatisfactorily released. According to the PSI, in 2006, Nelson was found guilty of violating a protection order issued on behalf of his former common-law wife and her family.

On January 29, 2008, the court sentenced Nelson to 300 days in the county jail and ordered his driver's license revoked for a period of 15 years consecutive to the successful completion of his incarceration. The court deferred execution of the jail sentence until February 3, so that Nelson could seek a work release. The court further ordered that, upon appropriate application, it would consider granting a portion of the sentence under house arrest. The court explained that the sentence of imprisonment was necessary for the protection of the public because the risk was substantial that Nelson would reoffend during any period of probation. The court also reasoned that a lesser sentence would depreciate the seriousness of the crime committed and promote disrespect for the law. On February 5, Nelson's application for a work release was denied, due to a positive drug test result.

Nelson appealed his conviction and sentence, and we moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[5]

ASSIGNMENTS OF ERROR

Nelson asserts that the district court erred in (1) convicting him of driving during a 15-year revocation when there was insufficient evidence to support that conviction and (2) failing to place Nelson on probation.

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[5] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

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.[6]

[2,3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[7] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[8]

ANALYSIS

15-Year License Revocation Period

Section 60-4,104 provides that a copy of the order of the director revoking any operator's license, duly certified by the director and bearing the seal of the DMV, "shall be admissible in evidence without further proof and shall be prima facie evidence of the facts therein stated in any proceeding, civil or criminal, in which such suspension or revocation is an issuable fact."[9] In this case, the State entered into evidence a certified copy of the order of the director reflecting that Nelson's license for his third-offense DUI was revoked until September 6, 2007. Thus, the burden shifted to Nelson to rebut the correctness of that order.[10] Nelson argues that the May 29, 1992, bail order and the September 4 sentencing order rebut the State's prima facie case.

As a preliminary matter, we agree with Nelson that the record is unclear as to how much jail time Nelson served

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[6] *State v. Hense, supra* note 3.

[7] *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

[8] *Id.*

[9] Neb. Rev. Stat. § 60-4,104 (Reissue 2004).

[10] See *Delgado v. Abramson*, 254 Neb. 606, 578 N.W.2d 833 (1998).

for his third-offense DUI conviction. This is potentially relevant because, even if the 15-year period began when Nelson alleges, § 39-669.07(2)(c) provided that the 15-year revocation period shall not run concurrently with any jail term imposed. In other words, had Nelson served the 3 months of jail time to which he was sentenced, the 15-year period would not have expired by the time he was stopped on June 18, 2007. In this case, however, the DMV records admitted into evidence by the State indicate that Nelson spent only 3 days in jail, and there is no other evidence indicating the time actually served. Thus, we will assume that Nelson's arguments are not rendered irrelevant by the concurrency clause of § 39-669.07(2)(c).

Nelson's first argument in support of his contention that his 15-year revocation expired May 29, 2007, is that he should be given credit for the time he was ordered not to drive while on bail awaiting his sentence for the third-offense DUI. Nelson points out that under the current administrative license revocation scheme, not yet in effect at the time of his conviction, any period of revocation imposed for a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004) is reduced by any period of revocation imposed under Neb. Rev. Stat. § 60-498.02 (Reissue 2004).[11] Nelson also points out that Neb. Rev. Stat. § 83-1,106 (Reissue 2008) gives credit against a term of incarceration for time served while awaiting sentencing.

[4] But Nelson admits that there is no law which requires him to be given credit for the time he was unable to drive pursuant to the terms of his bail while awaiting sentencing in 1992. The Legislature has demonstrated that it can and will specify when credit should be given for similarly imposed restrictions—when it wishes to do so. The plain language of § 39-669.07(2)(c) did not provide for credit for any license restrictions imposed prior to sentencing, and it is not within an appellate court's province to read a meaning into a statute that is not there.[12] We find no merit to Nelson's argument that he should be given "credit" against his 15-year license revocation.

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[11] Neb. Rev. Stat. § 60-6,197.05 (Reissue 2004).

[12] *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

We next turn to Nelson's contention that under the plain language of § 39-669.07(2)(c), his 15-year license revocation began with the order of May 29, 1992. Nelson points to the provision of § 39-669.07 that the driver shall not drive for a period of 15 years "*from the date ordered by the court* and [the court] shall order that the operator's license . . . be revoked for a like period." Nelson reasons that because the September 4 sentencing order did not otherwise specify when the imposed 15-year revocation began to run, under § 39-669.07, the revocation period must run from the first time the court "ordered" him to turn over his license, on May 29. Relying on *State v. Schulz*,[13] Nelson further argues that such construction of the statute is necessary to prevent the sentence from being illegal for imposing a sentence in excess of that directed by the statute.

In *Schulz*, upon finding the defendant guilty of second-offense DUI, the trial court had sentenced the defendant to 1 year of probation, with 6 months' suspension of his driver's license and 48 hours in the county jail as conditions of his probation. Five months later, the defendant's probation was revoked, and the court revoked the defendant's driver's license for an additional 12 months and sentenced him to 30 days in jail. Section 39-669.07, as it existed at that time, stated that a person found guilty of second-offense DUI would be ordered not to drive "'for a period of one year from the date of his or her conviction.'"[14] Section 28-106 stated that the mandatory penalty for a second conviction of a Class W misdemeanor was 30 days' imprisonment.

We held in *Schulz* that the 48 hours of jail time served by the defendant was not part of his mandatory sentence of 30 days' imprisonment, but was instead a statutory condition of probation. Therefore, imposing 30 days in addition to that time did not violate the maximum sentence for the crime. However, we held that imposing a 1-year license revocation from the time the defendant's probation was revoked violated the plain language of the statute mandating that the license revocation run

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[13] *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985).

[14] See *id.* at 478, 378 N.W.2d at 168 (emphasis omitted).

"'from the date of his or her conviction.'"[15] We concluded that the State's concern—that such construction left little incentive not to violate the probation—was a concern "to be addressed by the Legislature rather than by this court."[16]

But by the time of Nelson's conviction in 1992, § 39-669.07 had changed significantly. It no longer stated that the revocation should run from the date of the conviction, and it stated that the revocation shall be "administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked."[17] Thus, our reasoning in *Schulz* does not support Nelson's argument that we must construe his 15-year revocation period as running from the date he was released on bail pending sentencing. To the contrary, by holding that the court could impose 30 days' jail time in addition to the 48 hours already incarcerated, we recognized that the same type of consequence does not necessarily make for the same "sentence."

The fundamental error of Nelson's arguments is that what he misconstrues as a "sentence" is merely a condition of bail. Neb. Const. art. I, § 9, provides in part that "[a]ll persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great." Neb. Rev. Stat. § 29-901 (Cum. Supp. 2006), in turn, states that any bailable defendant shall be ordered released from custody pending judgment and that the judge shall impose conditions of release which will reasonably assure the appearance of the person for trial—including restrictions on travel.

[5,6] In a criminal case, the "judgment" is the sentence.[18] It is clear that Nelson was released pending the creation of the PSI report that the judge was to consider in sentencing. It was not until September 6, 1992, that the sentence was rendered.

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[15] *Id.*

[16] *Id.* at 480, 378 N.W.2d at 170.

[17] § 39-669.07(2)(c).

[18] *State v. Hense, supra* note 3. See, also, *State v. Rodriguez*, No. A-92-614, 1993 WL 173833 (Neb. App. May 25, 1993).

Conditions of release are generally entrusted to the discretion of the judicial officer, who must consider the unique circumstances of each case.[19] Restrictions on the right to drive are not generally considered so severe as to unreasonably restrain the accused from liberty while on bail,[20] and are, in fact, not uncommon.[21] For instance, in *Wells v. State*,[22] the court held that the continuing enforcement of the court's order that the defendant surrender his driver's license did not violate a statutory prohibition against enforcing a sentence under supersedeas, because the order for surrender was not part of the defendant's sentence. The Georgia Court of Appeals explained that even though the trial court made the surrender a condition of the defendant's bond, it was a requirement imposed by statute on the court.

