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# AFFILIATED FOODS COOPERATIVE, INC., APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

611 N.W.2d 105

Filed May 26, 2000. No. S-98-1216.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ___: ___: ___. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Statutes.** Interpretation of a statute presents a question of law.
5. ___. A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.
6. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
7. **Administrative Law: Statutes: Legislature.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

David A. Domina and James F. Cann, of Domina Law, P.C., for appellee.

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

CONNOLLY, J.

This case presents the question whether charges for U.S. postage are a "cost of transportation" subject to Nebraska sales tax.

The appellants are the State of Nebraska, the Nebraska Department of Revenue (Department), and the State Tax Commissioner (collectively the State). The Department issued a deficiency assessment against Affiliated Foods Cooperative, Inc. (Affiliated Foods), for failure to collect sales tax on U.S. postage. Affiliated Foods used the postage to mail grocery advertisements to its members' customers. The State Tax Commissioner sustained the deficiency assessment. On appeal, the district court for Lancaster County ordered Affiliated Foods to pay only a portion of the deficiency assessment. The State appealed pursuant to Neb. Rev. Stat. § 84-913 (Reissue 1994) of the Administrative Procedure Act, and Affiliated Foods cross-appealed. We determine that charges for postage are a cost of transportation under Neb. Rev. Stat. §§ 77-2702.07(1)(c) and 77-2702.17(1)(c) (Cum. Supp. 1992), and are subject to sales tax. We affirm in part, and in part reverse and remand with directions.

## BACKGROUND

Affiliated Foods, a grocery wholesaler, is a cooperative owned by approximately 560 independent grocery retailers (members). Affiliated Foods acquires and warehouses food and other items for members to purchase and resell in their retail stores.

In addition to providing groceries at wholesale, Affiliated Foods operates a printing department that offers advertising services to members. This department puts together and sells weekly grocery ads for members to use in their businesses. Each member chooses the number of ads to purchase and the method by which the ads are distributed. One option is for Affiliated Foods to mail the ads directly to its members' customer lists. In this case, Affiliated Foods prints its bulk mail registration on the ads, then sorts, bags, and delivers them to the post office. Members are charged a printing cost for each ad, approximately 3 cents per ad, plus sales tax. There is no charge for the service of sorting, bagging, or delivering the ads to the post office. Members are charged for the amount of postage required to mail the ads, but Affiliated Foods does not collect sales tax on the price of postage.

The other distribution option is for Affiliated Foods to deliver the ads directly to a member's retail store. In this case, Affiliated Foods puts the ads on a delivery truck with the member's food order. There is a charge for the printing cost of each ad, approximately 3 cents per ad, plus sales tax. There is no charge for delivery of the ads to the store via delivery truck. Once the ads reach the store, the member distributes them to its customer list.

In either case, the billing for the ads appears on each individual member's weekly statement. Appearing on the statement is a charge for the ads and a separate charge for postage if the ad is distributed directly to a member's customer list. Sales tax is applied to the charge for the ads, but not for the postage.

The Department audited Affiliated Foods for the period of time between March 1, 1990, and February 28, 1993. A deficiency assessment was issued for sales tax on the postage charges paid to Affiliated Foods by its members who selected distribution of ads directly to their customer lists. The Department determined that the postage charges were part of the sales price and/or gross receipts of the ads under §§ 77-2702.17 and 77-2702.07. On the basis of this determination, the Department asserted that the postage charges were subject to sales tax.

Affiliated Foods protested the deficiency assessment, and the Tax Commissioner concluded that the assessment was proper and ordered payment. Affiliated Foods appealed the Tax Commissioner's decision to the district court under the Administrative Procedure Act. Upon a de novo review of the record made before the Tax Commissioner, the district court reversed in part and affirmed in part. It ordered Affiliated Foods to pay the portion of the deficiency assessment that accrued after January 24, 1993, the effective date of the revised Nebraska Sales and Use Tax Regulation 1-079, 316 Neb. Admin. Code, ch. 1, § 079 (1994). The district court determined that it would be inequitable to enforce the deficiency assessment for the entire audit period because Affiliated Foods had little warning that postage was taxable prior to passage of the 1993 regulation.

The State has appealed the district court's order reversing the deficiency assessment prior to January 24, 1993. Affiliated Foods has cross-appealed the district court's order upholding the deficiency assessment after January 24.

## ASSIGNMENTS OF ERROR

The State contends that the district court erred in (1) finding that the deficiency assessment was invalid for the period of time prior to the effective date of the revised regulation 1-079 and (2) failing to uphold the deficiency assessment for the entire assessment period when postage charges are a cost of transportation subject to sales tax under §§ 77-2702.17 and 77-2702.07.

On cross-appeal, Affiliated Foods contends that the district court erred in finding that (1) postage charges constitute a taxable cost of transportation under the definitions of gross receipts and sales price found in §§ 77-2702.07(1)(c) and 77-2702.17(1)(c) and (2) Affiliated Foods is liable for sales tax on postage charges incurred after the effective date of the revised regulation 1-079.

## STANDARD 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. *Lackawanna Leather Co. v. Nebraska Dept. of Revenue, ante* p. 100, 608 N.W.2d 177 (2000).

[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. *Id.*

[3] In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

## ANALYSIS

The audit period for sales and use taxes for Affiliated Foods ran from March 1, 1990, to February 28, 1993. During that period, there were minor substantive changes to the language of the relevant statutory provisions, as well as changes to the statute's numbering scheme. These changes, however, do not have a material impact on the outcome of this appeal. For the

sake of clarity, therefore, we will refer to the statutory provisions as they existed in 1993, the end of the audit period.

[4] Whether Affiliated Foods is liable for sales tax on postage charges depends on the meaning of the term "cost of transportation," found in the statutory definitions of gross receipts and sales price. See Neb. Rev. Stat. § 77-2703 (Cum. Supp. 1992). Interpretation of a statute presents a question of law. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). Under § 77-2703(1), sales tax is imposed upon the *gross receipts* from all sales of tangible personal property sold at retail in this state. Gross receipts, in turn, are determined according to the total amount of the *sale price* of the retail sales of retailers. § 77-2702.07(1). The gross receipts, § 77-2702.07, and sales price, § 77-2702.17, both include the cost of transportation of the property sold. If postage charges are a cost of transportation, then postage is included in the sales price and gross receipts. Thus, Affiliated Foods is liable for sales tax on postage if it is a cost of transportation.

### Postage Charges as Cost of Transportation

[5] The term "cost of transportation" is not defined in chapter 77, entitled "Revenue and Taxation," of the Nebraska Revised Statutes. A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999). The term "cost of transportation" is ambiguous. On its face, it neither includes nor excludes postage charges. Therefore, we shall construe the term "cost of transportation," as used in § 77-2702.07(1)(c) (gross receipts) and § 77-2702.17(1)(c) (sales price), to determine whether it includes postage charges.

Section 77-2702.07 provides the following definition for gross receipts:

> (1) Gross receipts shall mean the total amount of the *sale* or lease or rental *price*, as the case may be, of the retail sales of retailers valued in money whether received in money or otherwise, without any deduction on account of any of the following:

. . . .

(c) *The cost of transportation* of the tangible personal property prior to its sale to the purchaser.

(Emphasis supplied.) The definition for sales price, found at § 77-2702.17, provides:

(1) Sales price shall mean the total amount for which tangible personal property is sold valued in money whether paid in money or otherwise, without any deduction on account of:

. . . .

(c) *The cost of transportation* of the tangible personal property. The total amount for which tangible personal property is sold shall include any services which are a part of the sale and any amount for which credit is given to the purchaser by the seller.

(Emphasis supplied.) Under these statutory definitions, transportation costs are taxable as gross receipts when the transportation of the tangible personal property occurs prior to the retail sale. There is no reference to transportation costs when the transportation occurs after the retail sale. A 1985 amendment to the Nebraska Revenue Act of 1967, however, dictates the treatment of costs for transportation *after* a retail sale. See 1985 Neb. Laws, L.B. 715.

Before 1985, Neb. Rev. Stat. § 77-2702 (Cum. Supp. 1984) contained specific exclusions for the cost of transportation of tangible personal property *after* a retail sale. In addition to the language cited above, the definition for gross receipts went on to provide: "Gross receipts *does not include* any of the following: . . . (vii) Charges for transportation of tangible personal property *after* sale." § 77-2702(4)(d)(vii). The definition of sales price contained similar language: "Sales price *does not include* any of the following: . . . (vii) Charges for transportation of tangible personal property *after* sale." § 77-2702(15)(b)(vii). In general terms, this meant that transportation costs were excluded from the sales price and gross receipts if transportation of the property occurred *after* the retail sale. These exclusions were deleted in 1985. See 1985 Neb. Laws, L.B. 715.

The 1985 amendment indicates the Legislature's intent to expand the reach of the sales and use tax. Since 1985, all trans-

portation costs have gone into the calculation of gross receipts. The expansive nature of the 1985 amendment aids our interpretation of §§ 77-2702.07(1)(c) and 77-2702.17(1)(c); we shall read the term "cost of transportation" as broadly as possible so as to achieve the purpose of the sales and use tax provisions as amended in 1985. See *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 864, 560 N.W.2d 436, 444 (1997) ("when a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity").

[6] In addition, Nebraska Sales and Use Tax Regulation 1-079 is instructive in our analysis of whether postage is a cost of transportation. Regulation 1-079 was adopted by the Department under its authority to adopt regulations implementing the sales and use tax statutes. Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lackawanna Leather Co. v. Nebraska Dept. of Revenue, ante* p. 100, 608 N.W.2d 177 (2000). We are mindful of the fact that the revised regulation 1-079 did not come into effect until January 24, 1993. The outcome of this appeal, however, turns on our interpretation of §§ 77-2702.07(1)(c) and 77-2702.17(1)(c), not on the validity of regulation 1-079. Therefore, we will consider the regulation only as a guide to our interpretation of §§ 77-2702.07(1)(c) and 77-2702.17(1)(c).

[7] Regulation 1-079, 316 Neb. Admin. Code, ch. 1, § 079 (1994), which interprets § 77-2702.07 (gross receipts) and § 77-2702.17 (sales price), provides:

> 079.01 Charges for delivery, freight, *postage*, shipping, or transportation of an item are taxable whenever the item is taxable and the charges for delivery are paid to the retailer of the item.
>
> 079.02 Charges for delivery, freight, *postage*, shipping, or transportation that are paid to a person other than the retailer are exempt.

(Emphasis supplied.) From this regulation, it is clear that the State interprets the definitions of gross receipts and sales price to include postage as a cost of transportation. Although con-

struction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997).

In light of regulation 1-079 and the expansive nature of the 1985 amendments to § 77-2702, we conclude that postage is included in the gross receipts and sales price as a cost of transportation under §§ 77-2702.07(1)(c) and 77-2702.17(1)(c). Therefore, Affiliated Foods is liable for sales tax on the postage used to mail advertising flyers to its members' customers.

### Period of Liability

The district court ordered Affiliated Foods to pay the deficiency assessment from January 24, 1993, through the end of the audit period. The district court reasoned that regulation 1-079, effective January 24, was Affiliated Foods' first reasonable notice regarding sales tax on postage charges. Therefore, it reversed the deficiency assessment for the period before January 24.

We conclude that the district court erred in reversing the deficiency assessment for the audit period prior to January 24, 1993. Affiliated Foods is liable for sales tax on postage charges under §§ 77-2702.07(1)(c) and 77-2702.17(1)(c). These provisions have not materially changed since 1985. These statutory provisions were sufficient notice to Affiliated Foods that sales tax was due on postage. Therefore, we conclude that the deficiency assessment is valid for the entire audit period, from March 1, 1990, to February 28, 1993.

### Reimbursement for Postage Charges

Affiliated Foods argues that the district court erroneously found that the postage charges incurred in mailing the advertisements to the members' customers were part of the purchase price for the advertising materials. In essence, Affiliated Foods argues that it was simply *reimbursed* for the cost of postage which it *passed through* to members who had the ads mailed directly to their customers by Affiliated Foods.

Affiliated Foods' argument on this subject involves a question of fact. Therefore, we review the district court's order for errors

appearing on the record. The district court upheld the deficiency assessment for the period after January 24, 1993. Implicit in its holding is the factual determination that Affiliated Foods mailed the advertisements to its members' customers as part of the retail sale of the advertisements.

We conclude that there is competent evidence to support the district court's factual finding on this issue. First, the Affiliated Foods policies and programs handbook states that "[a]n agreement form is required for retailers who wish to participate in [Affiliated Foods'] weekly ad group." The agreement form allows each member to choose, in writing, the method by which Affiliated Foods is to distribute the ads. If a member chooses to have Affiliated Foods apply its bulk mail registration to the ads and mail them directly to the member's customer list, the postage charge appears on the member's weekly billing statement. This evidence is competent to support the district court's finding that the ads were mailed as part of their retail sale. Thus, Affiliated Foods' argument on this point is without merit.

### U.S. Postage as Nontaxable Federal Tax

Affiliated Foods also argues that postage is not included as a cost of transportation under Nebraska statutory law because the nature of the U.S. Post Office prevents the Department from assessing sales tax on postage. Essentially, Affiliated Foods argues that the State does not have the authority to tax postage because postage itself is a type of federal tax. This argument is without merit because the district court correctly found that Affiliated Foods mailed the advertisements as part of its retail sale. The postage was used to deliver property sold at retail; the tax was imposed upon the gross receipts of the retail sale, not on the postage itself.

### *Pledger v. Simpson Press, Inc.*, Distinguished

Finally, Affiliated Foods cites a decision by the Arkansas Supreme Court in which it determined that postage charges were not part of the sales price of advertising brochures. See *Pledger v. Simpson Press, Inc.*, 304 Ark. 274, 801 S.W.2d 44 (1990). In *Simpson Press, Inc.*, the defendant-appellee, Simpson Press, printed advertising brochures for direct mail advertisers. Upon a

customer's request, Simpson Press would use its bulk mail permit to purchase the necessary postage and mail the brochures. Under this arrangement, Simpson Press would first collect the estimated cost of the postage from the customer, then later make an adjustment to the customer's account if necessary. Simpson Press charged sales tax on the advertising brochures, but not on the postage charges. The Arkansas Department of Finance and Administration performed an audit of Simpson Press and assessed a sales tax on the postage charges.

The Arkansas Supreme Court held that Simpson Press' postage and mailing service should not be included as a part of the sale of the advertising brochures for two reasons. First, the Arkansas court determined that Simpson Press was merely acting as its customers' agent by providing a postage and mailing service. The Arkansas court reasoned that tax could not be collected from Simpson Press because it merely offered a service for its customers' convenience. Under Arkansas statutory law, a sale shall not include the furnishing or rendering of services, except as provided, and neither postage nor mailing is a service provided for in the Arkansas statutes. See, currently, Ark. Code Ann. § 26-52-103(a)(3)(E) (Michie 1997 & Supp. 1999). We are not persuaded by this rationale because the Nebraska statutes provide that "[t]he total amount for which tangible personal property is sold *shall include any services which are a part of the sale* . . . ." (Emphasis supplied.) § 77-2702.17(1)(c).

The second basis for the Arkansas Supreme Court's holding is also inapplicable under Nebraska statutory law. The Arkansas court stated that "[i]n determining whether transportation charges incurred in delivering goods to a buyer are subject to taxes, the factor having the most bearing is the *passage of title* to the goods from seller to buyer." (Emphasis supplied.) *Pledger v. Simpson Press, Inc.*, 304 Ark. at 277, 801 S.W.2d at 45-46. As discussed, the 1985 amendments to Nebraska's sales and use tax provisions eliminated the distinction between transportation charges incurred before the sale versus transportation charges incurred after the sale. See 1985 Neb. Laws, L.B. 715.

*Simpson Press, Inc.*, does not add persuasive authority to Affiliated Foods' argument. When the cost of transportation is

paid directly to Affiliated Foods, it is taxable. See §§ 77-2702.07(1)(c) and 77-2702.17(1)(c).

## CONCLUSION

Because the members paid Affiliated Foods for the postage on the ads, the postage charges were taxable. Postage is a cost of transportation. The cost of transportation is included in the gross receipts upon which sales tax is imposed. See §§ 77-2702.07(1)(c) and 77-2702.17(1)(c). Therefore, the deficiency assessment was properly imposed upon Affiliated Foods for the entire audit period. We affirm in part, and in part reverse and remand with directions to enter an order upholding the deficiency assessment for the entire statutory period.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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# W. PATRICK DUNN, APPELLEE, V. HAL DAUB, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF OMAHA, ET AL., APPELLANTS.

611 N.W. 2d 97

Filed May 26, 2000. No. S-99-017.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Declaratory Judgments: Parties.** The statute authorizing declaratory judgments is applicable only where all interested and necessary persons are made parties to the proceeding.
3. **Parties: Words and Phrases.** A necessary or indispensable party is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
4. **Declaratory Judgments: Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
5. **Declaratory Judgments: Ordinances: Jurisdiction: Parties: Appeal and Error.** The participation of a statutorily mandated necessary party in a declaratory judgment action involving the validity of a city ordinance is a jurisdictional requirement, and the failure to include such party requires vacation of a district court's judgment in the action.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Vacated and dismissed.

Paul D. Kratz, Omaha City Attorney, Wendy E. Hahn, and Michelle Peters for appellants.

John E. Corrigan and John P. Fahey, of the Law Office of John P. Fahey, P.C., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Hal Daub, Tom Graeve, and William Johnson appeal the December 22, 1998, order of the district court for Douglas County granting W. Patrick Dunn injunctive and declaratory relief. Because the city of Omaha, a statutorily necessary party, was not named as a party, we vacate the decision of the district court and dismiss the appeal.

## STATEMENT OF FACTS

On December 2, 1998, Dunn filed a verified petition for declaratory judgment and application for injunctive relief. Named as defendants in the petition were Daub, individually and in his official capacity as mayor of the city of Omaha; Graeve; and Johnson (appellants). The city of Omaha was not named and did not become a party to the action.

In the petition, Dunn alleged, inter alia, the following: that he was a taxpayer, resident, registered voter, and citizen of the city of Omaha, Douglas County, Nebraska; that Daub was the mayor of Omaha and that both Graeve and Johnson were employed by the Omaha fire division, Graeve as the fire chief and Johnson as an assistant fire chief; that at the time of filing the petition, Johnson was 61 years of age and that his 62d birthday would occur on December 26, 1998; that pursuant to Omaha Mun. Code, ch. 23, art. III, § 23-309 (1996) (the ordinance), fire division employees must retire upon reaching 62 years of age, unless a request is submitted not less than 30 days prior to the contemplated date of retirement by the chief of the fire division for an extension of the employee's service; that no such request

for an extension of Johnson's service was submitted and that it could not be submitted at the time of filing the petition because the 30-day time limit had passed; that contrary to the provisions of the ordinance, Daub instituted an evaluation procedure involving Johnson, along with other fire division employees, to determine which of these employees would be demoted or laid off effective December 31, 1998, due to 1999 budget constraints; that the continued employment of Johnson in violation of the ordinance constituted an unlawful and unauthorized expenditure of public funds; and that as a taxpayer and resident of the city of Omaha, Dunn was entitled to enjoy the benefits of city ordinances and to have those ordinances enforced. Dunn claimed his rights were violated due to appellants' conduct of continuing Johnson in employment beyond his 62d birthday. For Dunn's relief, he sought a declaratory judgment that the ordinance was valid and enforceable, a temporary injunction enjoining appellants from taking any action to retain Johnson in employment in violation of the ordinance, and a permanent injunction retiring Johnson from employment. No written opposition to the petition appears in the record.

On December 11, 1998, Dunn's petition came on for evidentiary hearing before the district court. Appellants appeared at the hearing and orally opposed the petition, arguing that Dunn did not have standing to bring the action. With respect to the merits, appellants argued that the ordinance was unenforceable because it violated state laws against age discrimination in employment.

