trial, but that the jury was "to make nothing of that and make no assumptions or take that in any way as to determining his guilt or innocence in this case."

Based on the facts, we conclude that the district court did not err when it found that Fox knowingly and voluntarily waived his constitutional and statutory right to be present at trial.

CONCLUSION

The district court did not err when it determined that Fox was competent to stand trial. The district court did not err when it concluded that Fox knowingly and voluntarily waived his right to be present at trial. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

MACK DOWNEY AND DEBORAH DOWNEY, HUSBAND AND WIFE, AND FERGUSON SIGNS, INC., APPELLEES AND CROSS-APPELLANTS, V. WESTERN COMMUNITY COLLEGE AREA, WHICH OPERATES WESTERN NEBRASKA COMMUNITY COLLEGE, APPELLANT AND CROSS-APPELLEE.

808 N.W.2d 839

Filed January 6, 2012. No. S-10-867.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **Judgments: Appeal and Error.** When determining the sufficiency of the evidence to sustain the trial court's judgment, a court must consider the evidence in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and the successful party is entitled to the benefit of every inference that can be deduced from the evidence.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Appeal and Error.** An appellate court resolves questions of law independently of the trial court.
5. **Negligence: Liability: Contractors and Subcontractors.** A nondelegable duty rule applies when the issue is whether an owner, who has maintained possession of the property, can be held liable for defects that arise on the premises through the negligence of an independent contractor.
6. **Negligence: Liability: Proximate Cause.** A possessor of land is liable for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant

either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

7. **Negligence.** Several factors relate to whether a possessor has breached a duty to use reasonable care. These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.
8. **Negligence: Invitor-Invitee: Licensee: Contractors and Subcontractors.** After *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), whether a possessor of land has breached a duty to use reasonable care to protect lawful visitors is determined under the same test for both licensees and invitees, which includes independent contractors.
9. **Negligence: Invitor-Invitee.** Even if a possessor of land has reason to believe that a lawful visitor will discover a defect, it can still have a duty to take reasonable measures to protect lawful visitors under circumstances showing that it should expect that visitors will not realize the danger or will fail to protect themselves.
10. **Negligence.** Whether a defendant breaches a duty is a question of fact for the fact finder.
11. **Workers' Compensation: Contribution.** Claims for contribution against employers covered by the workers' compensation statutes are barred.
12. **Workers' Compensation: Contribution: Parties: Liability.** An employer covered by workers' compensation does not have a common liability with a third party, which is necessary for contribution.
13. **Workers' Compensation: Statutes: Liability.** Because an employer covered by workers' compensation has no liability in tort, a release with such an employer is not a release with a "person liable" under Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008).
14. **Liability: Contribution.** Indemnity and contribution are distinct concepts.
15. **Negligence: Employer and Employee: Liability.** A defendant can point to the negligence of the employer and claim that the employer was the sole cause of the accident. But the defendant may not reduce his or her own liability by apportioning some of the fault to the employer.
16. **Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.
17. ____: ____. Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.

18. **Liability: Contribution: Damages.** If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution.
19. **Contribution: Words and Phrases.** Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard A. Douglas and Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Ossian, P.C., for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee Ferguson Signs, Inc.

Kyle J. Long, of The Robert Pahlke Law Group, for appellees Mack Downey and Deborah Downey.

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

CONNOLLY, J.

Like many cases arising from construction site injuries, this appeal raises several interrelated issues. These include premises liability, the nondelegable duty doctrine, indemnification, and the thorny issue of whether our comparative negligence statutes allow a court to apportion liability to an employer who is immune from suits in tort because of our workers' compensation statutes.

Mack Downey and his wife sued Western Community College Area, which operates Western Nebraska Community College (the College), after Downey suffered severe injuries from a fall that occurred while he was replacing a scoreboard at the College. His employer, Ferguson Signs, Inc., was named as a plaintiff in the suit to preserve a subrogation interest for workers' compensation benefits. After a bench trial, the court found that the College was liable for a portion of Downey's injuries. It also apportioned liability to Downey and Ferguson Signs. The College appeals, and the Downeys and Ferguson Signs cross-appeal.