In this case, Nelson does not claim that the court's condition suspending driving privileges while on bail was an abuse of discretion, but instead argues that the sentence began with his condition of bail. We disagree. Nelson's driving privileges were suspended simply as a condition of bond. That period was not part of Nelson's sentence to a 15-year license revocation.

Nor can the language "from the date ordered by the court" be construed to require that the 15-year period ran from the time of the bail condition when, at that time, Nelson had not yet been sentenced to a 15-year revocation period. Under the plain language of § 39-669.07, for purposes of delimiting the "period of fifteen years from the date ordered by the court," the "date ordered by the court" refers to the date the court ordered the 15-year license revocation, and not from any date

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[19] 8 C.J.S. *Bail* § 18 (2005). See, also, *State v. Hernandez*, 1 Neb. App. 830, 511 N.W.2d 535 (1993).

[20] *Id.*

[21] See, e.g., *State v. Fraga*, 189 S.W.3d 585 (Mo. App. 2006); *In re McSherry*, 112 Cal. App. 4th 856, 5 Cal. Rptr. 3d 497 (2003); *Matter of Buckson v. Harris*, 145 A.D.2d 883, 536 N.Y.S.2d 219 (1988); *Cope v. State*, No. A-433, 1985 WL 1077807 (Alaska App. Jan. 16, 1985) (unpublished opinion).

[22] *Wells v. State*, 212 Ga. App. 15, 440 S.E.2d 692 (1994).

the court may have issued an order affecting the defendant's driving privileges.

In summary, we find no merit to the defendant's argument that his 15-year revocation period had expired by the time he was pulled over in June 2007.

Excessive Sentence

We next consider whether the district court's sentence on the charge of driving with a revoked license was excessive. Nelson asserts that he should have been given probation rather than jail time.

[7-12] An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.[23] The term "judicial abuse of discretion" means that the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[24] 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 violence involved in the commission of the crime.[25] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.[26] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[27] In considering a sentence of probation in lieu of incarceration,

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[23] See, *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992); *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990).

[24] See *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), *disapproved on other grounds, State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

[25] *State v. Draganescu, ante* p. 448, 755 N.W.2d 57 (2008).

[26] *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[27] *Id.*

the court should not withhold incarceration if a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.[28]

In this case, the trial judge explained that 300 days' imprisonment was necessary for the protection of the public. The trial judge also stated that a lesser sentence would depreciate the seriousness of the crime committed. While it is true that most of Nelson's criminal record was developed prior to 1992 and that he now alleges he is sober, his record of driving offenses is extensive and includes a conviction for driving without a license and driving with a suspended license. Although Nelson alleges that he is now sober, the record reflects that at the time of his arrest, there was marijuana found in the vehicle. Nelson was not charged with possession of marijuana. We conclude that the district court did not abuse its discretion in denying probation, especially given the level of flexibility offered by the court in serving the jail time imposed. Furthermore, we note that while Nelson complains of the onerous nature of another 15-year revocation, as we explained in *State v. Hense*,[29] the 15-year revocation is a mandatory part of any sentence for felony operation of a motor vehicle during a period of revocation, including a sentence of probation. Thus, the district court had no discretion in this regard. We find no merit to Nelson's excessive sentence argument.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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[28] See *State v. Crowdell, supra* note 23.

[29] *State v. Hense, supra* note 3.

AARON KOCH ET AL., APPELLANTS, V. CEDAR COUNTY FREEHOLDER BOARD, APPELLEE, AND RICHARD R. PINKELMAN ET AL., INTERVENORS-APPELLEES.
AARON KOCH ET AL., APPELLANTS, V. CEDAR COUNTY FREEHOLDER BOARD, APPELLEE, AND DENNIS A. ARENS, SR., ET AL., INTERVENORS-APPELLEES.

759 N.W.2d 464

Filed January 9, 2009. Nos. S-07-837, S-07-1026.

1. **Schools and School Districts: Equity.** The actions of a county freeholder board under Neb. Rev. Stat. § 79-458 (Cum. Supp. 2006) sound in equity.
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. **Schools and School Districts: Property: Pleadings.** An error in the legal description of real property will not invalidate a petition to alter a school district boundary where it is clear from a reading of the entire petition what real property is intended, and such error will therefore not defeat the jurisdiction of the freeholder board.
4. **Jurisdiction: Pleadings.** The failure to properly verify a petition does not affect the subject matter jurisdiction of a court.
5. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2008) is a direct and legal interest in the controversy, which is an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
6. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
7. **Trial: Words and Phrases: Appeal and Error.** A trial de novo on the record is literally a new hearing and not merely new findings of fact based upon a previous record.
8. **Trial: Evidence: Appeal and Error.** A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.
9. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.

Appeals from the District Court for Cedar County: WILLIAM BINKARD, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellants.

Jeffrey L. Hrouda and George L. Hirschbach for appellees and intervenors-appellees.

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

HEAVICAN, C.J.

INTRODUCTION

The Cedar County freeholder board approved the transfer of real estate from the Wynot Public School District to the Hartington Public School District. Several taxpayers from the Wynot school district appealed to the district court, which affirmed the Cedar County freeholder board's actions. Those taxpayers now appeal the judgments of the district court.

FACTUAL BACKGROUND

In 2006, approximately 400 individual owners of real estate (freeholders) filed petitions with the Cedar County freeholder board (hereinafter the Board) asking that their respective properties be transferred from the Wynot Public School District to the Hartington Public School District as permitted by Neb. Rev. Stat. § 79-458 (Cum. Supp. 2006). Over the course of three board meetings held on September 28, 2006, and February 15 and May 25, 2007, the freeholders' petitions were approved and the property transferred from the Wynot school district to the Hartington school district.

Aaron Koch, Vanita Arndt, Duane Bair, James Eskens, and Nancy Rolfes (collectively the taxpayers)—all taxpayers from the Wynot school district—objected to the transfers and appealed to the district court pursuant to § 79-458(5). The district court permitted many of the original petitioners to intervene, concluding they were necessary parties to the actions in the district court. The Board's actions at the September 28, 2006, and February 15, 2007, meetings were consolidated into one action before the district court and are now at issue in case No. S-07-837; the actions of the Board at the May 25

meeting were separately decided and are on appeal in case No. S-07-1026.

The parties stipulated to the following: (1) Both the Wynot and the Hartington school districts are Class III districts; (2) in the 2004-05, 2005-06, and 2006-07 school years, the Wynot school district had an average daily attendance in grades 9 through 12 of fewer than 60 students; (3) effective for the 2006-07 school year, the Wynot school district had voted to exceed the maximum levy limit under Neb. Rev. Stat. § 77-3442 (Cum. Supp. 2006); (4) the high school for the Wynot school district was within 15 miles on a maintained public highway or road of the high school of the Hartington school district; (5) neither the Wynot school district nor the Hartington school district was a member of a learning community; (6) the Hartington school district is an accredited district; (7) all of the freeholders' petitions filed before the Board were approved by a majority of the members of the school board and board of education of the Hartington school district prior to the hearings before the Board.

After a hearing, the district court transferred to the Hartington school district all real estate determined to be contiguous to that district. The taxpayers appealed. The cases were consolidated for briefing and oral argument, and we granted the taxpayers' petition to bypass.

ASSIGNMENTS OF ERROR

On appeal, the taxpayers assign that (1) the Board and the district court lacked subject matter jurisdiction, because the freeholders' petitions before the Board failed to allege necessary statutory components, failed to bear the signatures of all property owners, failed to describe real estate in legally sufficient terms, and failed to allege that either the Hartington school district or the Wynot school district was not part of a learning community; (2) the district court erred in allowing the freeholders to intervene; (3) the district court erred in allowing the freeholders to file new petitions correcting the deficiencies in their original petitions; (4) the district court erred in transferring the property in question due to the various deficiencies of the petitions; and (5) the district court erred in

its interpretation of the meaning of "contiguous" and therefore erred in allowing the transfer of the real estate in question because it was not contiguous.

STANDARD OF REVIEW

[1,2] The actions of a county freeholder board under § 79-458 sound in equity.[1] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[2]

ANALYSIS

§ 79-458.