At the hearing, Dunn offered into evidence, without objection, a certified copy of the ordinance. Appellants introduced no evidence. Counsel for all parties agreed at the hearing to stipulate that the ordinance existed, that Johnson was one of the defendants to the action, and that he would be 62 years of age on December 26, 1998.

On December 22, 1998, the district court entered its written order in which it found that Dunn "ha[d] an interest in the subject matter of the lawsuit" and concluded that Dunn had standing. The court further considered the validity of the ordinance and concluded that the ordinance was "valid and enforceable" and that judgment should be entered on the merits in favor of Dunn. This appeal followed.

## ASSIGNMENTS OF ERROR

Appellants have assigned two errors. Appellants claim the district court erred (1) in concluding that Dunn had standing to bring the action and (2) in concluding that the ordinance was valid and enforceable.

## STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999).

## ANALYSIS

Dunn filed the instant case seeking declaratory and injunctive relief. Dunn sought a declaration by the district court that appellants were required to comply with a valid ordinance, the enforcement of which would cause the city of Omaha to retire Johnson from employment at age 62 in accordance with the provisions of the ordinance. The injunctive relief sought by Dunn, namely a temporary and a permanent order restraining appellants from continuing Johnson in employment, was dependent upon the declaratory relief Dunn requested.

Following the hearing of December 11, 1998, on December 22, the district court concluded that Dunn had standing and that the ordinance was "valid and enforceable," and granted Dunn declaratory and injunctive relief. Appellants then appealed, assigning as errors the district court's determinations that Dunn had standing and that the ordinance was valid and enforceable.

In reviewing the record, we note a procedural omission on the part of Dunn which obviates the need to address the assigned errors. In particular, we note that it is clear from the record before us that the city of Omaha, a statutorily necessary party, was not made a party to Dunn's declaratory judgment action.

Neb. Rev. Stat. § 25-21,159 (Cum. Supp. 1998) provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceed-

ing. In any proceeding which involves the validity of a municipal ordinance . . . such municipality shall be made a party, and shall be entitled to be heard.

[2,3] This court has repeatedly considered § 25-21,159. In *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 159, 505 N.W.2d 654, 660 (1993), we observed that "[t]his court has held on numerous occasions that the statute authorizing declaratory judgments is applicable only where all interested and necessary persons are made parties to the proceeding." See, *Taylor Oil Co. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Redick v. Peony Park*, 151 Neb. 442, 37 N.W.2d 801 (1949). We have defined a necessary or indispensable party as "one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest." *Taylor Oil Co.*, 254 Neb. at 280, 575 N.W.2d at 873. See, also, *Concerned Citizens v. Department of Environ. Contr., supra.*

[4] In considering the impact of the failure to join a necessary party under § 25-21,159, we have stated that " '[t]he presence of necessary parties [in declaratory judgment actions] is jurisdictional and cannot be waived, and if such persons are not made parties then the district court has no jurisdiction to determine the controversy.' " *Taylor Oil Co.*, 254 Neb. at 280, 575 N.W.2d at 873, quoting *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). See, also, *Concerned Citizens v. Department of Environ. Contr., supra*; *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977); *Redick v. Peony Park, supra.*

Dunn sought a declaratory judgment that the ordinance was valid and enforceable and that appellants' actions in retaining Johnson in employment violated the ordinance. Appellants orally opposed Dunn's petition, arguing the ordinance violated state law and, therefore, was unenforceable. The district court entered an order which concluded that the ordinance was "valid and enforceable." It is apparent that the instant action "involve[d] the validity of a municipal ordinance," under § 25-21,159, and that pursuant to this statute, the city of Omaha should have been a party to the action.

The absence of a statutorily mandated necessary party prevents a court from finally deciding a controversy. The city of Omaha's participation in the action is a jurisdictional requirement, and Dunn's failure to include the city of Omaha, which was a statutorily necessary party, mandates that we vacate the district court's judgment and dismiss the appeal.

## CONCLUSION

[5] Dunn failed to comply with the jurisdictional prerequisites of § 25-21,159, which required Dunn to include the city of Omaha as a statutorily necessary party in a declaratory judgment action involving the validity of a city ordinance. Accordingly, the judgment of the district court is vacated, and the appeal is dismissed.

VACATED AND DISMISSED.

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KENNETH GALE REINSCH, APPELLANT AND CROSS-APPELLEE, V. AVA IRENE REINSCH, APPELLEE AND CROSS-APPELLANT.

611 N.W.2d 86

Filed May 26, 2000. No. S-99-137.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Child Support.** Child support orders are always subject to review and modification.
3. **Divorce: Property Settlement Agreements.** If the terms of a property settlement agreement with respect to real and personal property and maintenance are not found unconscionable, the agreement is binding upon the dissolution court and the initial decree must carry such agreement into effect.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
5. **Judgments: Appeal and Error.** Upon further review from a judgment of the Court of Appeals, the Supreme Court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals.
6. **Modification of Decree: Child Support: Rules of the Supreme Court.** The adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted

a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

7. **Modification of Decree: Child Support.** Once a material change of circumstances has been demonstrated with respect to the amount of child support, the district court is not required to find a separate material change of circumstances specifically relating to duration in order to modify both the amount and duration of a child support obligation.
8. **Divorce: Child Support: Public Policy.** The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce.
9. **Modification of Decree: Child Support: Statutes.** The enactment of Neb. Rev. Stat. § 42-371.01 (Reissue 1998) in 1997 delineating the circumstances for terminating child support obligations is not tantamount to a material change in circumstances justifying modification of a child support award.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Seward County, ALAN G. GLESS, Judge. Judgment of Court of Appeals affirmed.

David L. Kimble for appellant.

Kathy Pate Knickrehm, and David B. Downing, of Downing, Alexander, Wood & Ilg, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

On February 24, 1998, Ava Irene Reinsch filed a petition to modify upward and extend the termination date of child support being paid by Kenneth Gale Reinsch for the parties' son, Eric Reinsch. The divorce decree entered May 5, 1986, provided, inter alia, that custody was awarded to Ava and that Kenneth was to pay $200 per month child support until Eric reached the age of 18. On January 19, 1999, the district court for Seward County issued an order in which it found a material change in circumstances and increased Kenneth's monthly support obligation, extended the termination of Kenneth's obligation until Eric's 19th birthday, and awarded Ava attorney fees. Kenneth appealed the modification of the age 18 provision and the award of attorney fees to the Nebraska Court of Appeals, and Ava cross-appealed the district

court's failure to make the increase retroactive to the date she filed her application to modify on February 24, 1998.

The Court of Appeals rejected Kenneth's assignments of error but found merit in Ava's cross-appeal and ordered that the increased child support obligation be applied retroactively to March 1, 1998, the first date on which child support was due after Ava filed her petition to modify. *Reinsch v. Reinsch*, 8 Neb. App. 852, 602 N.W.2d 261 (1999). The Court of Appeals affirmed the district court's order as modified. *Id.*

Kenneth petitioned for further review, assigning as his sole error that the Court of Appeals erred in affirming the district court's order extending his child support obligation until Eric's 19th birthday. We granted Kenneth's petition for further review. For the reasons recited below, we affirm the judgment of the Court of Appeals.

## STATEMENT OF FACTS

Kenneth and Ava were married on April 20, 1974. They have one child, Eric, born November 6, 1981. The parties' marriage was dissolved on May 5, 1986. The decree of dissolution incorporated verbatim the parties' property settlement agreement (agreement) dated February 19, 1986. The agreement provided that Ava would have custody of Eric and that Kenneth would pay $200 per month in child support "until the child reaches the age of 18, dies, marries, or becomes emancipated." Ava was not represented by separate counsel. The trial court in the dissolution action found the agreement to be fair, reasonable, and not unconscionable.

Ava filed a petition to modify the decree on February 24, 1998. Trial was held on November 24. After trial, the district court ordered that Kenneth's support obligation be increased to $683 per month and that Kenneth's obligation be extended until Eric reached the age of 19. The court ordered the increased payments to start on January 1, 1999, rather than ordering that the increase be applied retroactively.

Kenneth appealed to the Court of Appeals, assigning as error the district court's (1) extension of his obligation by 1 year; (2) not allowing him to take an income tax deduction for Eric after increasing the support obligation; (3) setting aside the property

settlement agreement and decree without a finding that the agreement was procured by fraud or was unfair and unconscionable; and (4) awarding attorney fees to Ava. Ava cross-appealed the district court's failure to make the increase in child support retroactive to the date she filed her petition to modify.

The Court of Appeals rejected Kenneth's assignments of error but found merit in Ava's cross-appeal. In its decision, the Court of Appeals held that the enactment of Neb. Rev. Stat. § 42-371.01 (Reissue 1998) was a material change of circumstances justifying modification of the duration of the child support award. *Reinsch v. Reinsch, supra*. The Court of Appeals further determined that the district court should have made the increase in child support retroactive to March 1, 1998, the first date on which child support was due after Ava filed her petition to modify. *Id.* The Court of Appeals affirmed the district court's order as modified. *Id.*

Kenneth petitioned for further review. Kenneth's petition was limited to the claim that the Court of Appeals erroneously extended his child support obligation until Eric's 19th birthday. We granted Kenneth's petition for further review.

## ASSIGNMENT OF ERROR

Upon further review, Kenneth asserts the Court of Appeals erred in affirming the district court's order which set aside the property settlement agreement and decree without a finding that the agreement was procured by fraud or was unfair or unconscionable and extended Kenneth's child support obligation by 1 year.

## STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

## ANALYSIS

*Standard for Modification of Child Support Order.*

We first address Kenneth's argument, properly rejected by the Court of Appeals, that the district court erred in setting aside the

parties' property settlement agreement with respect to child support without a finding that such agreement was procured by fraud or was unconscionable. Kenneth misstates the standards applicable to this case. The present action is one for a modification of a child support order, which order is subject to a material change of circumstances analysis and is always subject to review and modification, whereas the standards upon which Kenneth relies relate variously to real and personal property and maintenance. Kenneth's first argument on further review is unavailing.

Kenneth relies on Neb. Rev. Stat. § 42-366 (Reissue 1998), and the cases *Prochazka v. Prochazka*, 198 Neb. 525, 253 N.W.2d 407 (1977), and *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975), in support of his argument that the district court and the Court of Appeals should have analyzed the change of age provision under a fraud or unconscionable analysis. Kenneth's reliance is misplaced.

[2] Section 42-366 provides that the parties to a dissolution of marriage may enter into a written property settlement agreement containing provisions for, among other things, the support and custody of minor children. § 42-366(1). The statute specifically provides that "the terms of the agreement, *except terms providing for the support and custody of minor children*, shall be binding upon the court unless it finds . . . that the agreement is unconscionable." (Emphasis supplied.) § 42-366(2). We further note that child support orders are always subject to review and modification. *Shomaker v. Shomaker*, 183 Neb. 609, 163 N.W.2d 102 (1968). See, also, *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993).

[3] In applying § 42-366, we have held that if the terms of a property settlement agreement with respect to real and personal property and maintenance are not found unconscionable, the agreement is binding upon the dissolution court and the initial decree must carry such agreement into effect. *Prochazka v. Prochazka, supra*. See, also, *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985); *Dobesh v. Dobesh*, 216 Neb. 196, 342 N.W.2d 669 (1984); § 42-366(4). We have also held that where a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court

and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not thereafter be vacated or modified in the absence of fraud or gross inequity. *Klabunde v. Klabunde, supra.* See, also, *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998); *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988); *Colson v. Colson*, 215 Neb. 452, 339 N.W.2d 280 (1983).

[4] Notwithstanding Kenneth's argument to the contrary, neither the "unconscionable" standard nor the "fraud or gross inequity" standard as utilized in the cases referred to above are applicable to this action involving modification of child support. Instead, we have consistently held that a party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). Kenneth's first argument is without merit, and the Court of Appeals did not err in rejecting his argument.

*Extension of Child Support Obligation.*

[5] Kenneth assigns as error the Court of Appeals' affirmance of the district court's order extending his child support obligation. Although we disagree with the Court of Appeals' reasoning, we conclude that the Court of Appeals did not err in affirming the district court's order extending Kenneth's child support to age 19 and accordingly, affirm the decision of the Court of Appeals. *Corcoran v. Lovercheck*, 256 Neb. 936, 943-44, 594 N.W.2d 615, 621 (1999) (noting that "upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which we deem to be correct merely because we may disagree with the reasoning employed by the Court of Appeals").

The district court's order was a modification of a child support order, and as discussed above, a party seeking to modify a child support order must show a material change in circumstances. *Rhoades v. Rhoades, supra.* Thus, Ava was required to show a material change in circumstances which justified modifying the child support order.

With respect to the requested increase in the amount of child support, Ava alleged in her petition to modify that the material changes in circumstances warranting modification of the decree were (1) that Kenneth was "making significantly more income" and Ava was "making more income" than at the time of the decree of May 5, 1986, and (2) that subsequent to the decree, the Nebraska Supreme Court had adopted the Nebraska Child Support Guidelines and that application of such guidelines would result in a variation by 10 percent or more due to financial circumstances which have lasted 3 months and could reasonably be expected to last for an additional 6 months. Ava requested that the decree be amended to increase child support, that Kenneth's support obligation be continued until Eric reached age 19, and that Kenneth be ordered to pay attorney fees and costs. Kenneth admitted Ava's asserted material changes in circumstances with respect to the parties' incomes and asked that the child support guidelines be applied to calculate the amount of child support. However, he opposed the remainder of Ava's petition and asked that it be dismissed.

In the district court's "Journal Entry on Modification," the court ordered that the decree be modified to increase Kenneth's child support obligation to $683 per month. Citing to the public policy of this state that a parent has a duty to support his or her minor or unemancipated child, the district court further ordered that the decree "be modified to reflect that [Kenneth's] child support obligation shall continue until the minor child of the parties becomes 19 years of age." The district court awarded attorney fees to Ava.

[6-8] The record is clear, and the parties do not dispute, that there was a material change of circumstances justifying modification of the amount of Kenneth's child support obligation. Such modification was justified by the changes in the parties' incomes and by the adoption of the child support guidelines subsequent to the entry of the decree in 1986. See *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991) (holding that adoption of child support guidelines effective October 1, 1987, constituted material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date). Once these material changes of

circumstances were demonstrated with respect to the amount of child support, the trial court, which may always review or modify a child support order, see *Shomaker v. Shomaker*, 183 Neb. 609, 163 N.W.2d 102 (1968), was also justified in reassessing the propriety of the duration of Kenneth's child support obligation. The district court was not required to find a separate material change of circumstances specifically relating to duration in order to modify both the amount and duration of Kenneth's child support obligation. In extending Kenneth's child support obligation to age 19, the district court followed the public policy of this state which provides that parents have a duty to support their minor children until they reach majority or are emancipated, *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961), and a parent is not relieved of this duty by virtue of divorce. Accordingly, the district court did not abuse its discretion in extending Kenneth's child support obligation to age 19.

Upon appeal, although neither asserted by Ava in her petition nor cited by the district court, the Court of Appeals determined that the 1997 enactment of § 42-371.01 was a change in circumstances justifying modification of the age 18 provision. Specifically, the Court of Appeals concluded the enactment of § 42-371.01 in 1997 was a material change in circumstances and reasoned that "while the age of majority was 19 when the court first entered the decree, the statutory law has now changed to make child support to age 19 mandatory unless the child is emancipated." *Reinsch v. Reinsch*, 8 Neb. App. 852, 856, 602 N.W.2d 261, 265-66 (1999).

[9] Contrary to the determination by the Court of Appeals, we hold that the enactment of § 42-371.01 in 1997 delineating the circumstances for terminating child support obligations is not tantamount to a material change in circumstances justifying modification of a child support award. Section 42-371.01 merely reflects the principle that a parent has a legal duty to support an unemancipated minor child, see *Waldbaum v. Waldbaum, supra*, and sets forth the circumstances and method for the termination of a child support obligation. Although we disagree with the reasoning employed by the Court of Appeals, we nevertheless conclude that the district court did not abuse its discretion when it found a material change of circumstances that

justified a modification of both the amount and the duration of Kenneth's child support obligation. We therefore conclude that the Court of Appeals did not err in affirming the district court's order extending Kenneth's child support obligation to Eric's 19th birthday.

## CONCLUSION

We conclude that the Court of Appeals erred in holding that the enactment of § 42-371.01 was a material change of circumstances justifying the modification of the child support age provision. However, because the district court did not abuse its discretion in modifying the age 18 provision properly based on a material change of circumstances and the public policy requiring a parent to support his or her minor unemancipated child, the Court of Appeals' affirmance of the extension of the age provision is affirmed. Kenneth did not appeal the district court's order increasing the amount of his child support obligation, nor did he petition for further review of the Court of Appeals' holdings regarding the income tax deduction, the award of attorney fees, or the retroactive application of the modification. Such determinations are therefore affirmed.

Ava has moved for attorney fees both in connection with her appeal to the Court of Appeals and in connection with her opposition to the filing of the petition for further review. Because she was successful before the Court of Appeals and this court, her motions for attorney fees are granted. Based on the affidavits in the record, Ava is awarded $1,200 in connection with her appearance in the Court of Appeals and $420 in connection with her opposition to the filing of the petition for further review before this court.

AFFIRMED.

# KATHLEEN J. PHILPOT, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER A. PHILPOT, DECEASED, APPELLANT, V. BIAGIO AGUGLIA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LINDA S. AGUGLIA, DECEASED, AND ENTERPRISE RENT-A-CAR COMPANY - MIDWEST, APPELLEES.

611 N.W.2d 93

Filed May 26, 2000. No. S-99-235.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Statutes.** A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.
4. **Statutes: Motor Vehicles.** Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 1998), by its terms, applies only to leased trucks, truck-tractors, and trailers. It does not apply to any other type of motor vehicle.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Douglas L. Kluender, Stephen L. Ahl, and Fred B. Campbell, Jr., of Wolfe, Snowden, Hurd, Luers & Ahl, for appellant.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellee Enterprise Rent-A-Car - Midwest.

Stephen S. Gealy and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees Biagio Aguglia and Estate of Linda S. Aguglia.

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

CONNOLLY, J.

This case requires us to decide whether a 1997 Dodge Grand Caravan (minivan) is a "truck" under the leased truck and trailer

liability provision found at Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 1998).

Kathleen J. Philpot, plaintiff-appellant, brought this action seeking damages following a two-vehicle collision. At the time of the collision, Linda S. Aguglia (Linda) was operating the minivan which her husband, defendant-appellee Biagio Aguglia, had rented from Enterprise Rent-A-Car Company - Midwest (Enterprise). Philpot sought to impose liability on Enterprise under § 25-21,239. Philpot argues that Enterprise, as a lessor of the minivan, is jointly and severally liable for the alleged wrongful death of her husband, Christopher A. Philpot (Christopher), because the minivan that Linda was driving at the time of the collision was a leased truck under § 25-21,239. Enterprise filed a motion for summary judgment, contending that the minivan was not a truck and that therefore, § 25-21,239 was not applicable. The district court sustained Enterprise's motion for summary judgment. We agree with the district court that as a matter of law, the minivan is not a truck and that § 25-21,239 does not apply. We therefore affirm.

## BACKGROUND

As a preliminary matter, we note that exhibit 33, Aguglia's deposition, was withdrawn by Philpot for the purposes of Enterprise's motion for summary judgment. We do not consider exhibit 33 in our analysis.

In November 1997, Christopher and Linda were involved in a car collision that claimed both their lives. Linda was driving the minivan that was owned by Enterprise and leased by Aguglia. Philpot sought to impose liability on Enterprise under § 25-21,239.