I. BACKGROUND

In 2003, the College requested bids to replace a scoreboard in its gym. The bid included a requirement that the winning bidder help the College remove the old scoreboard. The College left the means and method of removing the existing scoreboard to the contractor and subcontractors. The College awarded the project to NEVCO Scoreboard Company. Ferguson Signs was a subcontractor for the project.

The scoreboard was about 12 feet square at the top, 9½ feet square at the bottom, and 6 feet tall. The scoreboard had a wooden platform installed about 3 feet above the metal floor of the scoreboard. From the top of the scoreboard to the wooden floor was about 3 to 4 feet. This platform sat at an angle within the scoreboard. Looking at it from the top, it looked like a diamond set in a square. This left triangular-shaped gaps at the corners of the scoreboard where the metal floor was exposed. The bottom of the scoreboard was about 30 feet off the gym floor.

Although some employees of the College had previously entered the scoreboard without the use of safety equipment, they knew that the sheet metal floor was not a weight-bearing surface. Still, no one at the College told Downey or any of the other contractors that the scoreboard's floor was not weight bearing.

Downey and Ferguson Signs' original plan to remove the old scoreboard was to simply lower the scoreboard to the floor. But the plan changed because there was no lift system in place that would allow them to lower the scoreboard. Ferguson Signs discussed the need for a new plan with a maintenance worker for the College. They agreed that Ferguson Signs would have to weld a new plate to the gym ceiling to allow an attached chain to lower the scoreboard. Although there was a discussion about hiring another subcontractor, the owner of Ferguson Signs decided that Downey could do the necessary welding. The welding point was to be on the ceiling directly above the middle of the scoreboard, which would mean that Downey would have to enter the scoreboard to do the welding. Despite at least one employee of the College knowing that one of the subcontractors would have to enter the scoreboard to remove

it, the College and its employees failed to warn Downey or Ferguson Signs of the potential danger.

Before Downey's fall, the owner of Ferguson Signs and Downey had climbed the scaffolding and looked into the scoreboard to try to find a way to lower it. Neither of them, however, ever entered the scoreboard. Downey testified that he could not see how the metal floor was attached to the scoreboard. According to Downey, the metal could have been weight bearing depending on how it was attached.

A custodian working for the College saw Downey's fall. He stated that Downey climbed the scaffolding next to the scoreboard. Then he put one leg over, swung the other leg over, and then immediately fell through the bottom of the scoreboard to the floor 30 feet below. He landed headfirst and suffered serious injuries.

Downey received workers' compensation benefits from Ferguson Signs. Then, Downey and his wife sued the College. Ferguson Signs was named as a plaintiff because it had paid workers' compensation benefits to Downey and wished to preserve its subrogation interest. Downey alleged that the College was negligent as follows:

- failing to warn him of the false floor;
- failing to provide safe access;
- failing to provide fall protection;
- failing to provide anchor points for Downey to tie onto; and
- failing to provide reasonably safe premises.

Downey also asserted a premises liability claim against the College.

In its answer, the College alleged that it was not in control of the construction site when the accident occurred. The College also argued that the condition of the scoreboard was open and obvious. Finally, the College argued that the plaintiffs had been contributorily negligent to the extent that it should bar recovery for Downey.

1. Trial on Liability

The court determined that the College had breached a nondelegable duty arising from its control of the worksite. This duty required the College to provide Downey a safe place to work. To determine whether this duty was breached, the court

applied the test for premises liability we laid out in *Herrera v. Fleming Cos.*[1] and subsequent cases. The court ultimately found the College liable.

According to the court, Ferguson Signs and Downey were also negligent. Downey was negligent in entering the scoreboard without first determining whether the metal floor would support his weight and in failing to use safety equipment and proper fall protection equipment.