Because § 79-458 is central to the disposition of these appeals, we first set forth the relevant portions of that statute.

> (1) Any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of a school land lease under section 72-232, or entrant upon government land who has not yet received a patent therefor may file a petition with a board consisting of the county assessor, county clerk, and county treasurer, asking to have any tract or tracts of land described in the petition set off from an existing Class II or III school district in which the land is situated and attached to an accredited district which is contiguous to such tract or tracts of land if:
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> (a) The Class II or III school district has had an average daily membership in grades nine through twelve of less than sixty for the two consecutive school fiscal years immediately preceding the filing of the petition;
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> (b) The Class II or III school district has voted to exceed the maximum levy established pursuant to subdivision (2)(a) of section 77-3442, which vote is effective for the school fiscal year in which the petition is filed or for the following school fiscal year;

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[1] See *In re Plummer Freeholder Petition*, 229 Neb. 520, 428 N.W.2d 163 (1988).

[2] *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

(c) The high school is within fifteen miles on a maintained public highway or maintained public road of another high school; and

(d) Neither school district is a member of a learning community.

For purposes of determining whether a tract of land is contiguous, all petitions currently being considered by the board shall be considered together as a whole.

(2) The petition shall state the reasons for the proposed change and shall show with reference to the land of each petitioner: (a) That (i) the land described in the petition is either owned by the petitioner or petitioners or that he, she, or they hold a school land lease under section 72-232, are in possession or constructive possession as vendee under a contract of sale of the fee simple interest, or have made an entry on government land but have not yet received a patent therefor and (ii) such tract of land includes all such contiguous land owned or controlled by each petitioner; (b) that the land described in the petition is located in a Class II or III district that is not a member of a learning community, the district has had an average daily membership in grades nine through twelve of less than sixty for the two consecutive school fiscal years immediately preceding the filing of the petition, the district has voted to exceed the maximum levy established pursuant to subdivision (2)(a) of section 77-3442 as provided in subdivision (1)(b) of this section, and the land is to be attached to an accredited school district which is contiguous to such tract or tracts of land and which is not a member of a learning community; and (c) that such petition is approved by a majority of the members of the school board of the district to which such land is sought to be attached.

(3) The petition shall be verified by the oath of each petitioner. Notice of the filing of the petition and of the hearing on such petition before the board constituted as prescribed in subsection (1) or (4) of this section shall be given at least ten days prior to the date of such hearing by one publication in a legal newspaper of general

> circulation in each district and by posting a notice on the outer door of the schoolhouse in each district affected thereby, and such notice shall designate the territory to be transferred. Such board shall, after a public hearing on the petition and a determination that all requirements of this section have been complied with, change the boundaries of the school districts so as to set off the land described in the petition and attach it to such district pursuant to the petition.
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> . . . .
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> (5) Appeals may be taken from the action of such board or, when such board fails to agree, to the district court of the county in which the land is located within twenty days after entry of such action on the records of the board by the county clerk of the county in which the land is located or within twenty days after March 15 if such board fails to act upon such petition, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county.

We are aware that § 79-458 has been amended several times since the first freeholder petitions were filed in this case. The parties have not presented any argument regarding these amendments, and we have determined that these changes do not affect the analysis of these appeals. Therefore, we will cite to the 2006 version of the statute for the sake of simplicity and convenience.

Subject Matter Jurisdiction.

In their first assignment of error, the taxpayers argue that the district court lacked subject matter jurisdiction over the freeholders' petitions. In particular, the taxpayers contend that the petitions filed before the Board failed to comply with the requirements of § 79-458, because the petitions failed to allege necessary statutory components, failed to bear the signatures of all property owners, failed to describe real estate in legally sufficient terms, and failed to allege that the Hartington and Wynot school districts were not part of a learning community. The taxpayers assert that such deficiencies prevented the

Board, and in turn the district court, from exercising jurisdiction over the petitions.

We agree that the filing of a petition "asking to have any tract or tracts of land . . . set off from an existing Class II or III school district"[3] is required under § 79-458 before the Board has jurisdiction to transfer the requested tracts of land from one school district to another. However, we disagree with the taxpayers' contention that the allegations in that petition must contain no deficiencies before the Board can exercise jurisdiction.

[3] First, many of the so-called deficiencies alleged by the taxpayers are not necessarily deficiencies within the meaning of § 79-458. The taxpayers first contend that the petitions filed before the Board had insufficient legal descriptions. But this court has held that "'[a]n error in the description will not invalidate the petition [to alter a school district boundary] where it is clear from a reading of the entire petition what land is intended,'"[4] and we have noted that such error will not defeat the jurisdiction of the Board.[5] And there is no argument that the descriptions were insufficient to describe the land in question, only that the description was not a complete legal description. We therefore conclude that the insufficiency of certain legal descriptions does not prevent the Board from exercising jurisdiction over the petitions.

The taxpayers next argue that some of the petitions lacked the signatures of all necessary property owners. We note that the statute does not explicitly require the approval of all *property owners*, but instead, of all *petitioners*.[6] We decline to hold that the failure to have all property owners sign the relevant petition prevents the Board from exercising jurisdiction when such is not explicitly required by statute. Moreover, notice of any hearings before a freeholder board is required under the

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[3] § 79-458(1).

[4] *Schilke v. School Dist. No. 107*, 207 Neb. 448, 453, 299 N.W.2d 527, 530 (1980).

[5] *Id.*

[6] § 79-458(3).

statute[7]; thus, landowners also have an opportunity to object to the transfer, if desired.

[4] The taxpayers also assert that some of the petitions lacked proper notarization and were therefore invalid. The statute does require that the petitions filed before the Board be verified,[8] though it does not explicitly set forth how the petition should be verified. Assuming the taxpayers are correct in asserting that the lack of a proper notary would prevent a petition from being verified under the statute, we nevertheless conclude that such does not affect the Board's jurisdiction, as this court has previously held that the failure to properly verify a petition does not affect the subject matter jurisdiction of a court.[9]

We agree that the omission of the allegation that neither district was part of a learning community was a deficiency in the pleading.[10] However, we conclude that this deficiency did not defeat the Board's jurisdiction. This is so because at the time of the filing of these petitions before the Board, the relevant statute, Neb. Rev. Stat. § 79-2102 (Cum. Supp. 2006), provided that requests to form a learning community be made with the Secretary of State by March 1 in order to be effective on September 1. This statute was not effective until July 14, 2006. As such, the first deadline to form a learning community was March 1, 2007, with that learning community to take effect on September 1. At the time the petitions were filed in September 2006, it would have been a legal impossibility for either school district to be part of a learning community. Under such circumstances, we conclude that the failure to allege that neither district was part of a learning community did not defeat the Board's jurisdiction.

The district court did not lack jurisdiction over these cases. The taxpayers' first assignment of error is without merit.

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[7] *Id.*

[8] *Id.*

[9] See *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 269 Neb. 725, 695 N.W.2d 435 (2005).

[10] See § 79-458(2).

Did District Court Err by Allowing Intervention?

In their second assignment of error, the taxpayers contend that the district court erred by granting the freeholders the right to intervene.

A review of the record reveals that following the decision of the Board, the taxpayers filed their appeal with the district court under § 79-458(5). However, the taxpayers failed to caption the freeholders as parties, nor was notice of the appeal served on the freeholders. The Board then filed a motion alleging the freeholders were indispensable parties under what is now codified as Neb. Ct. R. Pldg. § 6-112(b)(7). The district court sustained the Board's motion and directed the taxpayers to serve notice on the freeholders. The court's order gave the freeholders 30 days in which to file a petition in intervention if they so chose.

The taxpayers first contend that the petitions in intervention should not have been granted and that the freeholders were not indispensable parties. Intervention is authorized by Neb. Rev. Stat. § 25-328 (Reissue 2008), which provides:

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

[5] The interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest in the controversy, which is an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.[11]

In this case, the subject matter of the appeal before the district court is whether the Board should have transferred the

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[11] *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

freeholders' property from the Wynot school district to the Hartington school district. And the freeholders were the parties to initially request the transfer of such property. It is difficult to comprehend how the freeholders would not have a direct and legal interest in the culmination of a process they began, a process that determines the school district in which their properties are located.