The minivan Linda was driving at the time of the collision was registered in the State of Nebraska as a passenger car. It was equipped with a seating arrangement for seven to eight passengers, which included two seats in the front of the vehicle, a bench-style seat immediately behind the front seats, and a second bench-style seat immediately behind the first bench-style seat. Approximately 90 percent of the floorspace available in the minivan was designed for occupancy by passengers, not for property or cargo. It was equipped with an automatic transmis-

sion, air conditioning, power steering, cruise control, a tilt steering wheel, power brakes, power windows, power door locks, two doors on each side for a total of four passenger doors, dual air-conditioning controls for passengers in the middle and back seats, and an AM/FM stereo radio with a cassette player. In addition, the entire interior of the minivan was carpeted and all seats were upholstered. In contrast to the minivan, Dodge produces a cargo van which is equipped with only two seats and an open area for hauling cargo.

## ASSIGNMENTS OF ERROR

Philpot assigns as error the district court's ruling that (1) there was no genuine issue of material fact and (2) the minivan was not a truck under § 25-21,239.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Callahan v. Washington Nat. Ins. Co., ante* p. 145, 608 N.W.2d 592 (2000).

## ANALYSIS

Philpot argues that Enterprise, as a lessor of the minivan, is jointly and severally liable for Christopher's alleged wrongful death because the minivan that Linda was driving at the time of the collision was a leased truck under § 25-21,239. Enterprise argues that the minivan it leased to Aguglia was not a truck because it was not designed, used, or maintained primarily for

the transportation of property. Section 25-21,239 provides in relevant part:

> The owner of any truck, truck-tractor, whether with or without trailer, or trailer, leased for a period of less than thirty days or leased for any period of time and used for commercial purposes, shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state[.]

[3,4] A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. *Affiliated Foods Co-op v. State, ante* p. 549, 611 N.W.2d 105 (2000); *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999). Section 25-21,239, by its terms, applies only to leased trucks, truck-tractors, and trailers. It does not apply to any other type of motor vehicle.

Neb. Rev. Stat. § 60-674 (Reissue 1998), of the Nebraska Rules of the Road, provides that "[t]ruck shall mean any motor vehicle designed, used, or maintained primarily for the transportation of property." The definition of the term "truck" found at § 60-674 is relevant in determining the scope of § 25-21,239 because that provision and the Nebraska Rules of the Road share the common legislative purpose of increasing highway safety. The purposes of the Legislature in enacting § 25-21,239 were for the promotion of highway safety and the financial protection of innocent traffic victims. See *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976). Likewise, certain goals of the Nebraska Rules of the Road are to promote economic savings by relieving congestion and confusion in traffic, to increase the efficiency of streets and highways by the application of uniform traffic control devices, and to reduce the huge annual loss of life and property which occurs on Nebraska's highways. Neb. Rev. Stat. § 60-602 (Reissue 1998). Since the legislative purposes behind the rules of the road closely resemble the legislative purposes behind § 25-21,239, the definition of "truck" found in § 60-674 is relevant to determining the scope of § 25-21,239.

Under § 60-674, Philpot argues that this court should focus on the use of the vehicle at the time of the collision. We reject this argument. The statute defines a truck as a vehicle that is designed, used, or maintained *primarily* for the transportation of property. This implies that the relevant inquiry in the determination of whether a vehicle is a truck is the general use to which the vehicle is put, not the actual use by a particular driver.

The record shows that the minivan involved in the collision was equipped with a seating arrangement for seven to eight passengers. There were two seats in the front of the vehicle, and two rows of bench-style seats behind them. Approximately 90 percent of the floorspace available in the minivan was designed for occupancy by passengers, not for property or cargo. In addition, the minivan was equipped with features ordinarily intended to provide for the comfort of the passengers, such as air conditioning, power door locks, and power windows. From this evidence, it is clear that the minivan was designed, used, and maintained primarily for the transportation of persons, and not for the transportation of property.

At the time of the collision between Christopher and Linda, there was another statutory definition of the term "truck" found at Neb. Rev. Stat. § 60-301(29) (Cum. Supp. 1996), entitled "Motor Vehicle Registration." It provides that the term "[t]rucks means motor vehicles equipped or used for the transportation of property." *Id.* This definition is irrelevant to determining whether the minivan is a truck, however, because the motor vehicle registration statute deals only with regulation of motor vehicles upon the highway. See *Paltani v. Sentinel Life Ins. Co.*, 121 Neb. 447, 237 N.W. 392 (1931) (statute dealt only with regulation of motor vehicles upon highway and definition of word "truck" therein did not become part of insurance contract). The motor vehicle registration provisions do not contain a statement of legislative purpose aimed at increasing highway safety. Therefore, the definition of "trucks" found at § 60-301(29) does not help to determine the scope of § 25-21,239.

Moreover, the record indicates that the minivan Aguglia leased from Enterprise was registered in the State of Nebraska as a passenger car. Under § 60-301(21), a "[p]assenger car means a motor vehicle designed and used to carry ten passen-

gers or less and not used for hire." As mentioned, the minivan was designed to carry seven to eight passengers. It clearly fits within the category of a passenger car for registration purposes. The definition of the term "truck" for motor vehicle registration purposes is irrelevant to the determination of whether the minivan is a truck for purposes of § 25-21,239.

Our determination that the minivan is not a truck comports with the decision in *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976), in which this court held that § 25-21,239 (then found at Neb. Rev. Stat. § 39-6,193 (Reissue 1974)) was not unconstitutionally vague for lack of a definition of the word "truck." In *Bridgeford,* this court noted that there had been a statutory definition of the word "truck" since 1919. In addition, *Bridgeford* noted that "[t]he word 'truck' is a term of common understanding, and men of normal intelligence would not necessarily have to guess at its meaning nor would they usually differ as to its application." 195 Neb. at 320, 238 N.W.2d at 450-51.

A minivan, such as the 1997 Dodge Grand Caravan, would not normally be viewed as falling within the scope of § 25-21,239. A minivan is more likely to be used to transport passengers than to transport cargo. A minivan's use is not generally subject to the same dangers as that of a larger truck, such as being loaded with inadequately secured cargo. See *Bridgeford v. U-Haul, supra.* There is also no indication that the Legislature intended to include this kind of vehicle within the statute's coverage. By its terms, § 25-21,239 applies only to trucks, truck-tractors, and trailers.

## CONCLUSION

We conclude, as a matter of law, that the minivan that Aguglia leased from Enterprise is not a truck under § 25-21,239. There are no material issues of fact, and Enterprise is entitled to judgment as a matter of law. We therefore affirm.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. KERRI LOBATO, APPELLANT.

611 N.W.2d 101

Filed May 26, 2000. No. S-99-342.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion.
2. **Sentences: Probation and Parole.** Whether a condition of probation imposed by the sentencing court is authorized by statute presents a question of law.
3. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
4. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
5. ___: ___. The sentencing court may impose such reasonable conditions of probation as it deems necessary or likely to ensure that the offender will lead a law-abiding life.
6. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
7. **Sentences: Probation and Parole.** Denying a probationer the ability to earn good time credit as provided for by Neb. Rev. Stat. § 47-502 (Reissue 1998) is not a condition of probation authorized by statute.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed in part, and in part vacated and remanded with directions.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

HENDRY, C.J.

## INTRODUCTION

Kerri Lobato pled guilty to theft by deception, a Class III felony, and was sentenced to 5 years' probation. As one of the terms of her probation, Lobato was ordered to spend 180 days in the county jail. Lobato appeals, claiming the sentence is excessive. We moved this case to our docket pursuant to our power to

regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## FACTUAL BACKGROUND

Lobato was charged with two counts of theft by deception on February 17, 1998. These charges resulted from Lobato's obtaining cash and gift donations from various individuals, claiming the money was to be used for Lobato's cancer treatment and prescription drugs, when in fact Lobato knew she did not have cancer.

Lobato pled guilty to one count of theft by deception. The court sentenced Lobato to 5 years' probation. As one of the conditions of probation, Lobato was ordered to serve 180 days in the county jail. In addition, the court ordered that Lobato serve this jail time without the possibility of earning good time credit. Lobato was also ordered to pay court costs and $4,511.59 in restitution. The court further ordered Lobato to write letters of apology to each victim within 30 days.

## ASSIGNMENTS OF ERROR

Lobato claims, restated, that the trial court erred in (1) imposing a sentence of probation that was excessive and disproportionate and (2) denying Lobato the opportunity to earn good time credit during her 180-day jail term.

## STANDARD OF REVIEW

[1] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

[2] Whether a condition of probation imposed by the sentencing court is authorized by statute presents a question of law. See, *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991).

## ANALYSIS

### EXCESSIVE SENTENCE

Lobato argues that "imposition of the maximum jail sentence as a condition of probation is excessive and unnecessary to reha-

bilitate this Appellant." Brief for appellant at 8. Under Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 1998), the court has the authority to sentence a defendant, as a condition of probation, "[t]o be confined periodically in the county jail or to return to custody after specified hours but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense and (ii) for felonies, one hundred eighty days."

[3] The 180-day jail term is within the statutory limits. Absent an abuse of discretion, such a sentence will be upheld on appeal. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Bartholomew, supra.*

The record shows that Lobato solicited and accepted donations of money and gifts from numerous victims who had been misled by Lobato into believing that she had cancer. The trial judge at sentencing noted, "it was a scam, more or less, that you perpetuated, and I can't put you on just straight probation without some jail time, because that would be viewed as a slap on the wrist. And I think it is appropriate you serve some jail time for this offense."

Behavior such as Lobato's harms not only those victimized by the "scam," but also may cast doubt on legitimate fundraising efforts on behalf of terminally ill persons with true financial needs. The trial court did not abuse its discretion in ordering Lobato to serve 180 days in jail as part of her probation.

## Good Time

[4] Lobato also argues that the trial court erred in ordering that Lobato could not earn good time credits while incarcerated. "[W]hen a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute." *State v. Escamilla*, 237 Neb. at 650, 467 N.W.2d at 62; *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). Lobato asserts that she should be allowed to earn good time credits while incarcerated under Neb. Rev. Stat. § 47-502 (Reissue 1998). Section 47-502 states that a person incarcerated in a city or county jail shall receive 7 days of good time credit for every

14 consecutive days served without committing any breach of discipline or other violation of jail regulations.

We have previously addressed the impact of § 47-502 on incarcerated probationers in *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). In *Salyers*, the defendant asserted that probationers serving intermittent sentences should be entitled to earn good time credit under § 47-502. We disagreed, finding that the plain language of the statute required that the jail time be served consecutively in order for § 47-502 to apply.

The State asserts that the holding of *Salyers* is without application in Lobato's case because § 47-502 has been amended since the *Salyers* decision. At the time *Salyers* was decided, an inmate in city or county jail was required to serve 21 consecutive days to earn 7 days of good time credit. In 1993, the Legislature amended § 47-502 to provide that inmates must serve 14 consecutive days to earn 7 days of good time credit. This amendment does not affect the holding in *Salyers* that probationers serving consecutive jail time are eligible to earn good time credit under § 47-502.

[5-7] While the sentencing court may impose "such reasonable conditions as it deems necessary or likely to [e]nsure that the offender will lead a law-abiding life," § 29-2262(1), "'special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict,'" *State v. Escamilla*, 237 Neb. 647, 651, 467 N.W.2d 59, 62 (1991). Denying a probationer the ability to earn good time credit as provided for by § 47-502 is thus not a condition of probation authorized by statute. See *State v. Escamilla, supra*. Lobato was sentenced to serve 180 consecutive days in the county jail. She is eligible to earn good time credit under the terms of § 47-502 while incarcerated. See *State v. Salyers, supra*.

The State argues that because Lobato was sentenced to probation and not sentenced to "punitive" incarceration, § 47-502 need not apply. We find this distinction unpersuasive. As we noted in *State v. Salyers*, 239 Neb. at 1007, 480 N.W.2d at 177, the language of § 47-502 is plain and unambiguous and "specifically applies to jail inmates who have served [the required number of] consecutive days." The trial court erred in ordering that

Lobato could not earn good time credit while incarcerated for 180 consecutive days.

## CONCLUSION

That portion of Lobato's sentence denying good time credit under § 47-502 is vacated and the cause is remanded with directions consistent with this opinion. In all other respects, the sentence is affirmed.

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

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STATE OF NEBRASKA, APPELLEE, V.
NECDET CANBAZ, APPELLANT.

611 N.W. 2d 395

Filed May 26, 2000. No. S-99-848.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion, where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court.
2. ___: ___. When judicial discretion is not a factor involved in assessing admissibility, the court's application of the Nebraska rules of evidence will be upheld unless clearly erroneous.
3. **Expert Witnesses: Appeal and Error.** The decision whether to exclude expert witness testimony in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
6. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.
7. **Expert Witnesses.** An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
8. **Rebuttal Evidence: Witnesses: Indictments and Informations.** The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses.
9. **Trial: Witnesses: Mental Competency.** Under the proper circumstances, the State may have an appropriate witness attend the trial and testify on the issue of the defendant's mental state based upon what the witness learned as a result of the evidence adduced at trial.

10. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
11. **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.
12. ___: ___. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. For the purposes of Neb. Rev. Stat. § 27-403 (Reissue 1995), unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
13. **Rules of Evidence: Other Acts: Proof: Words and Phrases.** Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Michael D. Nelson, of NelsonMcClellan, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

HENDRY, C.J.

## INTRODUCTION

Necdet Canbaz was found guilty after a jury trial of first degree murder and use of a weapon to commit a felony in the shooting death of Debora Peralta. Canbaz now appeals.

## STATEMENT OF FACTS

Peralta and Canbaz began a relationship in approximately 1992 and lived together in Canbaz' home for approximately 4 years prior to Peralta's death. In early July 1998, Peralta ended the relationship with Canbaz and moved out. Canbaz was very upset and angry with Peralta for ending the relationship. He made statements to neighbors and coworkers that he was angry with Peralta and wanted to hurt her and kill her and her family members.

On September 5, 1998, Canbaz took Peralta out for dinner. They then spent the night at Canbaz' home. Canbaz left the following morning, and when he returned home around midday, Peralta was gone.

Peralta had returned to her apartment. At about 12:20 p.m., Peralta called the Sarpy County Family Service Domestic Abuse Program from her apartment. She spoke with Theresa Hamilton, who worked for Family Service, asking questions and seeking general information. After about 2 minutes of conversation, Peralta became very frantic and the pitch of her voice rose. She said, "[H]elp, help. He's coming in. He's coming in. Call the police." Hamilton then heard Peralta screaming, after which a man came on the line and said hello three times. Hamilton did not answer, and after about 30 seconds, she disconnected and called the 911 emergency dispatch service, giving them Peralta's telephone number.

Peralta ran outside. Canbaz ran after her and shot her in the back of the head. Peralta collapsed on the sidewalk. Canbaz came up to her and shot her again in the neck. Canbaz then left the scene in his Jeep and later went to his ex-wife's home. He left his ex-wife a note saying that he had killed Peralta. The police, acting on information received from several witnesses to the shooting, arrested Canbaz later that day. After being properly informed of his *Miranda* rights, Canbaz gave a statement to the police.

In Canbaz' statement to the police, he admitted that he was very upset when Peralta moved out. He admitted that Peralta took out a protection order against him after the move because she was scared. He admitted that he had a sale in late August to dispose of his belongings. He admitted that he went to Peralta's apartment the day of the shooting, purportedly to recover $30,000 which she had taken from him when she left his home earlier that day. Canbaz stated Peralta was on the telephone when he pushed away some bookcases blocking the door and entered the apartment and that he picked up the receiver and said hello. Further, he admitted that as they were leaving the apartment, Peralta ran away from him and that he shot her. He also stated he had an airline ticket to leave for Turkey to see his father, with a departure date a few days after the shooting.

However, he denied ever saying that he would kill Peralta or her family.

Canbaz was charged with first degree murder and use of a weapon to commit a felony. Canbaz pled not guilty. At trial, after the State had presented about two-thirds of its evidence, the court met with counsel in chambers to discuss the State's motion in limine concerning testimony to be presented by Dr. Robert Gutnick, Canbaz' medical expert. The State also informed Canbaz' attorney at this meeting that it intended to have a rebuttal expert listen to Gutnick's testimony. At the end of the conference, Canbaz' attorney made a request to sequester witnesses, which the court granted. The defendant did not request that the court sequester the State's rebuttal witness.

Canbaz did not raise an insanity defense, but instead introduced expert medical testimony from Gutnick in an effort to negate the State's evidence of premeditation. Gutnick opined that at the time of the shooting, Canbaz was suffering from a major depressive disorder with psychosis, panic disorder, and disassociative amnesia. However, Gutnick also testified that Canbaz could, at the time this incident occurred, form an intent of action. Gutnick's opinions were based on medical records from Canbaz' general physician, Dr. David Jasper; medical records from Canbaz' counselor, Roger Yarns, M.S.W.; the police reports on the shooting, including Canbaz' statement; and a 2½-hour medical examination performed by Gutnick.

After Gutnick testified, the State called Dr. Y. Scott Moore as a rebuttal witness concerning Gutnick's testimony. Moore's opinions were based on the same records that Gutnick used, plus Gutnick's written report from his examination of Canbaz and Gutnick's testimony at trial. Moore opined that Canbaz was not suffering from a major depressive disorder at the time of the shooting because Canbaz did not display significant characteristics common to a major depressive disorder. Moore also opined that Canbaz was not suffering from disassociative amnesia because Canbaz was able to give a clear account of the events during, prior to, and after the shooting.

Canbaz objected to Moore's testimony on the basis of foundation, violation of the pretrial discovery order, and violation of the witness sequestration order. He also objected to the testi-

mony of other witnesses, namely Hamilton, the Family Service worker who took Peralta's call; Gene Simon and Sandy Simon, Canbaz' neighbors; Erin Whittington, an acquaintance of Canbaz; and Catherine Clemons and Diane Handley, Canbaz' coworkers. These objections were overruled.

Canbaz was found guilty and sentenced to life imprisonment for the murder of Peralta and 5 to 10 years' imprisonment for the use of a weapon to commit a felony.

## ASSIGNMENTS OF ERROR

Canbaz asserts, rephrased and summarized, that the trial court erred in (1) allowing into evidence the testimony of Moore, Hamilton, Whittington, Gene Simon, Sandy Simon, Handley, and Clemons and (2) overruling Canbaz' motion for a new trial.

## STANDARD OF REVIEW

[1] The admissibility of evidence is reviewed for an abuse of discretion, where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

[2] When judicial discretion is not a factor involved in assessing admissibility, the court's application of the Nebraska rules of evidence will be upheld unless clearly erroneous. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[3] The decision whether to exclude expert witness testimony in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999); *State v. Larsen, supra.*

## ANALYSIS

### TESTIMONY OF MOORE

[5] Canbaz first asserts that the trial court erred in admitting the expert testimony of Moore. The decision whether to exclude

expert witness testimony in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Larsen, supra.* An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

[6] At trial, Canbaz' attorney objected to Moore's testimony on the basis of foundation, stating, "My foundational objection is that this person has never met Mr. Canbaz and, therefore, does not have foundation to give testimony or any opinions in this case." Opinion evidence which is unsupported by appropriate foundation is not admissible. *State v. Clark, supra.* Thus, according to Canbaz, the trial court abused its discretion in allowing Moore to testify.