The court concluded that Ferguson Signs was negligent in several ways:

- failing to comply with Occupational Safety and Health Administration (OSHA) regulations;
- failing to determine whether surfaces on which its employees would be working could support their weight; and
- failing to provide proper fall protection equipment.

In sum, the court ruled that Ferguson Signs had a duty to protect Downey from injury and that it failed to discharge that duty.

The court found that the negligence of the College, Downey, and Ferguson Signs all combined to produce a single injury. The court determined that Downey was 33-percent negligent, Ferguson Signs was 33.5-percent negligent, and the College was 33.5-percent negligent.

2. Trial on Damages

The court found that Downey's economic damages totaled $1,058,950.50, while his noneconomic damages were $500,000. It found that Downey's wife had sustained noneconomic damages of $200,000.

As part of its apportionment of damages, the court then confronted an issue involving the interplay of Nebraska's comparative negligence rule and its workers' compensation statute. The court stated in its order that the issue is whether a "workers' compensation employer's negligence can be considered for purposes of comparative negligence and apportionment of damages against the third party tortfeasor." The court concluded that it could be. It ruled that an employer who has

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[1] *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

paid workers' compensation benefits is a "'released person'" under Neb. Rev. Stat. § 25-21,185.11(1) (Reissue 2008) and that Ferguson Signs' share of the liability had to be subtracted from Downey's recovery from the College.

The court rejected the College's claim for indemnification and contribution. The court determined that any claim for contribution would be barred by the exclusivity provision of the workers' compensation laws. And the court also rejected any claims for indemnification. It found that there was no express contractual term providing for such indemnification and that there was no special relationship that would give rise to an implied indemnification.

II. ASSIGNMENTS OF ERROR

The College assigns, restated and consolidated, that the district court erred in

(1) concluding that the College was liable under a premises liability theory;

(2) not finding that Downey's and Ferguson Signs' negligence and failure to comply with OSHA regulations were the proximate cause of the accident;

(3) not combining Downey's and Ferguson Signs' negligence for comparative negligence purposes;

(4) not reducing Downey's economic damages by Ferguson Signs' share of the allocated negligence; and

(5) not concluding that Ferguson Signs owed an independent duty to the College that created a special relationship that would allow for indemnification.

On cross-appeal, the Downeys and Ferguson Signs assign that the district court erred in

(1) concluding that Ferguson Signs was a "released person" under § 25-21,185.11; and

(2) apportioning negligence to Ferguson Signs and reducing the Downeys' recovery as a result.

III. STANDARD OF REVIEW

[1,2] In actions brought under the Political Subdivisions Tort Claims Act,[2] an appellate court will not disturb the factual

[2] Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002).

findings of the trial court unless they are clearly wrong.[3] When determining the sufficiency of the evidence to sustain the trial court's judgment, a court must consider the evidence in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and the successful party is entitled to the benefit of every inference that can be deduced from the evidence.[4]

[3,4] Statutory interpretation presents a question of law.[5] An appellate court resolves questions of law independently of the trial court.[6]

IV. ANALYSIS

1. Is the College Liable Under a Premises Liability Theory?

The trial court concluded that the College had a nondelegable duty to provide Downey with a safe place to work. It determined that this nondelegable duty arose from the College's "'possession and control of premises.'"[7] To determine whether the College had breached this nondelegable duty, the court applied our test for premises liability to the College. But the nondelegable duty rule does not apply here.

[5] A nondelegable duty rule applies when the issue is whether an owner, who has maintained possession of the property, can be held liable for defects that arise on the premises through the negligence of an independent contractor.[8] This is a type of vicarious liability. In contrast, the alleged defects here existed before the College invited a contractor to the property for repairs. So the College's duty to provide Downey with a safe place to work was the duty that a possessor of property

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[3] See *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[4] See *id.*

[5] *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

[6] See *id.*

[7] See *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

[8] See, e.g., *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). See, also, Restatement (Second) of Torts § 422 (1965).

owes to a lawful visitor. And thus, as we explain later, whether the College maintained possession of the premises during repairs is irrelevant to whether it breached its direct duty to Downey. In short, the nondelegable duty rule did not apply here. But the court correctly applied premises liability elements to decide the issue.