[6] Moreover, it seems clear that the freeholders are indispensable parties. An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[12] The freeholders also meet this definition for the same general reasons noted with respect to intervention. The taxpayers' action in the district court requires the court to determine whether the freeholders' property should be transferred from one school district to another. This controversy cannot be adjudicated without affecting the freeholders' interests.

The taxpayers' argument that the freeholders should not be permitted to intervene because "[w]hether the petitioners seeking land transfers are present before the Court or not, the Court must decide the validity of the Board's actions"[13] is not persuasive. As will be discussed in more detail below, the appeal before the district court is a trial de novo, which means a new hearing with new evidence. Thus, in this instance, the district court is not limited to deciding whether the Board's actions were valid, but instead will decide anew whether the transfer is valid. This should be done with input and argument from all affected parties, including the taxpayers and the freeholders.

The district court did not err by allowing the freeholders to intervene. The taxpayers' second assignment of error is without merit.

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[12] *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[13] Brief for appellants at 18.

Did District Court Err in Transferring Property?

In their third assignment of error, the taxpayers argue that the freeholders should not have been permitted to file amended petitions before the district court; in their fourth assignment of error, the taxpayers more generally argue that the district court erred in transferring the property in question to the Hartington school district because of the various deficiencies in the petitions filed before the Board.

The disposition of both these assignments of error is dependent upon an understanding of how the appeal provided by § 79-458(5) works. That subsection provides that appeals are taken "in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Neb. Rev. Stat. § 23-135 (Reissue 2007) provides for appeals from actions of a county board allowing or disallowing claims against the county. Case law under that section, as well as under § 79-458, provides that appeals are taken as a trial de novo before the district court.[14]

[7,8] In *In re Covault Freeholder Petition*,[15] we explained the trial de novo:

> When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.

Miller v. School Dist. No. 69[16] and *In re Covault Freeholder Petition* both provide examples of the operation of a trial de novo. In *Miller*, certain property owners wished to transfer property from a school district in Pawnee County, Nebraska,

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[14] See *Zeller Sand & Gravel v. Butler Co.*, 222 Neb. 847, 388 N.W.2d 62 (1986) (appeals under § 23-135). See, also, *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984).

[15] *In re Covault Freeholder Petition, supra* note 14, 218 Neb. at 769, 359 N.W.2d at 354.

[16] *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981).

an accredited school district, to a neighboring school district in Gage County, Nebraska, a nonaccredited school district. At that time, state law provided that property could not be transferred from an accredited district to a nonaccredited district. A statutory board composed of city officials from the counties at issue nevertheless approved the transfer, and that approval was upheld by the district court. We affirmed, noting the record showed that by the time of the district court's action upholding the transfer, the school district in Gage County had become formally accredited.

We discussed *Miller* in *In re Covault Freeholder Petition*, an opinion consolidating three appeals, in which one appeal presented similar facts. The freeholders wished to transfer property from a school district in Table Rock, Nebraska, to a school district in Pawnee City, Nebraska. The transfer was ordered by the county board and upheld by the district court. At that time, the statute provided that property could only be transferred from a nonaccredited district to an accredited district; as of the date of the transfer, the Table Rock school district—the district from which transfer was sought—was not accredited, while the Pawnee City school district was accredited. The district court held that it

> could not consider the fact that Table Rock had been advised of its accreditation and would be accredited before the new school year began, but must instead consider the status of the district as it existed on the date on which the freeholder board met. The district court also held that it could not consider evidence as to the status of Table Rock on the date of the trial, but was only to determine whether Table Rock was accredited on the date the freeholder board met.[17]

Citing *Miller*, this court disagreed:

> [W]hen the trial court considered this matter . . . it should have taken into account the fact that the district was now accredited and that the [petitioners] did not meet the necessary requirements of [the statute].

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[17] *In re Covault Freeholder Petition, supra* note 14, 218 Neb. at 769, 359 N.W.2d at 354.

> . . . .
>
> In the instant case all of the requirements necessary to effect accreditation of the Table Rock school district had been met prior to the time that the statutory board ordered the transfer, and in fact the formal certification was granted prior to the time the children began school and prior to the time the district court acted on the appeal. It was therefore error for the district court not to consider those facts.[18]

Against this backdrop, we consider the taxpayers' arguments that the freeholders should not have been allowed to amend their petitions and that the deficiencies of the original petitions precluded the district court from approving the transfer by the Board.

Miller and *In re Covault Freeholder Petition* both make it clear that the district court is to consider the facts as they existed at the time of the trial before the district court in concluding whether the transfer was appropriate. And, aside from the various deficiencies discussed above, and contiguity, to be discussed below, there is no allegation that the transfers were not authorized under § 79-458. In fact, except for contiguity, the parties stipulated to each requirement under the statute.

We also conclude that because the district court was allowed to accept new evidence and consider the question of transfer anew, it did not err in allowing the filing of new or amended petitions.

The district court did not err in allowing the filing of new petitions or in transferring the property in question. The taxpayers' third and fourth assignments of error are without merit.

Contiguity.

In its fifth and final assignment of error, the taxpayers contend the district court erred in its interpretation of the term "contiguous" and therefore erred in concluding the properties in question were contiguous.

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[18] *Id.* at 769-70, 359 N.W.2d at 354-55.

Section 79-458(1) provides that "[f]or purposes of determining whether a tract of land is contiguous, all petitions currently being considered by the board shall be considered together as a whole." Relying on this language, the district court, on its own, transferred land that was not necessarily contiguous to the Hartington school district, but whose contiguity could be established through other properties currently before the Board that were contiguous.

However, the taxpayers contend that this interpretation is incorrect, and the proper interpretation is that "all petitions being considered by the Board must be considered 'together as a whole,' and if *any* petition lacks contiguity, then *all* lack it."[19] The taxpayers reason that "the statutory objective is to allow land to transfer, but not in such huge quantities as to destroy the original school district, and make education of its students impossible."[20]

[9] Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[21] And a plain reading of this language, considered in light of the rest of the statute, reveals that the district court's interpretation was correct.

Contrary to the taxpayers' assertion, there is no evidence that § 79-458 was intended to limit the amounts of land which could be transferred from one school district to another. Rather, the logical interpretation of the statute is the one utilized by the district court: that all petitions could be considered together in order to find that otherwise noncontiguous land is nevertheless contiguous. Lending further support to this conclusion is the fact that the taxpayers' interpretation could allow owners of noncontiguous land to defeat the petitions of owners of contiguous land by the simple act of also filing a petition before the Board.

If a limitation on the amount of land that could be transferred at one time had been intended by the Legislature, we

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[19] Brief for appellants at 30 (emphasis in original).

[20] Brief for appellants at 30-31.

[21] *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

conclude that such could have been accomplished much more directly by other means, notably, omission of the very language which we are now asked to interpret.

The district court's interpretation of "contiguous" was correct. The taxpayers' final assignment of error is without merit.

CONCLUSION

The decisions of the district court are affirmed.

AFFIRMED.

KENT L. JARDINE, APPELLANT, V. WILLIAM F. McVEY, SR., ET AL., APPELLEES.

759 N.W.2d 690

Filed January 9, 2009. No. S-07-1068.

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: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders.
4. ____. An officer or director must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders.
5. **Estoppel.** Judicial estoppel may bar inconsistent claims against different parties.
6. ____. Whether judicial estoppel is applicable turns on whether the court has accepted inconsistent positions from the plaintiff.
7. ____. For judicial estoppel to apply, the court must have accepted a previous inconsistent position.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Edward D. Hotz, Patrick M. Flood, and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Bryan S. Hatch and Victor C. Padios, of Stinson, Morrison & Hecker, L.L.P., for appellees.

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

CONNOLLY, J.