In his brief, Canbaz relies on *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951), to assert that a personal examination of a defendant by the testifying expert is required in order for a medical expert to have the proper foundation to render an opinion regarding the defendant's state of mind. In *Tvrz*, we stated three possible ways to lay a proper foundation: acquaintance with the party under investigation, a medical examination made by the expert, or a hypothetical case stated to the expert in court. Thus, *Tvrz* does not support Canbaz' assertion that a personal medical examination is necessary. Furthermore, in 1975, the Legislature adopted Neb. Rev. Stat. § 27-703 (Reissue 1995), regarding expert testimony. The statute states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[7] The trial court did not abuse its discretion in determining that Moore possessed sufficient foundation to offer his opinion regarding Canbaz' mental state under § 27-703. An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or con-

jecture. *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983). Here, the record shows that Moore's opinions were based on a review of the same information upon which Gutnick relied, namely Canbaz' medical records and the police reports from the shooting, which included Canbaz' statement. Moore additionally reviewed Gutnick's written report and Gutnick's testimony regarding his examination of Canbaz, which incorporated some of Canbaz' statements to Gutnick during the examination. As such, Moore had sufficient facts to allow him to express his opinion regarding Canbaz' mental state. The trial court did not abuse its discretion in concluding that Moore had sufficient foundation to testify. See, e.g., *McGilberry v. State*, 741 So. 2d 894 (Miss. 1999) (state's expert witness not required to personally examine defendant).

[8] Canbaz also asserted at trial that Moore should not be allowed to testify because the State did not disclose Moore's identity as a witness prior to trial. Such nondisclosure, argues Canbaz, amounts to a violation of the district court's pretrial discovery order. Canbaz does not argue in his brief that Moore's testimony was somehow improper rebuttal testimony. In fact, the record shows that Moore's testimony was offered by the State, after Gutnick offered his testimony on behalf of Canbaz, to rebut Gutnick's evidence regarding Canbaz' mental state at the time of the shooting. See *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). As a proper rebuttal witness, "[i]t has long been the rule in this state that the requirement that the names of the witnesses for the state must be endorsed upon the information has no application to rebuttal witnesses." *State v. Pratt*, 197 Neb. 382, 387, 249 N.W.2d 495, 498 (1977). See, also, *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953). Thus, the State was not required to provide Canbaz with Moore's name prior to trial.

Canbaz asserts, however, that the pretrial discovery order obligated the State to name rebuttal witnesses. The pretrial discovery order, drafted by Canbaz, ordered the State to provide various items, including "the names, addresses and telephone numbers of all witnesses upon whose evidence the charges are based." The discovery order does not require the State to disclose any information with regard to rebuttal witnesses. Thus,

we find no abuse of discretion in allowing Moore to testify because the trial court correctly determined that the State had no obligation under our case law, or under the terms of the discovery order, to identify Moore as a rebuttal witness prior to his testifying.

Finally, Canbaz asserts that Moore should not have been allowed to testify because Moore was present in the courtroom during the testimony of Gutnick, in violation of the witness sequestration order entered by the court. The reasoning from *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984), and *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989), is helpful in addressing this issue.

In *Jackson*, the defendant requested that the State's expert medical witness be sequestered during trial. The trial court denied the request. The State explained that the presence of its expert was necessary because the State " 'has no opportunity under the law, unless the defense allows [it], to examine the defendant at all, other than to be present in court when [the defendant] testifies.' " 231 Neb. at 213, 435 N.W.2d at 897. We recognized in *Jackson* that there are constitutional constraints upon the State's ability to obtain information on a defendant's mental state and concluded that the trial court did not abuse its discretion in refusing to sequester the State's expert.

[9] In *Vosler*, we noted that because the State could not compel a defendant to submit to a mental examination unless he or she tenders an insanity defense, "[t]he State could also have an appropriate witness attend the trial and testify on the issue [of the defendant's mental state] based upon what the witness learned as a result of the evidence adduced at trial." 216 Neb. at 471, 345 N.W.2d at 812.

Consistent with *Jackson* and *Vosler*, we find that the trial court did not abuse its discretion in allowing Moore to testify because Moore was properly present in the courtroom during Gutnick's testimony.

### Testimony of Hamilton

Canbaz next asserts that the trial court erred in admitting the testimony of Hamilton, the Family Service worker who received Peralta's call. At trial, Canbaz' attorney objected to Hamilton's

testifying that during the call, Peralta said, "[H]elp, help. He's coming in. He's coming in. Call the police." Canbaz asserted that this testimony was hearsay and lacked foundation because Hamilton did not personally know the identity of the woman she spoke to on the telephone.

[10] The State argues that Hamilton's testimony as to what Peralta said on the telephone was admissible under the excited utterance hearsay exception. For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). See, also, Neb. Rev. Stat. § 27-803(1) (Reissue 1995). Hamilton testified that after 2 minutes of calm conversation, "[t]he pitch of [Peralta's] voice rose. She became excited, agitated. . . . She said help, help. He's coming in. He's coming in. Call the police. . . . She was like yelling, screaming at that point."

Peralta's statement meets the criteria for the excited utterance exception. There was a startling event, in the form of Canbaz' forcing his way into Peralta's home. Peralta's statement related to this event. Peralta was under the stress of the event when she made her statement, as evidenced by the fact that she was yelling and frantic. The court did not err in determining that Hamilton's testimony as to Peralta's statement was admissible under the excited utterance exception.

Canbaz also argues that Hamilton lacked the foundation to testify because she did not know the actual identity of the woman who called her. Hamilton testified that at the beginning of the call, the caller gave Hamilton the telephone number from where she was calling. Officer Marlin McClarty, who responded to the 911 emergency call made by Hamilton, testified that the telephone number given to the 911 dispatch operator matched Peralta's address, 414 North 39th Street. Further, Canbaz admitted in his statement that Peralta was on the telephone when he entered her apartment. He picked up the telephone and said hello, but there was no answer. This corresponds with Hamilton's testimony that after Peralta said, "[H]elp, help. He's coming in. He's coming in. Call the police,"

a man came on the line and said hello, to which Hamilton did not respond. This evidence sufficiently established that Peralta was the person Hamilton spoke to on the telephone. The trial court did not err in determining that Hamilton had sufficient foundation to testify regarding the telephone conversation. Canbaz' assignment of error regarding Hamilton's testimony is without merit. See *Parker v. State*, 129 Md. App. 360, 742 A.2d 28 (1999).

TESTIMONY OF WHITTINGTON

Whittington, an acquaintance of Canbaz, testified that a few days before the shooting, Canbaz told her "he was moving back to Turkey but I'd see him on the news before he left." Canbaz asserts that Whittington's testimony lacked relevance and, further, assuming it was relevant, that her testimony was more prejudicial than probative under Neb. Rev. Stat. § 27-403 (Reissue 1995).

[11] 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. *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Whittington's testimony about Canbaz' statement shortly before the murder was relevant in that it was evidence of Canbaz' intentions. Canbaz' assertion that Whittington's testimony is irrelevant is without merit. Canbaz further asserts, however, that the trial court abused its discretion in admitting Whittington's testimony because, if relevant, it was more prejudicial than probative.

[12] Under § 27-403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "For the purposes of this rule . . . [u]nfair prejudice means an undue tendency to suggest a decision based on an improper basis." (Citations omitted.) *State v. Newman*, 250 Neb. 226, 241-42, 548 N.W.2d 739, 751 (1996). After carefully reviewing the record, we find that the trial court did not abuse its discretion in determining that Whittington's testimony was more probative than prejudicial. This assignment of error is without merit.

TESTIMONY OF GENE SIMON, SANDY SIMON, HANDLEY, AND CLEMONS

Finally, Canbaz argues that the trial court abused its discretion in admitting the testimony of Canbaz' neighbors and coworkers regarding statements Canbaz made to them about wanting to kill Peralta and/or her family.

Gene Simon testified that after Peralta moved out in early July 1998, "[Canbaz] mentioned on several occasions that he would like to kill her or that he wanted to kill her. . . . [H]e mentioned he had bought five pairs of handcuffs and he was going to kill each and every member of her family." Sandy Simon, Gene Simon's wife, testified that after Peralta moved out, "[Canbaz] confronted me outside in my driveway very angry, upset; and repeatedly [sic], I'm going to kill Debbie and her family." Handley, a coworker of Canbaz, testified that the day after Peralta moved out, Canbaz told her that "he had been driving around all night looking for [Peralta] trying to find her. . . . He said that he was going to hurt her and that she wasn't going to get away with it and that he would make her pay. . . . He said that he had a gun." Clemons, another coworker, testified that she had one conversation with Canbaz sometime after Peralta moved out, where "[Canbaz] talked about wanting to hurt [Peralta]. He said that at one point, he would kill her and then kill himself." When Canbaz picked up his paycheck on August 31, he told Clemons "by the end of his vacation, it would be all over."

[13] Canbaz argues that these statements are irrelevant and prejudicial evidence of prior bad acts under Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime. *Id.* See, also, *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). Prior to trial, the State argued that § 27-404 was inapplicable to the disputed statements because the statements were relevant only to this crime, and not evidence of any other prior crimes. See *State v. McManus, supra*. However, the court determined that § 27-403 applied, and held a pretrial hearing regarding the disputed testimony. The court determined that

the disputed evidence was admissible, subject to a limiting instruction that such evidence should be considered by the jury only to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in the crimes charged against defendant." See § 27-404(2).

The testimony of Canbaz' neighbors and coworkers is not evidence of prior unrelated bad acts under § 27-404(2). It is relevant evidence that Canbaz murdered Peralta intentionally and with premeditation. The disputed evidence was offered by the State to specifically show that Canbaz formed an intentional, premeditated plan to kill Peralta. The trial court erred in concluding that § 27-404(2) applied to the disputed testimony. However, this error resulted in no prejudice to Canbaz. The limiting instruction at trial simply admonished the jury to consider the disputed testimony for the very purpose for which it was admitted.

Canbaz further argues that the trial court erred in admitting the disputed statements under § 27-403 because the statements were more prejudicial than probative. As we have already noted, under § 27-403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Unfair prejudice means an undue tendency to suggest a decision based on an improper basis." *State v. Newman,* 250 Neb. 226, 242, 548 N.W.2d 739, 751 (1996).

The testimony of Canbaz' neighbors and coworkers was not unfairly prejudicial, confusing, or misleading to the jury. This testimony provided a proper basis for determining whether Canbaz killed Peralta intentionally and with premeditation. The trial court did not abuse its discretion in admitting the testimony of Gene Simon, Sandy Simon, Handley, and Clemons. Canbaz' assertion to the contrary is without merit.

## MOTION FOR NEW TRIAL

Canbaz also asserts that the trial court erred in not granting his motion for a new trial. Because Canbaz has failed to show any error committed by the trial court, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

## CONCLUSION

Having considered all of Canbaz' assigned errors, we conclude they are without merit and affirm his convictions and sentences.

AFFIRMED.

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CAROL A. BOWERS, FORMERLY KNOWN AS CAROL A. SCHERBRING, APPELLANT, V. ROBERT SCHERBRING, APPELLEE.

611 N.W.2d 592

Filed June 2, 2000. No. S-98-564.

1. **Modification of Decree: Good Cause: Appeal and Error.** The determination of good cause necessary for modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
2. **Modification of Decree: Alimony: Good Cause.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown.
3. **Good Cause: Words and Phrases.** Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case.
4. **Evidence: Appeal and Error.** In a de novo review, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Modification of Decree: Alimony.** Changes in circumstances within the contemplation of the parties at the time a decree of dissolution is entered do not justify modification of an alimony award.
7. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Douglas County, MARY G. LIKES, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Michael B. Kratville, of Terry & Kratville Law Offices, for appellant.

Karen L. Vervaecke for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Carol A. Bowers, formerly known as Carol A. Scherbring, appealed from the Douglas County District Court's denial of her application to modify an award of alimony and her request for attorney fees. The Nebraska Court of Appeals affirmed, and we granted Bowers' petition for further review.

## SCOPE OF REVIEW

[1] The determination of good cause necessary for modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

## FACTS

On June 3, 1996, the district court entered a decree dissolving the marriage between Bowers and Robert Scherbring. The decree awarded each party alimony of $1 per year. On September 24, Bowers filed an application for an increase in alimony, alleging a material change in circumstances. Bowers alleged that subsequent to entry of the decree, she was unexpectedly laid off from her job as part of a reduction in force which occurred on August 15.

At the hearing on the application, Bowers testified that she had previously been employed for numerous years as a medical technologist. A few days before entry of the decree, she began to work for Independence Regional Hospital and was employed there for 89 days. Subsequently, she was employed at Trinity Hospital for approximately 3 weeks. She voluntarily terminated her employment for an opportunity to work at Kaiser Permanente. She voluntarily terminated her employment with

Kaiser Permanente and then gained employment at Physicians Reference Laboratory, LLC. There, she was asked to leave employment after approximately 1 month because of a mistake she had made in the laboratory. She then became employed at Lab One and worked there for approximately 7 weeks before she was asked to leave. At the time of the hearing, Bowers had not sought employment in the medical technology field since her employment with Lab One ended in March 1997. Bowers testified that she was unable to work in the field of medical technology due to her problems with cognitive impairments.

The medical testimony offered at the hearing showed that Bowers suffered from cognitive impairments related to short-term memory and that she was unable to continue working in the medical technology field. Bowers has suffered problems with memory retention and concentration since 1994. She has been treated by Dr. Johnny Johnson, an internal medicine/general practice physician; Dr. Roxane Bremen, a neurologist; Dr. Dennis Cowan, a neuropsychologist; and a Dr. Keyser, a psychologist.

Dr. Thomas Grandy, a psychologist, opined that in terms of Bowers' short-term memory, she had recall very similar to a person with a learning disability. Her scores on visual matching and "cross out" were in the 28th and 24th percentile respectively. Grandy stated that such deficiencies would cause problems for someone working as a medical technologist and that the tests he performed showed that Bowers had a deficiency in short-term memory such that she had difficulty in remembering words and numbers and in putting items in sequence. Grandy stated that the test results, combined with employer information which he had obtained, strongly suggested that Bowers could not satisfactorily perform the daily duties required of a laboratory medical technologist in a timely and accurate manner. He opined that Bowers could not maintain employment in her previous career, but that she might be employable within the medical field either in a less demanding professional position or in a clerical position. He recommended that Bowers undergo vocational rehabilitation.

Bowers testified that she had collected unemployment for 6 months and then had "cashed in" her retirement funds. She has

applied twice for Social Security disability benefits, but was turned down. She was subsequently accepted into graduate school at the University of Nebraska-Omaha in the Department of Education, where she hopes to become a counselor and work with abused women. She estimated that her monthly living expenses while she attended graduate school would be approximately $1,600 per month.

The district court denied Bowers' application for modification, finding that there had not been a material change in circumstances. Thereafter, the Court of Appeals affirmed. See *Bowers v. Scherbring*, No. A-98-564, 1999 WL 1080659 (Neb. App. June 29, 1999) (not designated for permanent publication). The Court of Appeals relied on the fact that Bowers had suffered from memory problems since 1994 and that she had reported difficulties with thinking and problems with memory in November 1995. It concluded that Bowers did not prove a change in circumstances regarding her employability and earning capacity and that although she offered evidence proving that she was no longer employable as a medical technologist, she failed to present evidence to show that she was unemployable in any field or that her medical condition had caused a decrease in her earning capacity. The court, with one judge dissenting, concluded that Bowers had failed to meet her burden of proving a change in circumstances since the time of the decree, and it affirmed the denial of Bowers' application to modify the decree. We granted further review.

## ASSIGNMENTS OF ERROR

Bowers argues, summarized and restated, that the Court of Appeals erred (1) in failing to find that a material change in circumstances had taken place since the entry of the divorce decree and (2) in not awarding fees and costs to Bowers.

## ANALYSIS

[2] Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown. In order for Bowers to show good cause, she must show a material and substantial change in circumstances which was not contemplated by the parties at the time of the decree.

[3,4] The determination of good cause necessary for modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case. *Id.*; *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985). In a de novo review, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[5] We first consider whether Bowers proved a material change in circumstances and examine the decision of the district court for an abuse of discretion. A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.* Here, the evidence is not in conflict, and our de novo review will be based upon whether the evidence presented establishes a material change in circumstances regarding Bowers' employment subsequent to the date of the decree such that the district court abused its discretion in refusing to modify the award of alimony.

[6,7] Changes in circumstances within the contemplation of the parties at the time a decree of dissolution is entered do not justify modification of an alimony award. *Id.* The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of the alimony award. *Id.*

In concluding that Bowers had failed to establish a material change in circumstances, the Court of Appeals relied upon the fact that she had suffered from memory problems since 1994 and that the neurocognitive deficits from which she suffered had existed since that time. See *Bowers v. Scherbring, supra.* Although it is undisputed that Bowers' neurocognitive deficits have existed since 1994 and were therefore contemplated by the

parties at the time of the dissolution, we conclude that it was not contemplated by the parties that Bowers' illness would prevent her from working as a medical technologist. Bowers had been treated by doctors regarding her illness prior to the decree of dissolution, but it was only after the decree that she had to stop working.

As a medical technologist, Bowers earned between $17 and $18 per hour. Assuming a 40-hour workweek, Bowers earned between $35,000 and $37,000 per year. At the time of the hearing on the application, Bowers was no longer employed. Grandy testified that Bowers might be employable within the medical field either in a less demanding position or in a clerical position. He recommended that Bowers undergo rehabilitation. We conclude that Bowers has shown that she has sustained a decrease in her earning capacity.

We next consider whether Bowers was required to show that she was unemployable in any field in order to prove a material change in circumstances occurring since the decree. In *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985), the husband was ordered to pay alimony, and 1 year later, he filed a petition to modify the award. The husband alleged a change of circumstances in the employment and earnings of the parties and a change in his health. The husband had worked as a pilot, but his pilot's license had been canceled because of health problems. He claimed that since his surgery, he had not been able to find work in this field. He alleged that he could perform only aviation-related jobs and that because of his age, health, and limited skills, he was not otherwise employable. The trial court found him to be employable and refused to modify his alimony obligation.

In affirming the trial court's decision, we noted that the husband seemed interested only in aviation-related employment and disregarded other employment possibilities. Relying upon *Sifers v. Sifers*, 544 S.W.2d 269 (Mo. App. 1976), we reasoned that simply because the husband could not find a job in his area of expertise did not mean that he was physically unable to work. His pension income, together with disability benefits, had increased each year. We noted that the wife's increase in income was offset by an increase in her living costs in Washington, D.C.

Based on these facts, we found no material change in circumstances and affirmed the trial court's denial of the husband's request to reduce or suspend the alimony award.

In contrast, in *Sholl v. Sholl*, 216 Neb. 289, 343 N.W.2d 742 (1984), we held that a change in the husband's status from being an owner-operator of a business to being a salaried employee was such a material change in circumstances as to constitute good cause to modify the husband's alimony obligation. In that case, the husband had been contracting to buy a retail grocery store at the time of the divorce. He was ordered to pay $370 per week in alimony for the first year and $350 per week for the following 3 years. When the grocery store began to lose money, the husband was unable to fulfill the terms of the purchase agreement. At the time of the request for modification, the husband was the comanager of another grocery store, where he earned $327 per week after taxes. On these facts, we found that the husband had proved a material change in circumstances. *Sholl* is significant because it illustrates that a change in one's status, such as a change from being an owner-operator of a business to being a salaried employee, if accompanied by a loss in income, can be the basis for modification of an alimony award.

In the present case, Bowers is unable to work in her chosen profession and has gone back to school to learn another occupation. We therefore conclude that the Court of Appeals erred in requiring Bowers to present evidence to show that she was unemployable in any occupation.

In summary, Bowers has shown a material and substantial change in circumstances that supports a modification of alimony. As the dissent in the Court of Appeals stated: "I know of no principle that would require an alimony recipient who has suffered a medical disability to prove a complete lack of employability in order to justify modification of an alimony award." *Bowers v. Scherbring*, No. A-98-564, 1999 WL 1080659 at *4 (Neb. App. June 29, 1999) (Mues, J., dissenting) (not designated for permanent publication). Bowers has shown a decrease in earning capacity not contemplated by the parties at the time of the decree, and the district court abused its discretion in failing to modify Bowers' alimony award.

Bowers also assigns as error that the Court of Appeals failed to rule on her request for fees and costs. This assignment of error is without merit. Bowers did not include an argument addressing this assignment of error in her brief before the Court of Appeals. Thus, the Court of Appeals was correct in not addressing this assignment of error.

## CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals and remand the cause to that court with directions that the Court of Appeals remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., dissenting.

I respectfully dissent. Based upon my review of the record, I cannot conclude that the trial court abused its discretion in determining that Bowers failed to meet her burden of proving a material change in her circumstances which would warrant modification of the original alimony award.

Bowers filed the application to modify on September 24, 1996, less than 4 months after entry of the decree on June 3. In her application, Bowers alleged that her circumstances had changed in that she "was unexpectedly laid off from her job as part of a reduction in force on approximately August 15, 1996." She did not allege any inability to work due to deterioration of her health. Although this had become her contention by the time of the modification hearing on April 20, 1998, she testified that she was "asked to leave" her job in August 1996 but did not state that the request was prompted by either a reduction in force or performance deficiencies related to her health.

Bowers testified that subsequent to the decree, her health changed for the worse in that she developed problems with memory and "brain functioning." As the majority notes, Bowers sought medical care for similar problems beginning in 1994. A medical record dated September 27, 1995, indicates that Bowers had reported intermittent problems with memory retention and concentration over a period of 2 years. Another medical record dated April 8, 1997, reflects that Bowers had reported "continual neurocognitive deficits" since 1994.

I disagree with the majority's conclusion that "it was not contemplated by the parties [at the time of the dissolution] that Bowers' illness would prevent her from working as a medical technologist." The record reflects that on May 11, 1994, Bowers resigned her position as a medical technologist at Midlands Community Hospital effective June 4 of that year, stating that she wished to assist her son with his modeling career in New York over the summer months. A Mayo Clinic record dated April 23, 1996, includes a medical history reflecting that Bowers reported becoming ill during a 1994 trip to New York City with her son and that she continued "to feel unwell" over the following year. This record further reflects that Bowers "worked in Missouri as a medical technologist for 2-1/2 months from November 1995, but is not working now." The only other evidence of Bowers' employment during the period between her resignation from her medical technologist position at Midlands Community Hospital in 1994 and her commencement of work in a similar position at Independence Regional Hospital "a few days prior to the divorce" was a job at Younkers which she held for approximately 3 weeks. In the report of his psychological evaluation of Bowers in November 1997, under the heading "Interview Information," Grandy recorded:

> Ms. Bowers stated that she was previous [sic] diagnosed with problems in the areas of short-term memory and thought sequencing by a neuropsychologist. She indicated that these problems were the result of encephalopathy caused by high blood serum levels of iron, lead and copper. She presented a lengthy work history in medical technology, but reported difficulties maintaining full-time employment since 1994. She reportedly left six or seven positions during the past four years due to mistakes and inability to learn.

This evidence contradicts Bowers' testimony that she had no reason to doubt her ability to perform the medical technologist position at Independence Regional Hospital when she accepted it. The trial court was in the best position to assess Bowers' credibility on this point and could have quite reasonably inferred from the evidence that Bowers suffered from health problems which prevented her from holding regular employment as a

medical technologist for approximately 2 years prior to the 1996 dissolution decree and that therefore, Bowers failed to prove a material change in circumstances which would warrant modification of the alimony award.

For these reasons, I agree with the Court of Appeals that the district court did not abuse its discretion in denying the modification sought by Bowers. I would affirm.

HENDRY, C.J., joins in this dissent.

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DIANE L. HEALD, APPELLEE, V. DAVID S. HEALD, APPELLANT.

611 N.W.2d 598

Filed June 2, 2000. No. S-98-1301.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Judgments: Evidence: 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. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
6. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.
7. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
8. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
9. ___. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the par-

ties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

10. **Divorce: Property Division.** Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.

11. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed as modified.

Charles Jan Headley for appellant.

Mark J. Milone, of Frost, Meyers, Govier & Milone, for appellee.

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

GERRARD, J.

## NATURE OF CASE

David S. Heald (husband) appeals from the dissolution decree rendered by the Cass County District Court, which dissolved the marriage between Diane L. Heald (wife) and him. The husband contends that the district court erred in its division of the marital estate by including alleged nonmarital property, by awarding the wife the entirety of the husband's profit-sharing plan, and by failing to set off his premarital downpayment toward the family home. The husband further claims that the district court erred in not granting his motion for a new trial to determine the wife's earning capacity. For the reasons that follow, we affirm as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

The Healds were married on August 26, 1983, and their marriage produced one child. The wife filed a petition for dissolution on January 21, 1997.

During the marriage, the wife was employed in various jobs, including U S West until 1992, followed by a 14-month period of unemployment; then at her husband's family business,

Prescott Heald & Son, Inc. (Heald & Son), for approximately 1 year; and also for a temporary employment agency. At Heald & Son, she worked part time as a computer programmer and was paid $8 an hour. She was still registered with the temporary agency at the time of trial, but was not working. Her highest hourly rate with the agency was $8.97. At trial, the wife calculated her gross monthly income at $9 per hour for a 40-hour week.

Throughout the marriage, the husband was employed by the family corporation, Heald & Son. The husband testified that his gross yearly income was approximately $48,000. The husband was the sole director, officer, and president of the corporation. Additionally, the couple owned the Heald & Son building and derived monthly rental income. The wife estimated the monthly rental income at $3,576.17, whereas the husband proffered a $749.23 figure.

The husband was also a Heald & Son shareholder. The manner in which he acquired his share was sharply disputed at trial. The husband claimed the stock was a gift and should be excluded from the marital estate, whereas the wife argued that the stock was marital property.

The husband testified that he and his father negotiated an agreement in which he became the owner of one share of Heald & Son. Two documents detailed the transaction. Exhibit 26 was an attorney letter, dated August 15, 1983, and addressed to both the husband and his parents. In this letter, the attorney advised:

> In my opinion the stock should be purchased by [the husband] and so long as any amount remains due and owing on the Note from the Company to [the husband's father], or on the Purchase Agreement, the stock should be sold to the Company with only one (1) share being sold to [the husband].

The other significant document was the "Stock Purchase Agreement" between the husband and his parents, dated September 1, 1983. In this agreement, the husband and Heald & Son were referred to as "Buyers" and the husband's father was referred to as "Seller." The agreement stated that the Seller desired to sell 1 share of his stock in the corporation to the husband and the remaining 189 shares to Heald & Son and that the

Buyers desired to purchase such shares. The Buyers agreed to pay all notes and loans the corporation owed the Seller. With these notes, together with interest and price, the total purchase price of all the shares was $147,474.21. The agreement also provided that the shares would remain in escrow and that the husband was prohibited from voting his share until all shares were paid in full. The Buyers authorized the Seller to vote all stock held in escrow until full payment was made.

At trial, the husband's mother testified that no payment was made to her or the husband's father for the share of stock that the husband received and that it was a gift to him. She admitted, however, that she was not involved in the legal transaction, but only in the home discussion. The husband also noted that his mother was not "too involved" in the negotiations. The husband's mother further admitted that, to her knowledge, the stock purchase agreement controlled the transaction.

The husband also testified that the stock was a gift. He stated that he did not file a gift tax return because his accountant told him it was not necessary. He explained that exhibit 27, which contained numerous Heald & Son checks written to the husband's father and signed by the husband, were payments made by the corporation for the 189 shares of stock. The husband stated that he did not use personal earnings to purchase the stock which was evinced in exhibit 27. When confronted with the stock purchase agreement on cross-examination, the husband maintained that the stock was gifted or inherited, but admitted that no documents indicated that it was in fact a gift. The wife testified that she believed that she and her husband bought the one share of stock for $150,000 because he told her that that was what had occurred.

Shortly before the couple married, the husband paid a downpayment for the marital home in Ralston, Nebraska. The wife did not know the amount of the downpayment. The mortgage banker's "Good Faith Estimate of Settlement Charges" was received into evidence, which shows that the home's purchase price was $72,880 and the loan amount was $67,500. At trial, the husband testified and the wife conceded that the difference between the purchase price and the loan amount was the downpayment supplied by the husband. The Ralston home was origi-

nally titled in the husband's name, but during the marriage, he conveyed title to the wife and himself as joint tenants. The couple later moved to another home in Plattsmouth.

Both parties accumulated value in various plans and pensions. Notably, the husband's profit-sharing plan was valued at $151,297.20. The wife also incurred substantial credit card debt during the marriage, and the husband would "bonus" himself additional money from the corporation in order to pay off the debt.

Testimony was also adduced involving the wife's purported frustration of the husband's discovery process during the proceedings. The wife testified that there were 5 or 10 boxes, now located at her mother's house, which she did not disclose to her husband. The wife stated that the boxes contained magazines and sewing books and that she did not disclose them to him because they were heavy. The husband testified that approximately 3 years before he left the marital home, the wife started "boxing stuff" and that although the wife eventually allowed him to review some of them, those he reviewed were not the same boxes that he saw her packing. The husband wanted an opportunity to review the contents of those boxes to see if there were items of substantial value that he could claim as a marital asset.

On October 15, 1998, the district court issued its decree dissolving the marriage. In relevant part, the court made findings that the wife had an earning capacity of $9 per hour and that the husband had a gross monthly income of $4,000 from Heald & Son and $1,065 from the rental property. In the property division, the district court acknowledged that the husband had made a $5,380 downpayment on the first marital home, but found that he was not entitled to any type of credit. The court noted that the property was eventually titled in the names of both parties as joint tenants and that when a husband and wife take property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other. The court found that the current marital home had a fair market value of $220,000 and awarded it to the husband, subject to the outstanding mortgage of approximately $97,081.82. The court found that the rental property had a fair market value of $230,000, with mortgages totaling

$163,445.59. The rental property was also awarded to the husband, subject to the mortgages.

The court found that the Heald & Son stock was marital property. In making its finding, the court noted:

> The Court finds that shortly after the parties were married, the [husband] entered into a stock purchase agreement (Exhibit 7) wherein the [husband] purchased one share of stock in Prescott Heald and Son, Inc. The remaining 189 shares of stock were purchased by Prescott Heald and Son, Inc. and became treasury stock. The [husband], as the owner of the one share of stock, is the sole stockholder of the corporation. A letter from the attorney who handled the transaction (Exhibit 26) further evidences the intent of the parties to enter into an agreement involving the purchase of the share of stock. The outstanding balance owed to the sellers pursuant to the stock purchase agreement has been fully paid off during the marriage of the parties. The [husband's] argument that the one share of stock was a gift to him and that the stock should not be considered as marital property is without merit.

The court valued the stock at $297,000 and awarded it to the husband.

The husband was also awarded the $500 boat trailer, bank accounts worth $244.79, all interest in his 401K plan valued at $2,761, and personal property with an approximate value of $3,550. The court awarded the wife the Jeep Cherokee valued at $10,175, bank accounts worth $15.24, and 600 shares of ADMS stock with an approximate value of $9,750. The wife was also awarded her U S West pension plan, which was rolled over into a Perelman-Carley & Associates, Inc., account, and was valued at $29,591.15. The court awarded the wife all interest in the husband's profit-sharing plan, valued at $151,297, and approximately $12,000 in personal property.

The court also awarded each party one-half of the wife's other U S West pension plan. It further noted that the husband had brought his IRA into the marriage, then valued at $4,237; after the marriage, the parties contributed an additional $8,000. The court set off 34.6 percent of the account's value for the husband

as a premarital asset and then stated that the remaining 65.4 percent should be divided equally as marital property.

In dividing the debts, the court obligated the wife to pay a total amount of $28,432.87, whereas the husband was held responsible for a $3,200 note and the mortgages. The court then noted that because the main assets of the marriage were awarded to the husband, the court equalized the division by entering a $150,000 judgment in favor of the wife and against the husband.

Finally, the court awarded the wife $400 in monthly alimony. The parties stipulated to joint legal custody of their child. The wife was found to be the primary residential or possessory parent, and the husband was obligated to pay $758.01 per month in child support.

The husband timely filed a motion for a new trial, which was overruled in relevant part. The husband timely appealed. We removed this case to our docket pursuant to our authority to regulate the dockets of the appellate courts of this state.

## ASSIGNMENTS OF ERROR

The husband alleges, restated, that the district court erred (1) by including his stock in the family corporation in the marital estate, (2) in awarding the wife the entirety of his profit-sharing plan, (3) in failing to set off his contribution of the downpayment toward the family home, and (4) in not granting his motion for a new trial to determine the wife's earning capacity.

## STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000); *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

[2] 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. *Parde v. Parde, supra*; *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). However, where the credible evidence

is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

[3,4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Meints v. Meints, supra.*

## ANALYSIS

### Stock in Heald & Son

[5] The parties were married on August 26, 1983, and the stock transaction occurred on September 1. The husband thus acquired his sole share in Heald & Son during the marriage, and the share is presumptively marital property unless an exception to the general rule excludes it from the marital estate. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

[6,7] The husband claims the share was a gift, which is normally excluded from the marital estate. With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). See, also, *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). The burden of proof to show that property is nonmarital remains with the person making the claim. *Parde v. Parde, supra.* Therefore, the husband has the burden of proving that the stock was a gift.

The husband has failed to meet this burden. Although both he and his mother testified that the stock was a gift, the stock purchase agreement, the attorney letter, and the wife's testimony suggest otherwise. Upon our de novo review, where the credible evidence is in conflict on a material issue of fact, we

consider and give weight to the circumstances that the trial judge heard and observed the witnesses and accepted the wife's testimony and the related inferences from the evidence. See *Elstun v. Elstun, supra*. We therefore conclude that the district court did not err in including the Heald & Son stock in the marital estate.

PROPERTY DIVISION

[8] The husband contests the property division in the assigned errors involving the profit-sharing plan and the downpayment on the marital home. In addressing these alleged errors, we note that the purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 1998). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

[9] Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Meints v. Meints, supra*.

The district court, for the most part, followed these three steps in dividing the property. The court set aside as the husband's nonmarital property his 300 shares of the ADMS stock, his premarital contribution to his IRA, and various items of personal premarital property. The court also awarded the wife various items of her personal premarital property. It then valued the marital assets and liabilities.

The final step involved the calculation and division of the net marital estate. The following chart shows how the marital estate was calculated and divided:

| Assets | Wife | Husband |
|---|---|---|
| Real estate—home | | $220,000.00 |
| Real estate—rental | | 230,000.00 |
| Heald & Son stock | | 297,000.00 |
| Marital personal property | $ 22,175.00 | 4,050.00 |

| | | |
|---|---|---|
| Bank accounts | 15.24 | 244.79 |
| ADMS stock | 9,750.00 | |
| Wife's rollover pension | 29,591.15 | |
| Husband's profit sharing | 151,297.00 | |
| Husband's 401K | | 2,761.00 |
| Wife's other U S West pension plan | one-half | one-half |
| Marital portion of IRA | one-half | one-half |
| Total marital assets | $212,828.39 | $754,055.79 |

| Liabilities | Wife | Husband |
|---|---|---|
| Home mortgage | | $ 97,081.82 |
| Mortgages on rental | | 163,445.59 |
| Loans/credit card debt | $ 28,432.87 | |
| Note to Heald & Son | | 3,200.00 |
| Total marital debt | $ 28,432.87 | $263,727.41 |

| | |
|---|---|
| Total marital assets | $966,884.18 |
| Total marital debts | (292,160.28) |
| Net marital estate | $674,723.90 |

Because the above calculation resulted in the wife's receiving a $184,395.52 portion of the net marital estate and the husband's receiving $490,328.38, the district court entered a $150,000 judgment in favor of the wife and against the husband. This judgment resulted in the wife's ultimately garnering $334,395.52 (49.6 percent) and the husband's receiving $340,328.38 (50.4 percent) of the net marital estate.

Through the imposition of the judgment, the district court attempted to equalize the property division. The husband argues, however, that it is inequitable to impose a $150,000 judgment under the circumstances of this case, i.e., the transfer of a three-generation family business to him. Section 42-365 does direct us to consider, among other things, the circumstances of the parties and their history of contributions to the marriage.

As previously discussed, we agree with the district court's determination that the Heald & Son stock was not a gift and, therefore, was properly included in the marital estate. The husband's claim that it is unfair to impose a $150,000 judgment under the circumstances is not persuasive. The evidence reveals that the husband was invited to join his father in working for the

family business, Heald & Son. The husband's father ran the business and inherited it from the husband's grandfather, who started the business in 1916. Heald & Son is a distribution center for specialty industrial products such as pallet rack industrial shelving. Although the husband worked in the business and contributed toward its success, the remaining 189 shares of Heald & Son stock were purchased by the corporation and became treasury stock during the marriage. The outstanding balance on all notes and loans the corporation owed to the husband's father, in the total sum of $147,474.21, was paid during the marriage. The evidence suggests that the long-established business and family name were greatly responsible for the closely held stock's value at the time of the dissolution decree. In short, there was nothing unusual that either party contributed to the business during the marriage that would cause us to invoke extraordinary equitable principles. Therefore, the district court did not abuse its discretion in making a nearly equal division of the net marital estate.

[10] Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). In the instant case, the wife received 49.6 percent of the net marital estate, whereas the husband received 50.4 percent. We conclude that this nearly equal distribution was equitable under these circumstances.

We do, however, modify the property division to reflect the husband's downpayment on the family home. Both parties agreed that prior to the marriage, the husband paid a $5,380 downpayment on the first marital home. The district court did not credit the husband this amount, citing *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988), for the proposition that because the parties took as joint tenants, a gift is presumed to be made by the spouse furnishing the consideration to the other. In so doing, however, the district court did not recognize the fact that when the husband made the downpayment, he was not yet married, unlike in *Brown v. Borland*, where the property was acquired and transferred during the marriage. Property which a party brings into the marriage is generally excluded from the marital estate. See, e.g., *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Johnson v. Johnson*, 209 Neb. 317, 307

N.W.2d 783 (1981); *LaBenz v. LaBenz*, 6 Neb. App. 491, 575 N.W.2d 161 (1998). Thus, the husband is entitled to a credit for the downpayment of $5,380. We therefore modify the district court's judgment to reflect this credit, resulting in a judgment to equalize the property division in the sum of $144,620.

### NEW TRIAL

[11] The husband argues that he should be entitled to a new trial on the wife's earning capacity as a sanction for her admitted frustration of the discovery process by not allowing him to view certain boxes. Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion. *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994). On the record before us, we cannot conclude that the trial court abused its discretion in denying the husband's motion for a new trial. This assignment of error is without merit.

## CONCLUSION

The district court correctly included the Heald & Son stock in the marital estate and its overall division of the marital estate was equitable. The district court, however, erred in failing to give the husband credit for the $5,380 premarital downpayment on the home. We therefore modify the property division, which affects the amount of the judgment in favor of the wife and against the husband. The amount of the judgment to equalize the property division is reduced to $144,620. In all other respects, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

# THE MUTUAL GROUP U.S., APPELLEE, V. CHARLES R. HIGGINS, APPELLANT.

611 N.W.2d 404

Filed June 2, 2000. No. S-99-031.

1. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Attorneys at Law: Appeal and Error.** If an appeal from an order of disqualification of counsel involves issues collateral to the basic controversy and if the appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory appeal from the order removing counsel is appropriate.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Standing: Jurisdiction: Parties: Courts.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding.
6. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
7. **Actions: Parties: Standing.** The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
8. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, "standing" requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.

Appeal from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Judgment of District Court affirmed.

Phillip G. Wright, of Quinn & Wright, for appellant.

Terrence J. Salerno for appellee.

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

McCormack, J.