The district court ultimately concluded that the College was liable to Downey on a theory of premises liability. The College asserts that this was error. It argues (1) that it was not in control of the worksite, (2) that the floor of the scoreboard did not constitute a latent defect, (3) that the condition was open and obvious, and (4) that it did not breach its duty.

[6] A possessor of land is liable for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.[9]

[7] Several factors relate to whether a possessor has breached a duty to use reasonable care.[10] These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or

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[9] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008); *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Herrera, supra* note 1.

[10] *Aguallo, supra* note 9; *Herrera, supra* note 1.

community in terms of inconvenience or cost in providing adequate protection.[11]

[8] The district court reasoned that the test for liability was modified for independent contractors by *Anderson v. Nashua Corp.*[12] The court concluded that a landowner's duty to independent contractors was limited to latent defects of which the independent contractor or his employees had no knowledge. But we decided *Anderson* in 1994. And in 1996, in *Heins v. Webster County*,[13] we abolished the distinction between invitees and licensees. After *Heins*, whether a possessor of land has breached a duty to use reasonable care to protect lawful visitors is determined under the same test for both licensees and invitees, which includes independent contractors.

As noted, one of the factors is the purpose for which the visitor entered the premises. Obviously, because we abolished the distinction between licensees and invitees, the relevant inquiry is not whether the visitor entered for his or her own purpose or for the possessor's purpose.[14] And an independent contractor is a business invitee, to whom a possessor owes a duty to protect against dangers it either knows of or could have discovered with reasonable care.[15]

But a possessor of property is not liable for injury to an independent contractor's employee caused by a dangerous condition that arose out of the contractor's work, as distinguished from a condition of the property or a structure on the property.[16] In *Anderson*, we recognized this rule. But relying on *Plock v. Crossroads Joint Venture*,[17] we also stated that a possessor's

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[11] *Aguallo, supra* note 9, quoting *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[12] *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

[13] See *Heins, supra* note 11.

[14] See, generally, *id.*

[15] Marc M. Schneier, Construction Accident Law 63 (1999).

[16] See, e.g., *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004); *Anderson, supra* note 12. See, also, Schneier, *supra* note 15.

[17] *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

duty to independent contractors was limited to latent defects that the independent contractor or his employees do not have knowledge of. This rule is no longer valid. To the extent that *Plock* and *Anderson* hold that a modified duty applies to independent contractors, we disapprove.

(a) Control of the Premises

The College contends that the court incorrectly concluded that it was in control of the premises. As stated, whether the College maintained control of the premises is irrelevant to its liability on the facts of this case. It is true that premises liability often depends on an owner's possession of the property when the injury occurred.[18] But here, the College's alleged negligence is its breach of a duty to protect Downey from a preexisting danger. So the question is whether it had exercised reasonable care to protect Downey when it turned the premises over to Ferguson Signs.[19] Because the court's determination of possession during repairs was unnecessary here, we do not consider whether it correctly ruled on the issue.

(b) Should the College Have Expected That Downey Would Not Discover the Defect?

The College next argues that the court erred in finding that the non-weight-bearing nature of the scoreboard's floor was a defect that Downey would not discover. It referred to this as a "latent defect." Similarly, the College argues that the court erred in failing to find that the defect was not open and obvious.

This court has adopted the Restatement (Second) of Torts § 343A,[20] which states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

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[18] See, e.g., *Range, supra* note 9.

[19] See, *Tillman v. Great Lakes Steel Corp.*, 17 F. Supp. 2d 672 (E.D. Mich. 1998); Schneier, *supra* note 15.