SUMMARY

Kent L. Jardine sued his former father-in-law, John N. McVey, and the board of directors of John's family corporations. Kent's claims for breach of fiduciary duty and fraudulent misrepresentation arose out of his divorce from Julie A. Jardine. During their marriage, Julie acquired stock in three corporations owned by her family. Under the property settlement agreement, John, on Julie's behalf, paid Kent $365,426 for any interest he claimed he had in the stock. About 8 months after the divorce, two of the three family corporations were sold at prices greater than what Kent received for his claimed interest in the shares.

Kent sued the directors of the three corporations, alleging two causes of action. Kent alleged that the directors breached their fiduciary duty. Kent contends that he was a shareholder and that the directors had a duty to inform him of the potential sale of the corporations for a greater value when they knew that he was going to receive a lower value for his stock. Kent's second claim for false misrepresentation is against John, Julie's father. Kent claims that John misrepresented to him that the corporations were not for sale, which induced Kent to sign the property settlement.

The district court granted John and the directors' motion for summary judgment. The court determined that Kent failed to establish he was a shareholder and that he was judicially estopped from seeking any further compensation for Julie's stock.

Regarding the breach of fiduciary duty claim, we affirm, because Kent was never a shareholder. Thus, the directors owed him no duty. The false misrepresentation claim fails because he was judicially estopped from claiming a position inconsistent with statements he made during the divorce proceeding. We affirm.

BACKGROUND

We glean the following facts from exhibits received at the summary judgment hearing.

The Divorce and Property Settlement Agreement

In 1980, Kent married Julie. Before the marriage, Kent worked for Continental Fire Sprinkler Company, one of the three corporations owned and operated by Julie's family.

During their marriage, John gave stock to Julie in all three corporations. The record shows that Kent never voted the shares of stock, never participated in any elections, and never served as proxy with the corporations and that all dividend checks were payable only to Julie. Both John, a founder of the corporations, and Kerry N. McVey, Julie's brother and the current president of two of the corporations, testified that Julie was the sole shareholder. The buy-sell agreements for the corporations showed that Julie was a shareholder.

In 2003, Kent filed for divorce. In the property settlement agreement, Kent received payment for a one-half interest he claimed in stock held by Julie in the corporations owned by Julie's family: Continental Fire Sprinkler Company, Continental Alarm & Detection, and Grif-Fab Corporation. Acting on Julie's behalf, John negotiated the settlement agreement with Kent. The main contention between the parties was the stock value. And to evaluate his alleged one-half interest in the stock, Kent retained a certified public accountant who examined the corporations' business records.

Kent also had discussions with Kerry regarding the stock. In the summer of 2004, Kerry proposed a division of the marital assets. In October, John used this proposal and stated to Kent that the values assigned to the stock were fair and reasonable. He stated that he believed Kent should receive around $850,000 when the stock, cabin, boats, jet skis, cars, and all other assets were taken into account.

On November 19, 2004, 4 days before the court entered the divorce decree, John met with Kent and they discussed the terms of the property settlement. At one point, after the conversation with the attorneys had concluded, Kent asked

John if Continental Fire Sprinkler Company was for sale and John responded that it was not. Kent then signed the settlement agreement, which provided that he would receive $365,426 for his claimed one-half interest in the stock. In total, Kent received $540,000 in cash, including the stock payment, plus other property valued at $350,000. John paid the $540,000 with his personal check. In exchange, Julie executed a promissory note to her father, John.

During the divorce negotiations, Kent had requested that any settlement agreement contain a "look-back" provision. This provision would have allowed Kent to receive more money for the shares if any of the corporations were sold within a set time after the signing of the property settlement agreement. Julie's attorneys rejected the request, and the provision was not included in the property settlement agreement.

In the agreement, Kent acknowledged and agreed that (1) he did not rely upon any representations whatsoever, whether by Julie or any other person, concerning the stock or the present or future value or prospects or potential income with respect to said stock; (2) he waived and relinquished any further inquiry regarding the stock; (3) he directed his counsel not to pursue any further inquiry regarding the stock; and (4) he argued the allocation of stock to Julie and the payment of $365,426 was "final, absolute and not subject to adjustment, question or challenge for any reason, whether known or unknown and whether now existing."

District Court Approves Property Settlement Agreement

The district court held a hearing to establish that the settlement agreement was fair, just, and not unconscionable. In response to questioning from his attorney, Kent testified that he (1) believed that the agreement was fair, reasonable, and not unconscionable; (2) agreed that any changes to the stock's value or changes in the corporations' structures, such as a sale, could not be considered in determining whether he received fair value for the stock; and (3) acknowledged that the agreement was final, absolute, and not subject to adjustment, question, or challenge for any reason, whether known or unknown and

whether now existing or arising in the future. On November 23, 2004, the district court approved the property settlement agreement and entered the divorce decree.

Kent Discovers That the Corporations Were Sold

In July 2005, Kent discovered that two of the three corporations were sold. Kent claims that the directors were aware of the divorce proceedings and knew the price that he was to receive in the property settlement agreement was substantially less than the value per share in any potential sale. Thus, Kent alleges that the directors had a duty to inform him of the negotiations to sell the corporations and that they breached that duty. Kent also alleges that John misrepresented to him in the fall of 2004 that there were no ongoing negotiations to potentially sell the corporations.

Kerry, who was the president of the corporations at the time, stated that during November 2004, the corporations received two offers. In July 2005, the corporations were sold to a new bidder.

STANDARD OF REVIEW

[1,2] 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] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and we give that party the benefit of all reasonable inferences deducible from the evidence.[2]

ASSIGNMENTS OF ERROR

Kent assigns, restated, that the district court erred in finding that (1) he failed to establish his status as a shareholder and (2) the doctrine of judicial estoppel precluded his claim against John.

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[1] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[2] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

ANALYSIS

Kent brought two claims: a breach of fiduciary duty against the board of directors, and a claim against John for fraudulent misrepresentation. The court granted summary judgment on both claims. First, it concluded that Kent was not a shareholder and that the directors therefore owed him no fiduciary duties. Second, it concluded that because of Kent's representations in the divorce proceedings, he was judicially estopped from claiming John made misrepresentations about a potential sale of the corporations.

Breach of Fiduciary Duty

[3,4] An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders.[3] An officer or director must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders.[4] Because a director's fiduciary duties extend only to shareholders and the corporation,[5] Kent's claim hinges on whether he was a shareholder when he signed the property settlement agreement.

In support of their motion for summary judgment, the directors presented evidence that Kent's name was not on the stock certificates; he never signed any stock purchase agreement or stock transfer statement acknowledging he was a shareholder in the corporations; he never signed any buy-sell agreement; he never received or endorsed any dividend checks; he never served as an officer; he never attended any annual meetings; and he never voted any shares, participated in any elections, or served as a proxy for the corporations.

In opposition to the motion for summary judgment, Kent offered the following evidence: (1) He received payment for the stock in the divorce proceeding; (2) Julie obtained the stock

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[3] See, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[4] *Trieweiler, supra* note 3.

[5] See, *id.*; *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979). See, also, Neb. Rev. Stat. §§ 21-2014, 21-2050, and 21-2055 (Reissue 2007).

during their marriage; (3) during the divorce negotiations with John and Kerry, they "acknowledged" Kent's one-half ownership in the stock; (4) Kerry's statement that if Kent had not worked for the corporations, Julie may not have received the stock when she did; and (5) when the corporations were sold, all shareholders were either employees or former employees of the corporations except Julie. Kent argues that this evidence supports an inference that he had to be a shareholder for Julie to be considered a shareholder.

A shareholder is a "person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation."[6] The directors presented undisputed evidence that Kent's name was not on the stock certificates. But Kent contends that issuance of a stock certificate in his name is not essential for him to be a shareholder. Yet, absent a stock certificate, "some sort of subscription or contract, express or implied, is required, whereby the person obtains the right to (1) hold stock or, upon some condition, demand stock; and (2) exercise the rights of a stockholder."[7]

We have discussed facts indicating shareholder status. In *Evans v. Engelhardt*,[8] we stated:

> During the operation of the corporation, [Paul] Evans was recognized by [the two other remaining corporate shareholders] as an active shareholder and participant in the corporation until June 1989. Distributions from the corporation were based on the percentage of stock ownership. The corporation's income tax returns for 1986 through 1990 list Evans as a shareholder, and Evans' shareholder distributions were reported on a schedule K-1. [The two other shareholders] notified Evans of shareholders' and directors' meetings, which notice evidenced their acknowledgment of Evans as a shareholder of the corporation.