## NATURE OF CASE

The Mutual Group U.S. filed a petition in the county court against Charles R. Higgins claiming subrogation rights pursuant to an insurance policy. Mutual Group subsequently filed a motion to disqualify Higgins' attorney. The county court sustained the motion. Higgins appealed to the district court, which affirmed the county court's decision. Higgins appealed the decision of the district court, and on our own motion, we removed the matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## BACKGROUND

This case arose from the alleged payment of medical bills by Mutual Group on behalf of Higgins following an injury caused by a third party. Higgins, being represented by Phillip G. Wright, had brought a claim against the third party. Mutual Group alleges that subsequent to the claim being filed against the third party, it notified Higgins that it would be pursuing its subrogation rights regarding any medical bills paid to or on behalf of Higgins by Mutual Group. Higgins has since settled his claim against the third party, but no part of such settlement has been paid to Mutual Group. Higgins contends that Mutual Group failed to give notice of any subrogation rights until after Higgins settled his claim against the third party.

Subsequent to filing its petition, Mutual Group filed a motion to disqualify Higgins' attorney, claiming that prior to Higgins' settlement with the third party, Mutual Group gave Higgins and Wright, as Higgins' counsel, notice of Higgins' contractual obligation under the insurance policy. Mutual Group alleged that as a result of the communication between it and Wright, "there is a strong likelihood that Mr. Wright would be a witness in this case and that his testimony would be other than on behalf of his client and very likely prejudicial to his client," and that pursuant to Canon 5, DR 5-102, of the Code of Professional Responsibility, Wright should be disqualified. The motion also claimed that "[i]t is possible that Mr. Higgins' attorney failed to act in such a manner as to limit Mr. Higgins' exposure on this particular issue

and, therefore, may be viewed as having interest in conflict with his client . . . ."

In its written letter dated September 22, 1998, the county court sustained Mutual Group's motion to disqualify, finding that "it is likely [Wright] will be a material witness in the matter." Higgins appealed to the district court, which initially dismissed the appeal for lack of an appealable order. On rehearing, the district court determined the order disqualifying Higgins' attorney was appealable and affirmed the county court's decision. The district court held:

> Wright, from his own summary in the record, represented Higgins in the adjudication of a damages claim. The issue between the parties in this proceeding is whether or not [Mutual Group] had an enforceable interest in the proceeds of that adjudication. From the record, it is quite clear that Mr. Wright's testimony will be necessary, and that under DR5-102, he is barred from further representing [Higgins] in these proceedings.

Higgins appealed from the district court's order.

## ASSIGNMENTS OF ERROR

Higgins contends that Mutual Group did not have standing to ask the county court to disqualify Higgins' counsel. Higgins contends that even if Mutual Group had standing, the district court erred in affirming the county court's finding that the facts of this case warranted disqualification of Higgins' counsel.

## STANDARD OF REVIEW

[1] In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999); *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

## ANALYSIS

[3] If an appeal from an order of disqualification of counsel involves issues collateral to the basic controversy and if the appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory appeal from the order removing counsel is appropriate. *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). This is one of those situations in which an appeal by Higgins after a judgment would not adequately protect his interests. We conclude that an interlocutory appeal is appropriate in this case and that we have jurisdiction to adjudicate this matter pursuant to the *Richardson* exception to the final order requirement for an appeal.

[4] We next turn to the question of standing because if Mutual Group lacks standing to bring a motion to disqualify Higgins' counsel, the county court and subsequently the district court were without power to act upon it. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Rozmus v. Rozmus, supra*; *Cotton v. Steele, supra.*

[5-7] Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding. *Hawkes v. Lewis, supra.* "In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy." *Id.* at 452, 586 N.W.2d at 434. The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.*; *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998).

[8] As an aspect of jurisdiction and justiciability, "standing" requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Rozmus v. Rozmus, supra*; *Cotton v. Steele, supra.*

We determine that Mutual Group has standing to request disqualification of Higgins' counsel. Mutual Group has "some legal or equitable right, title, or interest in the subject of the contro-

versy" because if Higgins' counsel is called as a witness by Mutual Group, Mutual Group will be prejudiced by Higgins' counsel's serving as an advocate and a witness. Additionally, if the trial court would subsequently determine that Higgins' counsel should be disqualified, the trial would at a minimum be delayed to allow Higgins to obtain new counsel, or a mistrial be declared. Either of these events would cause delay and additional expense to Mutual Group.

Having determined that Mutual Group has standing, we will next address the merits of the disqualification order. In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

The county court sustained Mutual Group's motion to disqualify, finding that "it is likely [Wright] will be a material witness in the matter." The district court, on appeal, affirmed the county court's finding, stating that "[f]rom the record, it is quite clear that Mr. Wright's testimony will be necessary, and that under DR5-102, he is barred from further representing [Higgins] in these proceedings." DR 5-102(B) provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness other than on behalf of his or her client, the lawyer may continue the representation until it is apparent that his or her testimony is or may be prejudicial to the client.

Canon 5, EC 5-9, of the Code of Professional Responsibility recognizes that the roles of witness and advocate are inconsistent:

> Occasionally a lawyer is called upon to decide in a particular case whether the lawyer will be a witness or an advocate. If a lawyer is both counsel and witness, he or she becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her

> own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

It seems clear that the testimony of Higgins' counsel will be necessary in the case against Higgins and that under Canon 5, DR 5-102, Higgins' counsel should be disqualified from representing Higgins. The same counsel that represents Higgins in this action represented him in his damages claim against the third party. In Mutual Group's motion for disqualification, and at the hearing on disqualification, it was represented to the court that Mutual Group had advised Wright of its subrogation claim. In the affirmative defenses of Higgins drafted by Wright, it is alleged that Mutual Group failed to give timely notice of any claim, lien, or subrogation until after Higgins had settled his claim. It is hard to imagine how this issue can be litigated without Wright's being a witness. We conclude that the district court did not err in affirming the county court's findings that the facts of this case warrant disqualification of Higgins' counsel.

AFFIRMED.

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## CAROL L. SNYDER, APPELLEE, V. JUANITA CASE, APPELLEE, AND EMCASCO INSURANCE CO., INTERVENOR-APPELLANT.

611 N.W. 2d 409

Filed June 2, 2000. No. S-99-309.

1. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **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 a factor only when the rules make such discretion a factor in determining admissibility.
3. **Trial: Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
4. **Expert Witnesses: Appeal and Error.** An appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion.

5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
6. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
7. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to.
8. **Actions: Insurance: Motor Vehicles: Breach of Contract.** An insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy.
9. **Limitations of Actions.** The point at which the statute of limitations commences to run must be determined from the facts of each case.
10. **Expert Witnesses.** Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.
11. **Damages: Evidence: Proof.** Damages for permanent impairment of future earning capacity may not be based on speculation, probability, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury.
12. ___: ___: ___. Where the evidence first shows that there has been an impairment, loss, or diminution of future earning capacity, the process to ascertain compensatory damages for such loss requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Steven W. Olsen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for intervenor-appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee Snyder.

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

STEPHAN, J.

EMCASCO Insurance Co. (EMC) appeals from a judgment in favor of Carol L. Snyder for underinsured motorist benefits

under an insurance policy issued by EMC. The district court for Scotts Bluff County, Nebraska, concluded that Snyder's claim was not barred by the statute of limitations, and following trial, a jury awarded a verdict in favor of Snyder, upon which judgment was entered. EMC perfected this timely appeal after the district court denied its motion for new trial. We find no error and affirm.

## BACKGROUND

On July 9, 1993, Snyder was injured in an accident involving a motor vehicle operated by Juanita Case. Snyder filed this action against Case on July 3, 1997, seeking damages for injuries to her neck, arm, shoulder, and back. On April 23, 1998, EMC filed a lien in the district court, claiming it had paid Snyder $5,000 pursuant to the medical payment provision under her policy and had not yet been repaid. On August 13, partial summary judgment was granted in Snyder's favor on the issue of Case's liability. In September, with the knowledge and consent of EMC, Snyder settled her claim against Case by accepting Case's liability insurance limit of $100,000. Snyder then made a demand upon EMC for underinsured motorist benefits provided by her policy. In a letter dated October 12, 1998, an EMC claims supervisor denied Snyder's claim for underinsured motorist benefits.

EMC intervened in this action on October 22, 1998, and Case was subsequently dismissed. In its petition in intervention, EMC alleged that it issued an insurance policy to Snyder which provided underinsured motorist coverage. EMC further alleged that Snyder had given notice of her claim for benefits under the underinsured motorist policy and that EMC had given its permission for Snyder to accept Case's policy limits. EMC alleged that Snyder had made demand for the policy limits under the underinsured motorist coverage, but alleged that this claim was barred by the statute of limitations and prayed for a determination that it had no liability to Snyder under its policy. In her answer and cross-petition, Snyder alleged that she had recovered Case's liability insurance policy limit of $100,000 and had made demand on EMC for underinsured motorist benefits, which EMC denied. Snyder denied that her claim was barred by the statute of limitations and prayed for judgment against EMC.

Both parties filed motions for summary judgment on the statute of limitations issue. The district court granted Snyder's motion on January 8, 1999, finding that because Snyder's underinsured motorist policy contained an "exhaustion clause," "the statute of limitations should begin to run on the date the aggrieved party had the right to institute and maintain suit for underinsured motorist insurance benefits, i.e. the date of compliance with the 'exhaustion clause'." The "exhaustion clause" contained within the underinsured motorist policy EMC issued to Snyder provides as follows: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

At trial on the issue of damages only, both parties presented evidence regarding the accident and the nature of Snyder's injuries. Jack Greene, a vocational rehabilitation counselor, testified as an expert witness on behalf of Snyder. Greene testified without objection that in his opinion, Snyder suffered a 50-percent loss of earning capacity as a result of the injuries she sustained in the accident. Over EMC's objection on grounds of "relevance and Rule 702," Greene testified that based upon his calculations, Snyder's loss of earning capacity had a value of $353,813.

The parties stipulated to medical bills of $11,330.90. The jury was instructed to determine the amount of damages which would compensate Snyder for her injury and returned a unanimous verdict in the amount of $150,000, upon which judgment was entered. In a ruling on posttrial motions, the district court denied EMC's motion for new trial but reduced the judgment by $101,484.73, representing the amount of personal injury and property damage payments received by Snyder from Case's liability insurance carrier.

## ASSIGNMENTS OF ERROR

EMC contends, summarized, that the district court erred (1) in finding that the statute of limitations on Snyder's claim for underinsured motorist benefits had not expired prior to the time she made her claim against EMC and (2) in allowing testimony from Snyder's vocational rehabilitation counselor, Greene.

## STANDARD OF REVIEW

[1] In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Essen v. Gilmore, ante* p. 55, 607 N.W.2d 829 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000).

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998); *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Seeber v. Howlette, supra*. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Similarly, our review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997).

[5] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Seeber v. Howlette, supra*; *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

## ANALYSIS

### STATUTE OF LIMITATIONS

Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998). Because of this derivative nature of underinsured motorist coverage, two statutory limitations periods are arguably applicable to an insured's action against the underinsured motorist carrier. The first is Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 1998), which provides that underin-

sured motorist coverage shall not apply to an action for "[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 . . . underinsured motorist." The second is Neb. Rev. Stat. § 25-205 (Reissue 1995), which provides for a 5-year statute of limitations on written contracts.

In *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999), we held that § 44-6413(1)(e) operates as a bar to an action for uninsured motorist benefits where the insured claimant did not commence an action against the tort-feasor within the applicable limitations period. However, § 44-6413(1)(e) does not apply if the injured party claiming underinsured motorist benefits commenced a timely claim against the tort-feasor. See *Schrader v. Farmers Mut. Ins. Co., ante* p. 87, 608 N.W.2d 194 (2000). In that circumstance, the 5-year statute of limitations for actions on written contracts set forth in § 25-205 applied to the claim for underinsured motorist benefits under the policy. *Schrader v. Farmers Mut. Ins. Co., supra.*

In this case, it is clear that Snyder commenced her action against Case within the 4-year limitation period governing tort actions. Therefore, § 44-6413(1)(e) is inapplicable, and EMC's statute of limitations defense must be analyzed under § 25-205. In *Schrader*, we did not reach the issue of when a cause of action for underinsured motorist benefits accrues under § 25-205. That issue is now squarely before us. EMC argues that Snyder's claim accrued on the date of the 1993 motor vehicle accident in which she sustained injuries, and is therefore barred under the 5-year limitations period. Snyder argues that because of the exhaustion clause contained in her policy, she had no right to commence an action against EMC until after she recovered the limit of Case's liability insurance policy in 1998 and that her claim against EMC was, therefore, timely.

[6,7] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Smith v. State*, 250 Neb. 291, 549 N.W.2d 149 (1996); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*,

244 Neb. 408, 507 N.W.2d 275 (1993). A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995); *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993); *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989).

As noted, this court has not previously decided the issue of when an insured's cause of action for underinsured motorist benefits accrues. A majority of state courts addressing this issue have held that because the action sounds in contract, the claim accrues and the statute of limitations begins to run on the earliest date the contract is breached. See, e.g., *Grayson v. State Farm Mut. Auto. Ins.*, 114 Nev. 1379, 971 P.2d 798 (1998); *Berkshire Mutual Insurance Co. v. Burbank*, 422 Mass. 659, 664 N.E.2d 1188 (1996); *Vega v. Farmers Ins. Co.*, 323 Or. 291, 918 P.2d 95 (1996); *Eidemiller v. State Farm Mut. Auto. Ins. Co.*, 22 Kan. App. 2d 278, 915 P.2d 161 (1996), *reversed on other grounds* 261 Kan. 711, 933 P.2d 748 (1997); *Plumley v. May*, 189 W. Va. 734, 434 S.E.2d 406 (1993); *Metropolitan Prop. & Liabil. Ins. Co. v. Walker*, 136 N.H. 594, 620 A.2d 1020 (1993); *State Farm Mut. Auto. Ins. Co. v. Springle*, 870 P.2d 578 (Colo. App. 1993); *Blutreich v. Liberty Mut. Ins. Co.*, 170 Ariz. 541, 826 P.2d 1167 (Ariz. App. 1991). Typical of the reasoning in these cases is the statement by the Supreme Judicial Court of Massachusetts that "[p]rior to the time when the contract is violated there is no justiciable controversy, and it would be illogical to let the statute of limitations for bringing an action begin to run before the action can be brought." *Berkshire Mutual Insurance Co. v. Burbank*, 422 Mass. at 661, 664 N.E.2d at 1189. Applying this rationale, these courts hold that the limitations period does not begin to run until there is an occurrence, such as a denial of underinsured motorist benefits, which would give the insured a right to maintain an action on the policy.

There is also some authority supporting the position taken by EMC that a cause of action for underinsured motorist benefits accrues on the date of the underlying tort. See, *Flatt v. Country Mutual Insurance Co.*, 289 Ill. App. 3d 1097, 682 N.E.2d 1228, 225 Ill. Dec. 151 (1997); *Grinnell Mut. Reinsurance Co. v.*

*Recker*, 561 N.W.2d 63 (Iowa 1997); *Green v. Selective Ins. Co. of America*, 144 N.J. 344, 676 A.2d 1074 (1996); *Stagni v. State Farm Mut. Auto. Ins. Co.*, 685 So. 2d 338 (La. App. 1996). Two courts have occupied a middle ground. In *Woodall v. Travelers Indem. Co.*, 699 So. 2d 1361 (Fla. 1997), the Supreme Court of Florida held that although a cause of action for underinsured motorist benefits accrues on the date of the underlying tort, the inclusion of an exhaustion clause in the policy has the effect of tolling the statute of limitations until the insured receives payment from the underinsured motorist's carrier. The Minnesota Court of Appeals has held that a cause of action for underinsured motorist benefits accrues on the date of the underlying tort *except* where the policy contains an exhaustion clause which "established the accrual date for [the] cause of action." *Sargent v. State Farm Mut. Auto. Ins. Co.*, 486 N.W.2d 14, 16 (Minn. App. 1992). See, also, *Cattnach v. State Farm Ins. Co.*, 577 N.W.2d 251 (Minn. App. 1998); *Nelson v. State Farm Ins. Co.*, 567 N.W.2d 770 (Minn. App. 1997).

In urging that we hold that the underinsured motorist claim accrued on the date of the underlying tort, EMC argues that "[a]n insured should not be able to unreasonably delay or indefinitely postpone the operation of the statute of limitations by failing to make a demand for payment." Brief for appellant at 23. We do not find this argument persuasive, in that we perceive no reason for a person who is partially compensated for an injury to be dilatory in pursuing a contractual claim against his or her insurer for the remainder. Moreover, an insurer is capable of protecting its interests by including provisions in its policy obligating the insured to give notice of events which could lead to underinsured motorist exposure. See, *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998); *Blutreich v. Liberty Mut. Ins. Co.*, 170 Ariz. 541, 826 P.2d 1167 (Ariz. App. 1991). We note that the policy under consideration in this case provides that no judgment in a suit brought against the owner or operator of an "underinsured motor vehicle" is binding upon EMC unless the insured gives notice of the suit and EMC has a "reasonable opportunity" to protect its interests.

[8,9] We conclude that the majority rule as stated above is sound and consistent with our well-established rule that an

action on a written contract accrues at the time of breach or failure to perform. Accordingly, we hold that an insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy. The point at which the statute of limitations commences to run must be determined from the facts of each case. *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998). Accordingly, we examine the record to determine when Snyder's cause of action against EMC accrued in this case.

As noted above, the policy which constituted EMC's contractual undertaking to Snyder specifically provided that it would "pay under this [underinsured motorist] coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." In *Ploen v. Union Ins. Co.*, 253 Neb. at 877, 573 N.W.2d at 443, we held that an identical exhaustion clause in an underinsured motorist policy is "plain and unambiguous, should be enforced according to its terms, and is not contrary to public policy." Thus, under the language of its policy, EMC had no contractual obligation to pay underinsured motorist benefits to Snyder until she exhausted the limits of Case's liability insurance by the settlement made with the knowledge and consent of EMC in September 1998. Snyder's cause of action against EMC did not accrue until EMC's claims supervisor denied liability for underinsured motorist benefits in a letter to Snyder's attorney dated October 12, 1998. Snyder's cross-petition asserting her claim for underinsured motorist benefits under the policy was filed November 3. Thus, the district court correctly held that Snyder's claim was not time barred, and EMC's first assignment of error is therefore without merit.

### Admission of Expert Testimony

[10] Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Phillips v. Industrial*

*Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999); *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

EMC does not question Greene's qualifications as an expert in the field of vocational rehabilitation counseling, but contends that his opinion placing a monetary value on Snyder's loss of earning capacity was inadmissible because it

> included a mathematical calculation that he was not qualified to make . . . did not include the proper factors for determining a loss of earning capacity, and was not helpful to the jury to the extent that it was a calculation that lay people could make without the testimony of an expert.

Brief for appellant at 29.

[11,12] Damages for permanent impairment of future earning capacity may not be based on speculation, probability, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. *Phillips v. Industrial Machine, supra*; *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). In *Uryasz*, we held that where the evidence first shows that there has been an impairment, loss, or diminution of future earning capacity, the process to ascertain compensatory damages for such loss requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth.

In *Phillips*, we held that a vocational rehabilitation counselor's opinion regarding an injured party's impairment of future earning capacity should not have been admitted because the witness assumed that the individual was disabled without any medical evidence to substantiate the assumption. This case is distinguishable from *Phillips* in that Greene testified that he based his opinion regarding Snyder's loss of earning capacity in part upon medical records reflecting her physical condition and degree of impairment. The record contains medical evidence that as the result of the injuries she sustained in the accident,

Snyder has a permanent impairment including a 5-percent whole person impairment for myofascial pain in her cervical spine, and a 10-percent whole person impairment attributable to pain and decreased range of motion in her lumbar spine. There was also medical evidence that Snyder was under lifting restrictions due to her injuries. Greene also testified that he considered and relied upon an occupational therapist's functional capacity assessment of Snyder performed on September 22, 1998, which listed a "variety of physical abilities and limitations" relating to Snyder's ability to perform various job-related physical tasks.