[20] Restatement, *supra* note 8, § 343A at 218. See *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

[9] Although the court did not explicitly address the open and obvious defense,[21] this rule controls both of the College's arguments. That is, even if a possessor of land has reason to believe that a lawful visitor will discover a defect, it can still have a duty to take reasonable measures to protect lawful visitors under circumstances showing that it should expect that visitors will not realize the danger or will fail to protect themselves.[22] We expressed this rule as a factor a court must consider under *Heins*.

The court found that lawful visitors such as Downey might not recognize the danger, because the scoreboard's floor was not weight bearing. This was a factual finding of the court.[23] But, the College argues that Downey saw the floor of the scoreboard from the scaffolding as he was preparing to enter. Further, it points out Downey's testimony that he could see that the wooden floor did not cover the entirety of the scoreboard—namely, that there were gaps at the corners. It also highlights that Downey admitted he could not know whether the floor was weight bearing. Finally, it cites testimony from Ferguson Signs that most attachments similar to the floor of the scoreboard in this case are not weight bearing. But Downey claims that the College is either misrepresenting Ferguson Signs' testimony regarding this final statement or removing it from context.

Downey concedes that both he and Ferguson Signs inspected the scoreboard before they began work. Downey argues, however, that they were not able to see how the metal floor was fastened to the rest of the scoreboard because they were not able to get close enough. Downey claims that, in his experience, how the metal floors were attached to the scoreboard could determine whether it was weight bearing.

At best, the evidence is in conflict. But we do not resolve such conflicts. The court found that Downey would not realize the danger or would fail to protect himself from it. The court was not clearly erroneous in finding that Downey would not

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[21] See *John, supra* note 20.

[22] See Restatement, *supra* note 8, § 343A.

[23] See *Aguallo, supra* note 9.

realize the danger or that he would fail to protect himself from the danger.

(c) Open and Obvious Condition

As mentioned, the rule we discussed in the previous section controls both of the College's arguments. Indeed, the court's finding that the defect was not open and obvious is implicit in the court's finding that Downey either would not discover or realize the danger or would fail to protect himself or herself against the danger. The court could not have found that Downey would have failed to recognize the danger, while at the same time holding that such a danger is open and obvious. Because we concluded that the court's factual finding that Downey would not recognize the danger was not clearly erroneous, we also conclude that the court's implicit finding that the condition was not open and obvious is also not clearly erroneous.

(d) Did the College Breach Its Duty of Reasonable Care?

Finally, the College argues that it did not breach its duty. It argues that it acted with reasonable care by granting Downey and Ferguson Signs control of the site, allowing Downey to observe the interior of the scoreboard, and restricting access to the scoreboard to only Ferguson Signs and its employees.

As previously stated, the following factors are relevant in determining whether the College breached its duty. These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction of giving the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.[24]

[10] Although the court did not expressly weigh these factors, it is uncontested that the College gave no warning to

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[24] *Aguallo, supra* note 9, quoting *Heins, supra* note 11.

either Downey or Ferguson Signs. It is this failure to warn that was the basis of the College's liability. Ultimately, whether a defendant breaches a duty is a question of fact for the fact finder.[25] And we review it for clear error. We find no clear error in the court's finding.

2. The Court Erred in Apportioning Negligence to Ferguson Signs

We next consider the Downeys' and Ferguson Signs' cross-appeals. We do so at this point because our resolution of this issue ultimately affects our resolution of some of the College's other assignments of error. In their cross-appeals, both the Downeys and Ferguson Signs argue that the court erred in apportioning negligence to Ferguson Signs. They argue that reducing the College's liability by assigning negligence to Ferguson Signs would circumvent the rule that a third-party tort-feasor is not entitled to contribution from the employer.

The question presented is whether Ferguson Signs is a "released person" within the meaning of § 25-21,185.11. If it is, then the court correctly reduced Downey's recovery from the College by Ferguson Signs' share of the obligation.