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[6] § 21-2014(20).

[7] 18A Am. Jur. 2d *Corporations* § 614 at 450 (2004). See *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989).

[8] *Evans v. Engelhardt*, 246 Neb. 323, 326, 518 N.W.2d 648, 651 (1994).

In contrast, Kent has failed to show that the corporations recognized him as a shareholder or that he had any shareholder rights.

Finally, Kent argues that he has standing as a shareholder because of his equitable interest in the stock Julie acquired during the marriage.

Kent relies on cases involving divorce proceedings in which courts recognized a spouse's interest in corporate stock, even if that spouse was not the record holder of the stock.[9] The New Hampshire Supreme Court held in *Bursey v. Town of Hudson*[10] that a husband's former wife had standing to challenge a tax lien on property owned by a corporation of which the husband, but not the wife, was a shareholder. Although the wife lacked title to the property, the court determined that because the corporation was marital property and a final divorce decree had not been entered, the wife could still have been awarded stock in the divorce decree. Therefore, the court concluded that the wife had a sufficient equitable interest in the property to challenge the tax lien.

Relying on *Bursey*, Kent contends he should be given shareholder status based upon an alleged equitable interest in the stock when he filed for divorce. He argues that because the alleged breach of fiduciary duties occurred after he filed for divorce and before the entry of the decree, he has shareholder status. Kent's contention fails for several reasons.

First, *Bursey* is distinguishable. Julie's stock was gifted to her. It was not marital property. Second, to the extent that Kent had any basis for claiming the stock as marital property, he agreed to accept a cash settlement for any claim in the stock.

Most important, whether the directors had a duty to inform Kent of any possible purchase negotiations is different from the issue raised in *Bursey*. The New Hampshire Supreme Court did not hold that a spouse's marital interest in stock

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[9] See *Bursey v. Town of Hudson*, 143 N.H. 42, 719 A.2d 577 (1998). See, also, *Kaplus v. First Continental Corp.*, 711 So. 2d 108 (Fla. App. 1998); *LaHue v. Keystone Inv. Co.*, 6 Wash. App. 765, 496 P.2d 343 (1972).

[10] *Bursey, supra* note 9.

created shareholder status. Nor did it create a duty for a director to inform a non-record-holding spouse of a director's planned action. Here, the directors presented undisputed evidence that the corporations intended and considered Julie as the shareholder.

In reviewing a summary judgment, an appellate court views the evidence in a 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.[11] Giving Kent the benefit of all reasonable inferences deducible from the evidence, we conclude no genuine issue of material fact exists whether he was a shareholder. The district court did not err in granting summary judgment on the breach of fiduciary duty claim.

Fraudulent Misrepresentation

Kent alleged that John represented to him that there were no ongoing negotiations to potentially sell the corporations. Kent alleged that the representations were false and that John knew them to be false when he made them. He concludes that he suffered damages, because the corporations were later sold for substantially more than he received. The district court granted John summary judgment. It determined that Kent's false misrepresentation claim was barred by judicial estoppel.

[5] Judicial estoppel may bar inconsistent claims against different parties.[12] And, we have previously set out the contours of judicial estoppel:

> The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. . . . The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. . . . It has been said that

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[11] See *Amanda C., supra* note 2.

[12] See *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995).

> unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. . . . However, the doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. . . . Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists.[13]

[6] Whether judicial estoppel is applicable turns on whether the court has accepted inconsistent positions from the plaintiff. In adopting judicial estoppel in *Melcher v. Bank of Madison*,[14] we relied on a Sixth Circuit case.[15] There, the court determined that the requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position. And absent such acceptance, the doctrine of judicial estoppel does not apply.[16] The court further stated that "judicial acceptance" requires not that a party prevail on the merits, but "only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition."[17]

[7] We have similarly recognized that for judicial estoppel to apply, the court must have accepted a previous inconsistent position.[18] Therefore, whether judicial estoppel applies depends upon whether Kent "successfully and unequivocally" asserted a position in the divorce proceeding that is inconsistent with his position in this lawsuit. Kent claims that John misrepresented at their November 19, 2004, meeting that the corporations were not for sale. Yet, the property settlement agreement states that Kent did not rely "upon any representations whatsoever,

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[13] *Id.* at 798, 539 N.W.2d at 842 (citations omitted).

[14] *Melcher, supra* note 12.

[15] *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982).

[16] *Id.*

[17] *Id.* at 599 n.5.

[18] *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002).

whether by Wife or any other person, concerning such stock or the present or future value or prospects or potential income with respect to said stock."

And remember, he specifically agreed to waive and relinquish any further inquiry into the stock, and he directed his attorney not to pursue any further inquiry into the stock. He also agreed that the allocation of the stock and the payment for the stock is "final, absolute and not subject to adjustment, question or challenge for any reason, whether known or unknown and whether now existing or arising in the future." Additionally, he testified at the divorce proceedings that cash payment to him for the stock was fair and reasonable. He also agreed that any changes regarding the stock's value or changes to the corporations' structure, mergers, sales, or the like would not affect the value of the stock in which he claimed an interest. In sum, Kent represented in the divorce proceeding that he did not rely upon anyone in entering into the property settlement agreement regarding the stock. His representations provided a basis for the court's acceptance of the property settlement agreement. Backpedaling, he now argues that he did rely upon John's statements that the corporations were not for sale when he agreed to the property settlement.

Despite any statements made to Kent, the agreement was clearly intended to preclude further claims related to the corporations' sale. Kent cannot show that he did not understand the consequences of signing the property settlement agreement. These inconsistent positions support the district court's determination that his claim is judicially estopped.

Giving Kent the benefit of all reasonable inferences deducible from the evidence, we conclude no genuine issue of material fact exists whether Kent's claim is judicially estopped. If Kent did not rely upon any representations regarding the stock when he entered the property settlement agreement, this would clearly include his representation that he did not rely upon any statements regarding the potential sale of the stock, or the lack thereof. The language of the property settlement is not limited to foreclosing Kent's reliance solely on any values placed on the stock. It also forecloses his reliance on any representations

regarding the stock, including the potential sale of the corporations. Because Kent is adopting inconsistent positions, his claim is judicially estopped. The district court did not err in granting summary judgment.

AFFIRMED.

MICHAEL P. WALSH, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE BOARD OF PUBLIC ACCOUNTANCY OF THE STATE OF NEBRASKA, APPELLEE.

759 N.W.2d 100

Filed January 9, 2009. No. S-07-1083.

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: Accounting: Disciplinary Proceedings.** The Nebraska State Board of Public Accountancy is authorized to discipline the holders of certificates and permits who fail to comply with the technical or ethical standards of the public accountancy profession.
3. **Administrative Law: Accounting.** The Nebraska State Board of Public Accountancy has the authority to adopt and promulgate rules and regulations of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accountancy and to govern the administration and enforcement of the Public Accountancy Act.
4. **Administrative Law: Accounting: Disciplinary Proceedings.** After notice and hearing, the Nebraska State Board of Public Accountancy may take disciplinary action against a permitholder for, among other reasons, violation of a rule of professional conduct adopted and promulgated by the board under the authority granted by the Public Accountancy Act.
5. ____: ____: ____. The types of disciplinary action available to the Nebraska State Board of Public Accountancy include reprimand, suspension, probation, placement of limits on a permit or certificate, revocation of a permit or certificate, and imposition of a civil penalty and costs.
6. **Administrative Law.** An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
7. **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.

8. ____. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

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

John P. Raynor, of Raynor, Rensch & Pfeiffer, for appellant.

Robert T. Grimit and John J. Heieck, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Noel L. Allen, of Allen & Pinnix, P.A., for amicus curiae National Association of State Boards of Accountancy.