Greene further testified that he performed a labor market analysis upon which he determined that Snyder's physical limitations after the accident resulted in a "very substantial loss of access to the labor market" and reduced her earning potential from $10 to $8 per hour. He stated that his calculation was based upon a full-time work schedule, both before and after the accident, and a remaining worklife expectancy of 20 years, from age 41 to 61.

Neb. Rev. Stat. § 27-702 (Reissue 1995) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Greene's opinion regarding the nature and extent of the impairment of Snyder's future earning capacity and its monetary value was based on evidence of permanent physical impairment which, on the basis of his labor market analysis, limited the work she could perform and the wages she could earn compared to her preinjury capabilities. We cannot say that Greene's specialized knowledge as a vocational rehabilitation counselor would not assist the jury in determining how Snyder's physical impairment affected her future earning capacity. We therefore conclude that the trial court did not abuse its discretion in overruling the objection to Greene's opinion regarding the value of Snyder's loss of future earning capacity. We note that the trial court properly instructed the jury that any damages for future losses must be reduced to present cash value.

## CONCLUSION

For the reasons stated above, we conclude that the district court did not err in determining that Snyder's claim against EMC for underinsured motorist benefits provided by her insurance policy was not barred by the applicable statute of limitations and, further, that the trial court did not abuse its discretion in permitting testimony in the form of expert opinion regarding the impairment of Snyder's future earning capacity. Likewise, we conclude that the district court did not err in denying the motion for new trial and therefore affirm its judgment.

Neb. Rev. Stat. § 44-359 (Reissue 1998) provides that in a successful action to enforce a policy of insurance by the insured, the court shall tax attorney fees against the insurance carrier. *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988). Pursuant to this statute and upon the motion and supporting affidavit of Snyder's counsel filed pursuant to Neb. Ct. R. of Prac. 9F (rev. 1996), Snyder is awarded attorney fees for legal services relating to this appeal in the amount of $7,000.

AFFIRMED.

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JUDY IWANSKI, APPELLANT, V. WILLIAM GOMES, APPELLEE.

611 N.W.2d 607

Filed June 9, 2000. No. S-98-374.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Actions: Mental Distress.** In order to recover on a cause of action for intentional infliction of emotional distress, a plaintiff must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

4. ___: ___. A sexual relationship between two consenting adults is not outrageous conduct such as to give rise to a claim for intentional infliction of emotional distress.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, 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.
6. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a cause of action alleging professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries. The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence.
7. **Malpractice: Physician and Patient: Liability.** When there is a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. It is the physician's deviation from the recognized medical standard of care during the course of treatment that is the essence of a claim for medical malpractice, and there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Vincent M. Powers for appellant.

Gregory S. Heier and Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

GERRARD, J.

## INTRODUCTION

Judy Iwanski sued William Gomes, a physician, seeking damages resulting from a sexual relationship gone awry, claiming intentional infliction of emotional distress and professional negligence. After the district court granted partial summary judgment in favor of Gomes, the remaining allegations were dismissed by Iwanski, and she appealed.

The resolution of this appeal depends on our determination of two issues. The first issue is whether the district court erred by concluding that Gomes' conduct did not rise to the level of

intentional infliction of emotional distress as a matter of law when Iwanski engaged in sexual relations with Gomes after confiding in him regarding marital stress and other difficulties she was experiencing. Second, we must also determine whether a physician commits professional negligence by engaging in sexual relations with a patient outside of the physician-patient relationship.

## FACTUAL BACKGROUND

Gomes is licensed to practice medicine in the State of Nebraska. In March 1988, Iwanski made an appointment to see Gomes at his medical office in Grand Island for treatment regarding a constant lack of energy, marking the commencement of a physician-patient relationship between the parties. This physician-patient relationship between Iwanski and Gomes continued over the course of the 5 years immediately following Iwanski's initial visit. During this time period, Gomes continued to provide medical services to Iwanski until June 2, 1993.

A sexual relationship between Iwanski and Gomes also commenced in March 1988, shortly after Iwanski's initial visit to Gomes' office. At the initial appointment, Gomes indicated that Iwanski could confide in him regarding various incidents of stress in her life should she wish to do so. Admittedly aware that Gomes was not a psychologist or a psychiatrist, Iwanski met Gomes at a Bosselman's truckstop near Grand Island a few days after the March appointment. At the truckstop, Iwanski got into Gomes' van, and the parties drove to Mormon Island State Park. While at Mormon Island, Iwanski discussed with Gomes some of the stress in her life; at the conclusion of their conversation, the parties engaged in sexual intercourse.

Nearly 5 years after the sexual relationship began, Iwanski, a registered nurse, was hired by Gomes on January 7, 1993. Iwanski continued to work under the employ of Gomes until approximately February 19, 1994. On several occasions between March 1988 and January 1994, Iwanski and Gomes took part in sexual relations in various locations, most of which occurred at Gomes' office during working hours. Iwanski testified that Gomes would oftentimes pass her in the office hallway and request that she accompany him into his office, where the

parties would engage in various sexual contacts, including but not limited to sexual intercourse. Gomes' requests were not always honored, as Iwanski testified that on numerous occasions, she would either reject his offers or refuse to accompany him into his office.

On June 2, 1993, Gomes conducted a Pap smear and accompanying examination on Iwanski after Iwanski requested that he do so. After the examination was completed, the parties engaged in sexual intercourse. There is no dispute as to whether Gomes had finished the examination when the sexual encounter took place, as Iwanski testified that the examination was completed before the parties had sex. Gomes' testimony is to the same effect.

The parties have stipulated that a disagreement exists over whether the final sexual contact between the parties occurred in January 1994 or on June 2, 1993. As to the disputed incident in January 1994, Iwanski testified that the incident occurred upon the request of Gomes, while Gomes maintains that the incident never occurred and that June 2, 1993, was the date of the final sexual encounter between the parties. In any event, the record reveals that the physician-patient relationship between the parties ended as of June 1993. Assuming, as we must when determining if summary judgment was properly granted, that the January 1994 incident did occur, Iwanski asserts that it occurred while she was still working as a nurse in Gomes' office. Iwanski testified that this incident occurred toward the end of the workday, at which time she disrobed and had sex with Gomes.

Subsequent to the termination of the physician-patient relationship and to the termination of the sexual relationship, Iwanski became suicidal and was unable to work full time as a nurse. Iwanski sought counseling, which she claims was unsuccessful. Attributing severe emotional distress to the lingering effects of her defunct relationship with Gomes, Iwanski brought this lawsuit seeking recovery on the theories of intentional infliction of emotional distress and professional negligence on the part of Gomes.

Gomes moved for summary judgment, which was granted in part by the district court upon a determination that Gomes' conduct did not rise to the level of intentional infliction of emo-

tional distress as a matter of law. Summary judgment was also entered in favor of Gomes on the theory of professional negligence on the ground that the sexual contact between the parties was not sufficiently linked to the medical treatment provided by Gomes. Summary judgment was denied, however, as to any acts arising in the course of medical treatment from and after June 2, 1993, the date before which the statute of limitations would bar recovery. Thereafter, Iwanski moved to dismiss the remaining allegations, and the district court entered a final order dismissing the operative petition. Iwanski timely appealed the final judgment.

## ASSIGNMENTS OF ERROR

Iwanski alleges, restated, that the district court erred in determining that (1) the sexual relationship and sexual contacts between Gomes and Iwanski did not rise to the level of intentional infliction of emotional distress as a matter of law and (2) the sexual relationship and sexual contacts between Iwanski and Gomes did not give rise to a claim for professional negligence.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Olsen v. Farm Bureau Ins. Co., ante* p. 329, 609 N.W.2d 664 (2000). 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. *Sherrets, Smith v. MJ Optical, Inc., ante* p. 424, 610 N.W.2d 413 (2000); *Olsen v. Farm Bureau Ins. Co., supra.*

## ANALYSIS

### INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Iwanski's first assignment of error alleges that the district court erred in relying on *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993), to conclude that

Gomes' conduct did not rise to the level of intentional infliction of emotional distress as a matter of law. We held in *Schieffer* that a priest's sexual relationship with a member of his church who was at the same time seeking counseling from him for emotional difficulties did not give rise to a claim of intentional infliction of emotional distress. *Schieffer* involved "conduct between consenting adults," and we noted that the allegations in that case fell far short of alleging that the plaintiff was incapable of consenting to what took place. 244 Neb. at 718, 508 N.W.2d at 911. After having determined that the sexual relationship in *Schieffer* was purely consensual, we affirmed the trial court's sustaining of the defendants' demurrer.

[3] As recognized in *Schieffer* and its progeny, this court has long held that three elements must be alleged and proved before a plaintiff can recover on a cause of action for intentional infliction of emotional distress. To recover for intentional infliction of emotional distress, a plaintiff must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997); *Schieffer v. Catholic Archdiocese of Omaha, supra.* With the foregoing in mind, we must determine if the record contains sufficient evidence to establish a genuine issue of material fact as to whether Gomes' conduct meets this test.

[4] We explained in *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. at 719, 508 N.W.2d at 911: "A sexual relationship between two consenting adults is not outrageous conduct such as to give rise to a claim for intentional infliction of emotional distress. This seems especially true given the fact that [there was] an approximate 7-year sexual relationship." In the instant case, Iwanski and Gomes entered into a sexual relationship in March 1988 that continued until at least June 1993. The relationship continued for 5 years, and the mere fact that Iwanksi's relationship with Gomes lasted 5 years instead of 7 is not sufficient to distinguish this case from *Schieffer*.

Iwanski maintains that this case differs from *Schieffer* because in that case this court noted:

> There is no allegation that the defendant used force or fraud to accomplish his sexual relations with the plaintiff during the period from 1982 to 1989. The amended petition does allege that the plaintiff was "vulnerable" because of "prior emotional problems." This allegation falls far short of alleging that the plaintiff was incapable of consenting to what took place.

*Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d 907, 911 (1993). Iwanski attempts to distinguish *Schieffer* by alleging that she was in a vulnerable position rendering her unable to consent, because of the transference doctrine, as well as relying on the fact that Gomes was her employer during a significant portion of the sexual relationship. Iwanski submits that she was unable to consent to the sexual relationship due to the pressures exerted on her by the surrounding circumstances, rendering Gomes' conduct outside the parameters of *Schieffer*. The record does not support Iwanski's allegations.

Iwanski's contention that her allegations of a nonconsensual relationship are sufficient to survive summary judgment confuses the standard by which we review a trial court's ruling on a demurrer with the standard by which we review a grant of summary judgment. In *Schieffer*, we suggested that allegations of the relationship being nonconsensual may have been useful to the plaintiff therein because in an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. See, *Danler v. Rosen Auto Leasing, ante* p. 130, 609 N.W.2d 27 (2000); *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000). However, we do not accord the same deference to the allegations in the petition when reviewing a trial court's grant of summary judgment.

[5] Iwanski's bare assertions that her relationship with Gomes was nonconsensual may have been sufficient to overcome a demurrer as in *Schieffer*, but such allegations are not necessarily sufficient to overcome Gomes' motion for summary judgment. To survive summary judgment, Iwanski must do more than

merely allege that the relationship was nonconsensual; she must present evidence that such was the case. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, 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. *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). Thus, summary judgment was improper only if Iwanski has presented evidence giving rise to a genuine issue of material fact as to the consensual nature of the relationship.

The record is devoid of evidence supporting the contention that Iwanski was unable to consent to the sexual relationship. Iwanski testified that at one point during the relationship, she thought that her having sex with Gomes was "acceptable because [she] felt at least he cared or had some love for [her]." Not only does Iwanski's own testimony indicate that she was able to consent, but also that Iwanski was aware of the decisions she was making as she was engaging in the sexual acts with Gomes. Furthermore, there were times throughout the relationship when Iwanski conveyed to Gomes that she did not want to have sex with him, indicating that she did in fact withhold her consent when she chose to do so. At the very most, the record indicates not that the relationship between Iwanski and Gomes was nonconsensual, but only that Iwanski had feelings of regret about the relationship to which she had consented. The record clearly shows that Iwanski not only had capacity to withhold her consent, but that she did so on many occasions.

Because there is no evidence to support Iwanski's claim of intentional infliction of emotional distress based on a nonconsensual sexual relationship, we conclude that the district court was correct in ruling that Gomes' conduct did not rise to the level of intentional infliction of emotional distress. Therefore, Iwanski's first assignment of error is without merit.

### Professional Negligence

Iwanski next contends that the district court erred in determining that the sexual relationship and sexual contacts between

Iwanski and Gomes did not give rise to a claim for professional negligence. In other words, we must determine if a doctor commits malpractice by engaging in sexual relations or having consensual sex with an individual with whom the doctor concurrently maintains a physician-patient relationship.

[6] In a cause of action alleging professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence. *Id.* Thus, Iwanski must show that Gomes' participation in a consensual sexual relationship with her, which was separate and distinct from the physician-patient relationship concurrently existing between them, fell below the generally recognized standard of care for the provision of medical services.

This court has never directly ruled upon the issue of whether it constitutes professional negligence for a physician to engage in a sexual relationship or sexual contacts with a patient apart from the physician-patient relationship. A number of courts that have addressed this issue, or similar issues regarding professional liability insurance contracts, often commence their analysis with a discussion of *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968).

*Marx v. Hartford Acc. & Ind. Co.* was a case in which this court set out to define "professional services" in the context of a dispute over whether certain property damages were covered by a professional liability insurance policy. While refilling a hot water sterilizer, Marx's employee, a technician, mistakenly poured benzine instead of water into the sterilization container. Fumes exploded, causing a fire, and extensive damage to the medical building resulted. No patient was present or being treated at the time. In this context, we stated:

> The insurer's liability is thus limited to the ***performing or rendering of "professional" acts or services***. Something more than an act flowing from mere employment or vocation is essential. *The act or service must be*

> *such as exacts the use or application of special learning or attainments of some kind.* The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. [Citations omitted.] In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

(Emphasis supplied.) *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. at 13-14, 157 N.W.2d at 871-72.

Similarly, in determining whether particular actions fall below the applicable standard of care for the rendering of professional services, the acts upon which Iwanski bases her claim must first "be such as exacts the use or application of special learning or attainments of some kind" that would constitute the "performing or rendering of 'professional' acts or services." *Id.* at 13, 157 N.W.2d at 871-72. In order to so qualify, Iwanski must demonstrate that her sexual relationship with Gomes in some way constituted the provision of medical services and that such provision of services was conducted in a manner as to fall below the applicable standard of care. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

A number of jurisdictions, relying in part on *Marx v. Hartford Acc. & Ind. Co., supra*, have taken the position that sexual contact with a patient does not constitute "professional services," notwithstanding the fact that the sexual contact takes place in a physician's office or that the pretense of medical care is used to catch the victim unaware. See *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993). These courts reason that such sexual contacts are "acts that can be accomplished by laypersons untrained in the medical arts. . . . The fact that the acts occurred between a doctor and a patient or former patient is

pertinent *only if the act itself is of a professional nature*." (Emphasis in original.) *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349, 353 (N.D. Ala. 1991).

We agree that the fact that sexual misconduct occurs in a medical professional's office "does not automatically transmute the act into a professional service [because the] location of an act's occurrence is not determinative of liability." *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 638 (Fla. App. 1994). When the only connection between the sexual misconduct and treatment is that the activity occurred in the medical professional's office, such a connection is too remote from the actual rendering of proper services to impose liability upon the medical professional for malpractice. See *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992).

[7] We conclude, based on the foregoing rationale, that there must be a causal relationship between the alleged harm and the complained-of professional act or service. When there is a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. In other words, it is the physician's deviation from the recognized medical standard of care *during the course of treatment* that is the essence of a claim for medical malpractice, and there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.

Applying this standard to the case at bar, we conclude that the district court properly granted Gomes' motion for summary judgment. As we have previously determined, the evidence reflects that the relationship between the parties was consensual. Moreover, as to the specific incident of June 2, 1993, Iwanski testified that the sexual act took place well after Gomes had completed the Pap smear and accompanying examination. The record clearly reveals that the sexual relationship between Iwanski and Gomes was separate and distinct from the provision of any medical services Iwanski received from Gomes. While we in no way condone Gomes' conduct in this matter, the issue before us is not whether he conducted himself in accordance

with ethical standards applicable to the medical profession, but, rather, whether he inflicted injury by negligently providing medical services to Iwanski. On that point, we must conclude that there is no genuine issue as to any material fact and that the district court properly determined that Gomes was entitled to judgment as a matter of law on the professional negligence cause of action. Consequently, Iwanski's second assignment of error is without merit.

Iwanski finally argues that the district court erred in granting summary judgment because Iwanski alleged that Gomes took advantage of and mishandled the transference phenomenon. This claim is without merit.

Transference has been defined as " '[t]he process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly.' S. Waldron-Skinner, *A Dictionary of Psychotherapy* 364 (1986)." *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698, 700 (Minn. 1990). The court went on to explain that "[t]he patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often 'falls in love' with him." *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d at 700. Even though transference is not confined solely to psychiatric treatment and the mental health profession, it has generally been accepted that mental health professionals expect and even elicit this phenomenon as a regular and accepted part of treatment. *Id.*

Although we have no evidence before us regarding the transference phenomenon and, therefore, we will not opine on the general acceptance of the transference phenomenon in the mental health field, we do note that *transference is not a recognized component in the medical treatment of physical conditions*. See *Odegard v. Finne*, 500 N.W.2d 140 (Minn. App. 1993). Moreover, there is no evidence in the record that the transference phenomenon was a factor in the instant case. Iwanski cannot seek to avoid summary judgment by relying on bare assertions that Gomes mishandled the transference phenomenon when she has produced no evidence that the phenomenon was

ever present in this case. See *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998).

## CONCLUSION

Having considered each of Iwanski's assignments of error and finding them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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KATHRYN JOAN JESSEN, APPELLEE, V.
TERRY LYNN JESSEN, APPELLANT.

611 N.W. 2d 834

Filed June 9, 2000. No. S-99-496.

1. **Judgments: Pleas: Alimony: Appeal and Error.** Where the substance of an appellant's motion to quash challenges the validity of a district court's order awarding an appellee temporary alimony pending appeal and the appellant's assignment of error presents the same issue, the issue presented is one of law in connection with which the appellate court, as a reviewing court, has an obligation to reach its own conclusion independent of those reached by the lower courts.
2. **Actions: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
3. **Actions: Judicial Notice: Records.** Appellate courts in this state 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.
4. **Garnishment: Collateral Attack: Pleadings.** It is not the office of a motion to quash, filed in response to a motion to garnish, to collaterally attack the judgment, the collection of which is the subject of the garnishment.
5. **Divorce: Alimony: Appeal and Error.** In dissolution actions, a challenge to an award of temporary alimony pending appeal is to be brought at the same time as the appeal of the decree of dissolution.
6. **Alimony: Waiver: Appeal and Error.** The purposes of an award of temporary alimony pending appeal include providing for support pending appeal and, by virtue of the award being denominated "temporary," permitting the recipient of the alimony award to appeal its sufficiency without being deemed to have accepted its benefits and having waived an appeal thereof.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James L. Zimmerman, of Sorensen & Zimmerman, P.C., for appellant.

Jeffrey L. Hansen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Terry Lynn Jessen appeals the order of the district court for Scotts Bluff County which denied Terry's motion to quash garnishment and order repayment of alimony. For the reasons set forth below, we affirm.

## STATEMENT OF FACTS

The instant appeal arises from the sequelae of dissolution proceedings involving the parties, Terry and Kathryn Joan Jessen, who were married on September 6, 1975, and divorced on September 18, 1996. The parties have filed three separate appeals involving various issues raised in the dissolution proceedings. In *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997), the Nebraska Court of Appeals dismissed Terry's appeal of the district court's order finding him in contempt of a nonhypothecation order for lack of a final, appealable order. In *Jessen v. Jessen*, case No. A-96-1151, a memorandum opinion and judgment on appeal filed November 10, 1998 (appeal of the decree), upon cross-appeals, the Court of Appeals affirmed all challenged orders of the divorce decree, except the award of alimony, which it vacated. The instant appeal arises from the district court's order subsequent to the spreading of the mandate following the appeal of the decree.