Section 25-21,185.11 provides in part:

> (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

We conclude that Ferguson Signs is not a "released person" under the statute.

[11,12] Section 25-21,185.11 refers to a release entered into by the claimant with a "person liable." But Ferguson Signs is not such a person because it was never liable in tort for the

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[25] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

injury. In *Vangreen v. Interstate Machinery & Supply Co.*[26] and *Harsh International v. Monfort Indus.*,[27] we held that claims for contribution against employers covered by the workers' compensation statutes were barred. We based this result, in part, upon the theory that an employer covered by workers' compensation does not have a common liability with the third party, which is necessary for contribution.[28]

In *Vangreen* and *Harsh International*, we noted that our rule denying contribution was in line with the majority rule. "The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."[29] And arguments that a state's adoption of comparative negligence altered this rule "have been consistently unsuccessful."[30] "There is nothing in the embracing of comparative negligence that implies any intention to alter the fundamental principle of exclusiveness of compensation liability."[31] Third-party defendants, such as the College, "are usually unable to raise the concurrent negligence of plaintiff-employers as a defense."[32] Because employers are immune from lawsuits by their employees, most courts are unwilling to reduce the liability of third-party tort-feasors by amounts not recoverable by the employees themselves.[33] Our research reveals the same.

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[26] *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976).

[27] *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003).

[28] See *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009).

[29] 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 121.02 at 121-11 to 121-12 (2009).

[30] *Id.* at 121-12.

[31] *Id.*

[32] 2 Mark A. Rothstein et al., Employment Law § 7.38 at 428 (4th ed. 2009).

[33] *Id.*

While there is authority to the contrary,[34] most courts do not allow a third-party tort-feasor to seek contribution from or argue the comparative negligence of the employer.[35]

[13] We agree with the majority rule, which is consistent with our decisions in *Vangreen* and *Harsh International*. To allow a court to apportion tort liability to an employer who, because of workers' compensation, is immune from tort liability is inconsistent with the rationale of these decisions. Thus, because an employer covered by workers' compensation has no liability in tort,[36] a release with such an employer is not a release with a "person liable" under § 25-21,185.11.

Admittedly, federal district courts in Nebraska have decided this question differently. In *Windom v. FM Industries, Inc.*,[37] the court refused to dismiss a cross-claim by a third party against a plaintiff that sought to reduce the plaintiff's recovery by the plaintiff's employer's share of the negligence. In its decision, the court in *Windom* distinguished between actions for

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[34] See, *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993); *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023, 166 Ill. Dec. 1 (1991); *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

[35] See, *Muller v. Gateway Building Systems, Inc.*, 743 F. Supp. 2d 1096 (D.S.D. 2010); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Durniak v. August Winter and Sons, Inc.*, 222 Conn. 775, 610 A.2d 1277 (1992); *Hanagami v. China Airlines, Ltd.*, 67 Haw. 357, 688 P.2d 1139 (1984); *Thompson v. Stearns Chemical Corp.*, 345 N.W.2d 131 (Iowa 1984); *C & K Lord v. Carter*, 74 Md. App. 68, 536 A.2d 699 (1988); *Van Hook v Harris Corp*, 136 Mich. App. 310, 356 N.W.2d 18 (1984); *Sweet v. Herman Bros., Inc.*, 688 S.W.2d 31 (Mo. App. 1985); *Cordier v. Stetson-Ross, Inc.*, 184 Mont. 502, 604 P.2d 86 (1979); *Bilodeau v. Oliver Stores, Inc.*, 116 N.H. 83, 352 A.2d 741 (1976); *Schweizer v. Elox Div. of Colt Industries*, 70 N.J. 280, 359 A.2d 857 (1976); *Layman v. Braunshweigische Maschinenbauanstalt*, 343 N.W.2d 334 (N.D. 1983); *Cacchillo v. H. Leach Machinery Co.*, 111 R.I. 593, 305 A.2d 541 (1973); *Hagemann v. NJS Engineering, Inc.*, 632 N.W.2d 840 (S.D. 2001); *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143 (Tenn. 2007); *Varela v. American Petrofina Co. of Texas*, 658 S.W.2d 561 (Tex. 1983).