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

WRIGHT, J.

I. NATURE OF CASE

The Nebraska State Board of Public Accountancy (Board) imposed sanctions on Michael P. Walsh for violation of its rules. The Board found that Walsh improperly advertised that he was a certified public accountant (CPA) without using a disclaimer to indicate that he was an "inactive registrant." The Board reprimanded Walsh and placed him on probation for 3 years, with the condition that he include the disclaimer along with any use of the CPA designation. The Board also found that Walsh impersonated his brother-in-law to obtain insurance information, an act which qualified as a "discreditable act" under the Board's rules. The Board reprimanded Walsh and placed him on probation for a concurrent term of 3 months. The Lancaster County District Court affirmed the order of the Board. Walsh appeals.

II. 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. *Nothnagel v. Neth, ante* p. 95, 752 N.W.2d 149 (2008).

III. FACTS

Walsh became an active CPA in Nebraska in 1977 and continued in that status through June 30, 2002. Walsh did not meet the requirements for continuing education, and he applied for and was issued an inactive permit for the period of July 1, 2002, to June 30, 2004. He continued to request and receive biennial inactive permits through June 30, 2008.

In 2004, the Board was advised that Walsh was violating its rules and regulations by advertising that he was a CPA without including a disclaimer that he was an inactive registrant. The yellow pages of a 2004 Omaha-area telephone directory included a listing for "CPA MICHAEL P WALSH" under "Accountants-Certified Public." The Board issued a "cease and desist notice" to Walsh, ordering him to immediately stop use of the CPA designation in any manner. He was directed to cancel the listing for future telephone directories and to send the Board a copy of a certified letter and return receipt to prove that he asked the telephone directory company to cancel the listing.

In response, Walsh allegedly sent a letter on February 23, 2005, to the telephone directory company requesting that he no longer be listed under the CPA classification in the yellow pages. A copy of the letter was received by the Board on March 1. Notwithstanding the letter, Walsh's listing continued and was renewed in 2005 and 2006. Walsh paid the bill for the listing each year.

In July 2005, the Board received a letter from Stephen F. Teiper, who was Walsh's brother-in-law, which accused Walsh of impersonating Teiper on the telephone to obtain financial information from Teiper's insurance company. According to Teiper, Walsh identified himself as Teiper and gave the insurance company Teiper's Social Security number. Walsh admitted that he had impersonated Teiper in order to obtain financial information about Teiper's accounts.

The Board filed a complaint against Walsh on March 6, 2006, for violation of the Board's rules and regulations in two respects. The complaint alleged that Walsh (1) held himself out to the public as a permitholder when he advertised under the "Accountants-Certified Public" category in the telephone directory without including the disclaimer that he was inactive and (2) engaged in a discreditable act when he impersonated Teiper to obtain information from his insurance company.

At a hearing before the Board, Walsh acknowledged that he continued to renew his listing in the CPA section of the telephone directory without the disclaimer on advice of counsel that he was permitted to do so, even though he was inactive. Walsh acknowledged that he had intentionally and willfully ignored the Board's policy requiring use of the disclaimer in advertising.

Walsh also acknowledged that he had identified himself to the insurance company as Teiper. Walsh said that Teiper had provided his Social Security number and date of birth to allow Walsh to obtain information from the insurance company on Teiper's behalf.

The Board found that Walsh had intentionally and with knowledge of the Board's rules and regulations violated the rules by using "Certified Public Accountant" or "CPA" without the disclaimer indicating that he was an inactive registrant. As a sanction, the Board reprimanded Walsh and placed him on probation for 3 years with the condition that he cease using "Certified Public Accountant" or "CPA" within 30 days on his business cards, letterhead, advertising, tax returns, checks, or other written material provided to the public, unless it was also accompanied with the disclaimer "inactive registrant."

The Board also found that Walsh had committed a discreditable act when he lied to the insurance company and affirmatively represented that he was Teiper. The Board concluded that Walsh's conduct in impersonating a third party to secure financial information about that third party was reprehensible and reflected adversely on Walsh's fitness to engage in the practice of public accountancy. As a sanction, the Board reprimanded Walsh and placed him on probation for a term of

3 months to run concurrently to the previous sanction. He was also ordered to obtain 4 hours of continuing education in ethics by December 22, 2006. The Board ordered Walsh to pay costs and expenses not to exceed $3,000 within 6 months.

Walsh appealed to the Lancaster County District Court, which affirmed the Board's order in its entirety.

IV. ASSIGNMENTS OF ERROR

Walsh assigns the following errors, which we have consolidated and restated: Concerning the charge that he violated the Board's rules by including the CPA designation in his advertising, Walsh claims that the district court and the Board erred (1) in finding that the Board had subject matter jurisdiction over Walsh's tax return business, (2) in not finding that the Board's rules enlarge and modify the enabling statutes, (3) in not finding that the Board's actions violated Walsh's due process rights when the Board found he violated a rule not named in the complaint, and (4) in not finding the requirement of using the disclaimer "inactive registrant" violates Walsh's First Amendment right to free speech under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

Concerning the discreditable acts charge, Walsh claims that the district court and the Board erred (1) in not finding that 288 Neb. Admin. Code, ch. 5, § 007.01 (2005), is unconstitutionally vague; (2) in finding there was a sufficient nexus between the practice of public accountancy and Walsh's behavior for the Board to discipline him; and (3) in not dismissing the discreditable acts charge when the Board denied Walsh his "Seventh Amendment" right to confront his accuser.

V. ANALYSIS

[2,3] We begin with a review of the Public Accountancy Act, Neb. Rev. Stat. §§ 1-105 to 1-171 (Reissue 2007) (Act), and the Board's rules and regulations, which govern the practice of public accountancy in Nebraska. The Board's purpose is "to protect the welfare of the citizens of the state by assuring the competency of persons regulated" under the Act through administration of CPA examinations, issuance of certificates

and permits, and monitoring the requirements for continued issuance of certificates and permits. § 1-105.01. The Board is also authorized to discipline the holders of certificates and permits who fail to comply with the technical or ethical standards of the public accountancy profession. *Zwygart v. State*, 273 Neb. 406, 730 N.W.2d 103 (2007), citing § 1-105.01. The Board has the authority to adopt and promulgate "rules and regulations of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accountancy and to govern the administration and enforcement of the . . . Act." § 1-112. See, also, *Zwygart, supra*.

A permit to engage in the practice of public accountancy is issued by the Board to persons who hold certificates issued by the Board and who have met experience requirements. § 1-136(1). Permits for certificate holders may be renewed biennially for certificate holders and registrants in good standing. § 1-136(2)(b).

A certificate holder or registrant who has not lost his or her right to issuance or renewal of a permit and "who is not actively engaged in the practice of public accountancy in this state may file a written application with the board to be classified as inactive." § 1-136(4). The person is then carried on an "inactive roll" and may be issued a current permit upon application and payment of the current permit fee. *Id.*

[4,5] The "'[p]ractice of public accountancy'" is defined in 288 Neb. Admin. Code, ch. 3, § 001.17 (1995), as "the performance or offering to perform by a person holding himself out to the public as a permit holder . . . of one or more kinds of services involving . . . the preparation of tax returns or the furnishing of advice on tax matters." Whether active or inactive, a permitholder "shall be styled and known as a certified public accountant and may also use the abbreviation C.P.A." § 1-122. However, the Board's rules provide that when an inactive registrant uses "Certified Public Accountant" or "CPA" with his or her name, he or she shall also use "the disclaimer 'Inactive Registrant' in parentheses immediately after the title or abbreviation." 288 Neb. Admin. Code, ch. 7, § 003.01 (2007). After notice and hearing, the Board may take

disciplinary action against a permitholder for, among other reasons, violation of a rule of professional conduct adopted and promulgated by the Board under the authority granted by the Act. § 1-137(4). The types of disciplinary action available to the Board include reprimand, suspension, probation, placement of limits on a permit or certificate, revocation of a permit or certificate, and imposition of a civil penalty and costs. See § 1-148.

1. Advertising Charge

(a) Subject Matter Jurisdiction

Walsh asserts that the Board did not have subject matter jurisdiction over him because the only service he provided to clients was the completion of tax returns. This assignment of error has no merit. As noted earlier, the Board is authorized to discipline the holders of certificates and permits who fail to comply with the technical or ethical standards of the public accountancy profession. *Zwygart v. State*, 273 Neb. 406, 730 N.W.2d 103 (2007). Walsh used the "CPA" designation in his advertising and, therefore, submitted himself to the jurisdiction of the Board.

The definition of the "'[p]ractice of public accountancy'" in the Board's rules includes the service of preparing tax returns. 288 Neb. Admin. Code, ch. 3, § 001.17. Thus, the Board has jurisdiction over those persons who hold themselves out as permitholders and who prepare tax returns. By advertising in the telephone directory as a CPA and tax preparer, Walsh held himself out as a CPA, and he was subject to the jurisdiction of the Board.

(b) Board's Rules

Walsh next claims that the Board's rules enlarge and modify the enabling statutes. As previously noted, the Board has the authority to adopt and promulgate rules and regulations of professional conduct and to govern the administration and enforcement of the Act. See *Zwygart, supra*. See, also, §§ 1-108 and 1-112. State law provides a procedure for the adoption of rules and regulations that are "designed to implement, interpret, or

make specific the law enforced or administered" by an agency. Neb. Rev. Stat. § 84-901(2) (Reissue 2008).

[6] An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005). We have often held, however, that an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Id.* In this case, the Board is charged by statute with "protect[ing] the welfare of the citizens of the state by assuring the competency of persons regulated" under the Act. See § 1-105.01. The Board has the authority to adopt rules that will "make specific" the laws which it is directed to enforce. See § 84-901(2). It has the authority to discipline certificate holders and permitholders who fail to comply with the technical or ethical standards of the public accountancy profession. *Zwygart, supra*. See, also, § 1-105.01.

The Board's rules provide: "Whenever using 'Certified Public Accountant' or 'CPA' with his or her name, an inactive registrant shall use the disclaimer 'Inactive Registrant' in parentheses immediately after the title or abbreviation." 288 Neb. Admin. Code, ch. 7, § 003.01. The district court found that the Board's restrictions on the advertisement of inactive registrants and the requirement of the use of the disclaimer serve the fundamental purpose of the Act in ensuring that the public is able to distinguish among those who are permitted to practice public accountancy and those who are not. We agree.

The rules adopted by the Board do not enlarge or modify the Act. The Board is authorized to promulgate rules which allow it to meet the purpose of ensuring the competency of persons practicing public accountancy. There is no merit to Walsh's argument.

(c) Due Process

Walsh also argues that his due process rights were violated because the complaint charged that he had violated an

advertising rule, but he was found to have violated the rule requiring a disclaimer.

The complaint charged that Walsh had violated 288 Neb. Admin. Code, ch. 3, § 001.09 (1995), which defines the phrase "'[h]olding out to the public as a permit holder'" as follows:

> [A]ny representation that a person holds a permit to practice made in connection with an offer to perform or the performance of services to the public. Any such representation is presumed to invite the public to rely upon the professional skills implied by the permit in connection with services offered to be performed. For purposes of this definition and these rules, a representation shall be deemed to include any oral or written communication conveying that a licensee holds a permit, including the use of titles or legends displayed in letterheads, business cards, office doors, advertisements, and listings.

Walsh argues that his due process rights were violated because he was actually found to have violated 288 Neb. Admin. Code, ch. 7, § 003.01, which provides: "Whenever using 'Certified Public Accountant' or 'CPA' with his or her name, an inactive registrant shall use the disclaimer 'Inactive Registrant' in parentheses immediately after the title or abbreviation." He claims that he was never given notice of the disclaimer charge. We find no merit to this argument.

Walsh was on notice that the Board charged him with violating the rules against holding himself out to the public as a permitholder. Interwoven with this rule is the requirement that an inactive registrant include the disclaimer. Walsh had filed a brief on this issue 3 weeks before the hearing that addressed the use of the disclaimer. We conclude that Walsh had sufficient notice as to the rules he allegedly violated and that his due process rights were not infringed.

(d) First Amendment

Next, Walsh argues that the Board's charge that he violated the rule requiring a disclaimer violates the First Amendment right to free speech under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[7] There is nothing in the record to indicate that this argument was presented to the district court for consideration. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State ex rel. Stenberg v. Consumer's Choice Foods, ante* p. 481, 755 N.W.2d 583 (2008). The district court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

2. Discreditable Act Charge

(a) Constitutionality

[8] Walsh argues that the district court erred in failing to find that 288 Neb. Admin. Code, ch. 5, § 007.01, is unconstitutionally vague. Walsh offers no additional argument beyond merely stating that the "vagueness of the Catch-All Standard" of the Board's rules violates the state and federal Constitutions. See brief for appellant at 27. To be considered by this court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error. *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). We need not consider this assigned error further.

(b) Nexus

Next, Walsh claims there was not a sufficient nexus, between the practice of public accountancy and Walsh's activity in lying to the insurance company, for the Board to discipline him.

The Board's rules provide that "[a] licensee shall not commit an act that reflects adversely on his fitness to engage in the practice of public accountancy." 288 Neb. Admin. Code, ch. 5, § 007.01. The record is clear that Walsh impersonated Teiper and lied to the insurance company. The Board is authorized to adopt rules and regulations "of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accountancy." § 1-112.

This court has stated that "like attorneys or medical professionals, [CPA's] must demonstrate a high degree of moral and ethical integrity." *Troshynski v. Nebraska State Bd. of Pub.*

Accountancy, 270 Neb. 347, 353, 701 N.W.2d 379, 385 (2005). We have also stated:

> "The field of public accounting is a specialized one and the legislature has seen fit to regulate it. A certificate as a [CPA] indicates to the public that the person holding such a certificate possesses the highest sort of qualifications and is one in whom may be placed the utmost trust and confidence. . . ."

Zwygart v. State, 273 Neb. 406, 416, 730 N.W.2d 103, 112 (2007), quoting *Smith v. State Board of Accountancy of Kentucky*, 271 S.W.2d 875 (Ky. 1954).

We then stated:

> It is readily apparent that individuals rely upon honesty, integrity, sound professional judgment, and compliance with government regulations when they consult a CPA, even if the CPA may not be specifically acting as an accountant. . . . Accounting is a regulated profession, and its members are held to standards established by the Board.

Zwygart, 273 Neb. at 417, 730 N.W.2d at 112.

The district court found that a person could not knowingly impersonate another and make false statements without tainting the individual's reputation as a CPA and the reputation of the profession as a whole. We agree with the district court. Accountants are held to the standards established by the Board and must demonstrate moral and ethical integrity in the same manner as attorneys and medical professionals. Walsh's claim that there is no nexus between his actions and the practice of public accountancy lacks merit.

(c) Right to Confront Accuser

Finally, Walsh assigns as error the district court's failure to dismiss the discreditable act charge because the Board denied his "Seventh Amendment" right to confront his accuser. The right to confront one's accuser is guaranteed by the Sixth Amendment to the U.S. Constitution, which provides the right to confront witnesses "[i]n all criminal prosecutions." The proceeding against Walsh was purely civil in nature, and his constitutional rights are not at issue.

3. Summary

Walsh failed to include a disclaimer stating that he was an inactive registrant in his advertising in the telephone directory, which failure violated the rules promulgated by the Board. He continued the violation even after he was directed by the Board to cease and desist. Walsh also impersonated his brother-in-law when he called an insurance company in order to obtain financial information. This action reflects adversely on the public accountancy profession, which demands a high level of honesty and integrity.

This case comes to us for review of a judgment rendered by a district court pursuant to the Administrative Procedure Act, and as such, the judgment may be reversed, vacated, or modified 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. See *Nothnagel v. Neth, ante* p. 95, 752 N.W.2d 149 (2008). We find no errors on the record reviewed by the district court. The court's decision affirming the order of the Board conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

VI. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

HEADNOTES
Contained in this Volume