[36] See 7 Larson & Larson, *supra* note 29.

[37] *Windom v. FM Industries, Inc.*, No. 8:00CV580, 2002 WL 378525 (D. Neb. Mar. 12, 2002) (unpublished opinion).

indemnity or contribution and a claim that sought "'only allocation or, in the alternative, a reduction of Plaintiff's recovery to the extent [the employer] is apportioned fault at trial.'"[38] The court also relied on a comment to the Nebraska jury instructions that predicted that an employer's negligence would be taken into account in an action because it is likely a "released person" within the meaning of § 25-21,185.11.[39] Finally, the court also took into consideration our decisions allowing a claim-based express contractual indemnification to be asserted against the employer[40] and a Nebraska Court of Appeals' decision that a third party can argue the employer was the sole cause of the employee's injury.[41]

[14] We disagree with the federal district court's analysis. We do not view the attempt to apportion liability to an employer immune from tort liability as meaningfully different from seeking contribution from an immune employer. In both cases, the third party seeks to limit its exposure based on the fault of the employer. But our decisions in *Vangreen* and *Harsh International* relied in part on the rationale that an employer has no such fault. To allow negligence to be imputed to an immune employer is inconsistent with our earlier decisions. Further, the district court's reliance on our decision in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*[42] was misplaced as that case involved an express contract for indemnity. While we have recognized a few situations in which indemnity will be allowed against an immune employer (including when an express contractual provision calls for indemnity),[43] we stress that indemnity and contribution are distinct concepts.[44] Our

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[38] *Id.* at *2.

[39] *Id.*

[40] See *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

[41] See *Steele v. Encore Mfg. Co.*, 7 Neb. App. 1, 579 N.W.2d 563 (1998).

[42] *Union Pacific RR. Co., supra* note 40.

[43] See *Harsh International, supra* note 27.

[44] See *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

decision allowing indemnity based upon an express contractual provision is distinguishable from claims for contribution or to diminish a plaintiff's recovery because of an employer's comparative negligence. As we explain shortly, those entitled to indemnity are generally free from personal fault while those entitled to contribution are not.

Finally, the federal district court also cited *Steele v. Encore Mfg. Co.*[45] in its analysis. We view that case as distinguishable from the present case. In *Steele*, the plaintiff sued the defendant for injuries he suffered while working on an air compressor for the defendant. The plaintiff's employer was joined as a defendant solely for subrogation purposes. The district court instructed the jury that it could not consider the conduct of the plaintiff's employer. After noting that the defendant was not seeking contribution or indemnification from the employer, the Court of Appeals held that the court should have allowed the jury to consider whether the employer's conduct was *the sole proximate cause* of the plaintiff's injuries. If the employer's conduct was the sole proximate cause, then the defendant could not have caused the injury, which would negate the plaintiff's prima facie negligence case against that defendant. In other words, the defendant was not arguing that the employer is jointly liable with it, the defendant was arguing that it is not liable at all.

[15] So, in the light of *Steele* and our decision today, a defendant can point to the negligence of the employer and claim that the employer was the sole cause of the accident. But the defendant may not reduce his or her own liability by apportioning some of the fault to the employer. We note that this approach is consistent with that of other jurisdictions.[46]

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[45] *Steele, supra* note 41.

[46] *Gatlin v. Cooper Tire & Rubber Co.*, 252 Ark. 839, 481 S.W.2d 338 (1972); *Archambault v. Soneco/Northeastern, Inc.*, 287 Conn. 20, 946 A.2d 839 (2008); *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821 (Del. 1995); *Chumbley v. Dreis and Krump Mfg. Co.*, 521 N.W.2d 192 (Iowa App. 1993); *Troup, supra* note 35; *Dresser Industries, Inc. v. Lee*, 880 S.W.2d 750 (Tex. 1993).

Finally, the legislative history of the bills that eventually established comparative negligence in Nebraska unambiguously supports our conclusion. The legislative history indicates that the Legislature sought to leave in place existing law. This history reflects the Legislature's understanding that "unless an employer is the sole . . . cause of the accident, . . . the employer's negligence, if any, is ignored."[47] And this is the result we reach today.

As mentioned, our rationale in *Vangreen* and *Harsh International* is controlling—an employer does not have shared liability with a third party. So, Ferguson Signs was not a released party within the meaning of § 25-21,185.11 and the court erred in apportioning fault to it. Thus, we remand the cause to the court to apportion Ferguson Signs' share of the negligence between the College and Downey.

3. Proximate Cause

The College's next assignments of error relate to proximate cause. The College argues that the failure of Downey and Ferguson Signs to comply with OSHA regulations was the proximate cause of Downey's injuries. This assignment of error is confusing in that the court did apportion a share of liability to both Downey and Ferguson Signs, which necessarily includes a finding that their negligence was *a* proximate cause of the injury.

We do not read the College's brief as arguing that its negligence was not a proximate cause of the accident. Nor do we view the College as raising an argument that the others' negligence was a supervening cause that would have absolved the College of liability. At best, we view this assignment of error as arguing that Downey and Ferguson Signs' share of the negligence either equaled or surpassed that of the College's, which would have prevented Downey from recovering.[48]

We have already decided that the court cannot apportion liability to Ferguson Signs. Based on that decision, remand is

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[47] Summary Analysis, L.B. 88, Judiciary Committee, 92d Leg., 1st Sess. 3 (Jan. 23, 1991).

[48] See Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008).

necessary to apportion that share of the negligence to the other remaining parties. We leave to the court to decide whether Downey's apportioned fault is sufficient to bar recovery.

4. Implied Indemnification

The College next argues that Ferguson Signs owes the College indemnification for any damages it is obligated to pay Downey because Ferguson Signs owes an independent duty to the College. The College does not claim that any contractual provision for indemnification exists. The College argues that because the indemnification is based upon an independent duty and does not arise from the injury per se, such indemnification would not be barred by the exclusivity provision of workers' compensation law. But because the College was liable in its own right, a claim for indemnity is inappropriate in this case.

[16-19] Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.[49] Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.[50] If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution.[51] Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.[52] In sum, "[o]ne who is him[self] or herself at fault is not due indemnity, because liability for indemnity exists only when the party seeking indemnity . . . is free of fault and has discharged a debt that should be paid wholly by the indemnitor."[53]

As we explained earlier, the College was directly liable, not vicariously liable. It was independently liable based on its own

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[49] *Kuhn, supra* note 44.

[50] *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992).

[51] *Id.*

[52] *Kuhn, supra* note 44; *Estate of Powell, supra* note 28; *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[53] 41 Am. Jur. 2d *Indemnity* § 21 at 439 (2005).

acts and omissions, not those of Ferguson Signs or NEVCO Scoreboard Company. The College was not free from any wrongdoing. It thus cannot claim indemnity.

V. CONCLUSION

Because of our decision, other issues that the parties assigned are no longer relevant. We conclude that the court did not err in finding the College liable. Further, it correctly denied the College's claim for indemnity. The court, however, did err in apportioning negligence to Ferguson Signs. On remand, the court should reapportion Ferguson Signs' share of the negligence to the remaining parties—Downey and the College. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CHAD NORMAN, APPELLANT.
808 N.W.2d 48

Filed January 6, 2012. No. S-10-888.

1. **Judgments: 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.
2. **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.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
4. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal.
6. **Criminal Law: Convicted Sex Offender: Notice.** Before determining that a defendant convicted of a crime not sexual in nature is subject to sex offender