On June 21, 1994, Kathryn filed a petition for dissolution of marriage. On September 18, 1996, the district court entered the decree of dissolution. In the decree, the district court, inter alia, dissolved the parties' marriage; awarded custody of the couple's two children to Kathryn, with visitation to Terry; ordered Terry to pay child support; divided the parties' marital property; and ordered Terry to pay Kathryn alimony in the amount of $3,000 per month for 10 years.

On September 27, 1996, Terry filed a motion for new trial. On the same date, Kathryn filed a motion to establish temporary orders and set supersedeas, in which she requested, inter alia, that the district court award her temporary spousal support while the decree was being appealed. In a journal entry filed October 18, 1996, the district court overruled both parties' motions for new trial. In the same journal entry, the district court awarded Kathryn temporary alimony pending appeal in the amount of $3,000 per month.

On November 8, 1996, Terry filed a notice of appeal, in which he stated that he was appealing the decree and the district court's journal entry denying his motion for new trial. Thereafter, Kathryn filed a cross-appeal.

In Terry's brief filed in the appeal of the decree, he assigned the following 10 errors:

> 1. The Decree of the court is not sustained by sufficient evidence.
>
> 2. The Decree of the court is contrary to the evidence.
>
> 3. The Decree of the court is contrary to law.
>
> 4. The court erred in finding that an antenuptial agreement [the parties had signed prior to marriage] was not valid and binding.
>
> 5. The court abused its discretion in its determination of the income the parties would receive off the property awarded to them [as a result of the property division] by not relying upon income tax returns, but by relying upon a return investment analysis.
>
> 6. The court erred in determining child support again based on the income analysis used by the court to determine what income would be realized upon the court's return on investment analysis.
>
> 7. The court erred in awarding alimony be paid by [Terry] to [Kathryn] in view of the income available to [Kathryn] and the amount of income that she would derive from the property awarded to her.
>
> 8. The court erred in awarding attorney fees and costs to be paid by [Terry] to [Kathryn] in view of the property and income that was awarded to [Kathryn].

9. The court erred in its determination of what property should be set aside as pre-marital.

10. The court erred in the division of property and the court's evaluation of the property that was divided by the court and awarded to [Kathryn] and [Terry], and evaluations that the court placed upon pre-marital property awarded to [Terry].

Brief for appellant in case No. A-96-1151 at 3-4.

In the appeal of the decree, Terry did not assign as error the district court's award of temporary alimony to Kathryn pending appeal. Furthermore, Terry did not assign as error or argue in his brief to the Court of Appeals that the district court should be ordered to give him a credit for the temporary alimony paid pending appeal, which credit would be applied against either a permanent alimony award or the division of property, should Terry be successful in either of his appellate challenges to alimony or the division of property.

The Court of Appeals affirmed in part, and in part reversed the district court's decree. Specifically, the Court of Appeals affirmed the district court's decree in all respects except for the award of alimony, which it reversed, concluding it was an abuse of discretion. In its memorandum opinion of the appeal of the decree, the Court of Appeals did not address the district court's award of temporary alimony pending appeal.

Terry and Kathryn each filed a petition for further review with the Supreme Court. The petitions of both parties were denied on February 10, 1999. On February 19, the mandate was issued.

On April 8, 1999, Kathryn filed a "Petitioner's Motion to Authorize Release of Supersedeas Funds and to Allow the District Court to Apply Supersedeas to Unpaid Alimony Balance." In an order dated April 9, the district court spread the mandate upon its records. On April 16, Kathryn filed an affidavit and praecipe for summons in garnishment seeking to garnish the principal sum of $12,000 plus interest and costs of $371.60. In support of her applications, Kathryn alleged that Terry had essentially ceased paying alimony after the Court of Appeals had filed its memorandum opinion. Kathryn requested, inter alia, that the district court apply a supersedeas bond previously

posted by Terry in the earlier contempt proceeding to Terry's delinquent alimony payments.

On April 20, 1999, in response to Kathryn's motions, Terry filed a "Motion to Quash Garnishment and Order Repayment of Alimony." In the motion to quash, Terry stated that "the alimony judgment was reversed by the Court of Appeals making the order to pay alimony a nullity and therefore unenforceable." He sought an order requiring Kathryn to "refund all alimony or temporary alimony pending appeal payments made to her."

The parties' respective motions came on for an evidentiary hearing on April 20, 1999, and in a journal entry of even date, the district court overruled Terry's motion to quash and granted Kathryn's unpaid alimony motion. The district court ordered that Terry's supersedeas bond be used to satisfy the unpaid alimony and that the balance of the bond be released to Terry. Terry appeals the order of April 20 denying his motion to quash.

## ASSIGNMENT OF ERROR

On appeal, Terry has assigned one error. Terry claims the district court erred in overruling his motion to quash "to require [Kathryn] to repay the alimony paid by [Terry] to [Kathryn] during the pendency of the appeal after the appellate court determined that [Kathryn] was not entitled to alimony and reversed the alimony awarded in the Decree."

## STANDARD OF REVIEW

[1] Because the substance of Terry's motion to quash challenges the validity of the district court's order awarding Kathryn temporary alimony pending appeal, and Terry's assignment of error presents the same issue, the issue presented is one of law in connection with which we, as a reviewing court, have an obligation to reach our own conclusion independent of those reached by the lower courts. See, *Pfeifer v. E.I. Du Pont de Nemours and Co.*, 258 Neb. 756, 606 N.W.2d 773 (2000); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

## ANALYSIS

*Records Reviewable on Appeal.*

[2,3] In order to resolve this appeal, we must determine what evidence and records can be reviewed by this court on appeal. It

is provided by statute that judicial notice may be taken of any fact not subject to reasonable dispute, when such fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1995). It is well established that where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *In re Adoption of Trystyn D.*, *ante* p. 539, 611 N.W.2d 112 (2000); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). Similarly, appellate courts in this state 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. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980); *State v. Vann*, 2 Neb. App. 946, 519 N.W.2d 568 (1994). We, therefore, review the briefs and the transcript filed in the appeal of the decree in the consideration of the instant appeal.

*Overruling of Terry's Motion to Quash.*

At the core of Terry's appeal is the claim that he should not be liable for temporary alimony pending appeal when the alimony award set forth in the decree is reversed on appeal. Indeed, in his brief in support of his current appeal of the order of the district court overruling his motion to quash, Terry asserts:

> When a party to a dissolution of marriage action seeks temporary alimony to be paid during the pendency of an appeal which claims error in the awarding of the alimony, it is patently unfair that the recipient should be entitled to receive the money with impunity and without any risk of repayment should the appellant's appeal prove to be successful in reversing the alimony judgment.

Brief for appellant at 6. However, rather than challenging the order of October 18, 1996, granting temporary alimony pending appeal in the initial appeal of the divorce as the law allows,

Terry now attempts to challenge the order of temporary alimony pending appeal through the vehicle of a motion to quash, which he filed on April 20, 1999.

In response to Terry's appeal, Kathryn argues in her brief before this court that this court should dismiss Terry's appeal for lack of jurisdiction because Terry's challenge to the district court's order awarding Kathryn temporary alimony pending appeal is out of time. Although we determine that we do have jurisdiction over Terry's appeal of the denial of his motion to quash, we agree with Kathryn that Terry's challenge of the order of temporary alimony pending appeal should have been raised in the appeal from the decree and not in the form of a motion to quash collection of temporary alimony pending appeal, as Terry has attempted to do.

[4] It is not the office of a motion to quash, filed in response to a motion to garnish, to collaterally attack the judgment, the collection of which is the subject of the garnishment. See *Department of Banking v. Foe*, 136 Neb. 422, 286 N.W. 264 (1939) (decree rendered by court having jurisdiction of subject matter and parties cannot be successfully assailed collaterally by challenge to garnishment). Terry's motion to quash, filed in response to Kathryn's applications seeking garnishment for payment of the unpaid temporary alimony, is an impermissible attempt to attack, collaterally, the district court's October 18, 1996, order awarding Kathryn temporary alimony pending appeal. The district court properly overruled Terry's motion to quash.

In reviewing the present record as well as the briefs and the transcript in the appeal of the decree, we note that the district court's order awarding Kathryn temporary alimony pending appeal was entered on October 18, 1996, and that Terry filed his notice of appeal on November 8. We also note that Terry did not assign as error in the appeal of the decree the district court's award of temporary alimony pending appeal. Neither Terry's assignments of error in the appeal of the decree nor his brief filed in that appeal discuss or challenge in any manner the award of temporary alimony pending appeal. Terry did not challenge the award of temporary alimony pending appeal, nor did he seek any type of credit for the temporary alimony he paid during the

appeal to be applied against either the permanent alimony award, if any, or the division of marital property, should his challenge to permanent alimony be successful on appeal. Given the presentation of claims for appellate review, the Court of Appeals did not address the award of temporary alimony pending appeal in its memorandum opinion. See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief). In the appeal of the decree, the Court of Appeals affirmed the decree in all respects, except for the award of permanent alimony.

[5] Prior cases of this court demonstrate that in dissolution actions, a challenge to an award of temporary alimony pending appeal is to be brought at the same time as the appeal of the decree of dissolution. See, e.g., *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998) (claim that trial court erred in not allowing credit toward permanent alimony for temporary alimony paid pending appeal); *Isenberger v. Isenberger*, 239 Neb. 706, 477 N.W.2d 927 (1991) (same); *Seemann v. Seemann*, 225 Neb. 116, 402 N.W.2d 883 (1987) (challenge to trial court's order allowing credit against property settlement for temporary support paid pending appeal); *Barnes v. Barnes*, 192 Neb. 295, 220 N.W.2d 22 (1974) (credit sought against permanent alimony award for temporary alimony paid pending appeal).

In *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975), a case procedurally similar to the instant appeal, the district court entered the divorce decree, awarding the petitioner alimony in a lump-sum amount, payable by the respondent in 10 annual installments. After the decree was entered and following a hearing, the respondent was ordered to pay the petitioner temporary support during the pendency of the appeal. The petitioner appealed, and the respondent cross-appealed. On appeal, the respondent specifically claimed he was entitled to a credit of the amounts he paid petitioner pending appeal against the lump-sum award of alimony. Although this court rejected on the merits the respondent's appeal for a credit, we noted that the respondent had followed the proper procedure.

There is considerable logic supporting the procedure by which a temporary award of alimony pending appeal is to be considered

in the appeal of the divorce decree. Consideration of temporary alimony pending appeal in an appeal of a decree permits the appellate court to rule on the propriety of temporary payments in connection with its ruling on permanent alimony and other matters such as division of property and modification of the decree if necessary. If the alimony award is reversed or modified, the appellate court can order, inter alia, that the temporary payments be applied to permanent alimony or credited against property division. See *Isenberger v. Isenberger, supra*. Thus, had Terry raised a challenge to the award of temporary alimony pending appeal at the same time he challenged the award of permanent alimony, the Court of Appeals could have decided the propriety of the temporary award, as well as determined the issue of what credit or adjustment to which Terry may have been entitled. Had Terry followed the prescribed procedure, Terry's current attempt to gain relief from the temporary alimony payments made during the appeal by collaterally attacking the order awarding temporary alimony through a motion to quash would have been obviated. Not having challenged the temporary award of alimony pending appeal in the appeal of the decree, the order awarding temporary alimony pending appeal remained in effect, and Terry remained liable therefor until the mandate was spread on the record. See, Neb. Rev. Stat. § 42-365 (Reissue 1998); *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999).

In his reply brief, Terry argues that this court's decision in *Aspinwall v. Aspinwall*, 18 Neb. 463, 25 N.W. 623 (1885), precludes an appeal of a temporary award of alimony because the temporary order is not final. Terry misunderstands the *Aspinwall* opinion. In *Aspinwall*, we held that an order awarding temporary alimony prior to the entry of the decree of dissolution is not a final order. We said "[t]he principal thing sought and litigated for in the action is a divorce, and no judgment or decree in the case can be considered final unless it either awards or denies such divorce." 18 Neb. at 464, 25 N.W. at 623-24. Thus, we held in *Aspinwall* that an order awarding temporary alimony during the pendency of the case and prior to the entry of a divorce decree was not a final, appealable order.

[6] The purpose of a temporary alimony award prior to a decree is to provide temporary support during the dissolution

proceedings, see, generally, *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999), and such temporary alimony terminates when the divorce decree is entered, see, e.g., *Rickus v. Rickus*, 184 Neb. 833, 172 N.W.2d 628 (1969). The purposes of an award of temporary alimony pending appeal include providing for support pending appeal and, by virtue of the award being denominated "temporary," permitting the recipient of the alimony award to appeal its sufficiency without being deemed to have accepted its benefits and having waived an appeal thereof. See *Fletcher v. Fletcher*, 227 Neb. 179, 416 N.W.2d 570 (1987). Based on the foregoing, we conclude that the proper manner by which Terry should have challenged the award of temporary alimony pending appeal was in the appeal of the decree, and having failed to do so, he waived such challenge.

## CONCLUSION

Terry's motion to quash is an improper attempt to collaterally attack the district court's October 18, 1996, order awarding Kathryn temporary alimony pending appeal. For the reasons set forth above, we affirm the district court's order overruling Terry's motion to quash.

AFFIRMED.

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RHONDA HAUSER, APPELLEE, V. STEVEN HAUSER, APPELLANT.

611 N.W.2d 840

Filed June 9, 2000. No. S-99-566.

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 from the lower court's decision.
2. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition.
3. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
4. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

P. Bradley Dawson, of Clough, Dawson, Piccolo & Jones, for appellant.

Timothy P. Brouillette, of Elliott & Brouillette, for appellee.

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

HENDRY, C.J.

## INTRODUCTION

On March 24, 1999, the district court for Lincoln County granted Rhonda Hauser an ex parte protection order against Steven Hauser. After a show cause hearing conducted on April 21, the court concluded that the protection order should remain in force for 1 year. Steven appeals.

## FACTUAL BACKGROUND

On December 30, 1998, Rhonda filed a petition and affidavit to obtain a domestic abuse protection order against her then husband, Steven. At the time, Steven was employed by the Nebraska State Patrol. In her petition, Rhonda described two instances of domestic abuse. The court granted the ex parte protection order on December 31.

Thereafter, on January 10, 1999, the parties were given leave to submit supplemental affidavits on the issue of whether the protection order should remain in force for 1 year. In her supplemental affidavit, Rhonda alleged several more instances of abuse by Steven. Steven's affidavit denied Rhonda's claims and asserted that she had assaulted him twice during the marriage. In response to this evidence the court dismissed the petition on January 26, ruling that "the protection order previously entered should be dismissed, without prejudice" because it was presently "impossible to determine the true course of events."

On March 23, 1999, Rhonda filed a second petition for a protection order against Steven. The second petition alleged the same two incidents of abuse from the first petition and also noted that Steven had now been charged with assault regarding

these incidents. On March 24, the court entered an ex parte domestic abuse order.

Steven brought a motion to dismiss the petition, arguing that the court's previous dismissal without prejudice of the first petition for a protection order was "res judicata" for purposes of the second petition. The trial court overruled this motion, and a hearing was held on April 21, 1999, to determine whether the protection order should remain in effect for 1 year.

At the hearing, Rhonda testified about the two incidents alleged in the second petition and an additional incident which occurred on February 3, 1998. Steven's attorney objected, stating

> at this time I would move — make an objection on the basis that it [the February 3, 1998, incident] is not in conformity with the petition and affidavit to obtain a protection order filed on behalf of the petitioner herein as there is no allegation concerning February 1998 made in writing or in support of her affidavit used to obtain the order.

The trial court overruled the objection. Rhonda then testified regarding three other incidents of abuse. Steven's attorney objected to this testimony on the same grounds. His objections were again overruled. Steven's attorney cross-examined Rhonda on all aspects of her testimony. In addition, there was testimony at trial that the assault charges pending against Steven had been reduced from felony assault to a misdemeanor. Steven did not testify.

The trial judge found that the evidence showed Steven engaged in acts of violence against Rhonda during calendar year 1998 and that Rhonda was legitimately in fear of Steven. Accordingly, the court ordered that the protection order entered on March 24, 1999, remain in effect for 1 year. Steven appeals from this ruling. We moved the case to our court pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Steven asserts, restated, that the trial court erred in (1) violating his right to procedural due process by overruling his objec-

tions to testimony regarding incidents not pled in the second petition, (2) determining that the second protection order petition was not barred under the doctrine of res judicata, and (3) finding that Rhonda met her burden of proof to show that the permanent protection order should be granted.

## STANDARD OF REVIEW

[1] 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 from the lower court's decision. *Hron v. Donlan, ante* p. 259, 609 N.W.2d 379 (2000).

## ANALYSIS

[2] Regarding Steven's due process claim, it is a longstanding rule that "for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court." *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 521, 557 N.W.2d 684, 689 (1997). The record shows that Steven did not raise any issue of procedural due process before the trial court. An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). For this reason we will not consider Steven's due process claim.

[3] We also note that although Steven assigns as error the sufficiency of the evidence used to enter the protection order, he devotes no argument in his brief to this issue. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). We will, therefore, not address this assignment of error. Thus, the only remaining issue before us is Steven's claim that the second protection order is barred by res judicata.

[4] Because the protection order in this case has expired, the remaining issue presented has ceased to exist, rendering the case moot. Appeals involving the granting of a protection order will almost always be moot before the case is heard because of the time-limited nature of a protection order. *Hron, supra*; *Elstun v.*

*Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). However, we have recognized that under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. *Id.*

In determining whether the public interest exception should be invoked, the court considers 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. *Hron, supra*; *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

Steven's res judicata claim does not merit the application of the public interest exception. His claim is private and unique to the facts of this particular case, and as such, an authoritative adjudication for future guidance would be of limited value. See *Hron v. Donlan, ante* p. 259, 609 N.W.2d 379 (2000).

Neither does the expired protection order at issue in this case affect any other rights or liabilities. While Steven alleges in his brief that because of the granting of the protection order he "may be subject to certain employment ramifications [or] that he may also face future state misdemeanor or felony criminal prosecutions under §42-924 [and] 18 U.S.C. §2261(a)(1) or 18 U.S.C. §2261 (a)(2)," brief for appellant at 14, the record is devoid of any evidence to show that Steven was criminally convicted of any crime as a result of the issuance of the protection order, or that any other rights or liabilities were actually affected by the issuance of the protection order. Steven has failed to demonstrate any reason which would justify the application of any exception to the mootness doctrine. See, *Hron, supra*; *Elstun, supra.*

## CONCLUSION

Because we have concluded that this appeal is moot and that no exceptions to the mootness doctrine apply, the appeal is dismissed.

APPEAL DISMISSED.

# TIM D. RUBLE AND KAREN L. RUBLE, APPELLEES, V. HAROLD REICH, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND TIM FRANCIS AND WOODS BROS. REALTY, INC., THIRD-PARTY DEFENDANTS, APPELLEES.

611 N.W.2d 844

Filed June 9, 2000. No. S-99-596.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter 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.
2. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Contracts.** In interpreting a contract, we must first determine, as a matter of law, whether the contract is ambiguous.
4. **Judgments: Appeal and Error.** When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court.
5. **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.
6. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
8. **Contracts.** The meaning of an unambiguous contract is a question of law.
9. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
10. **Contracts.** A contract is viewed as a whole in order to construe it.
11. ___. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
12. ___. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
13. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
14. **Damages: Pleadings: Proof.** Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.

15. **Breach of Contract: Damages.** In measuring damages for a breach of contract, any cost or other loss that is avoided by the injured party's not having to perform is deducted from the amount of damages incurred.
16. ___: ___. In considering the amount of damages in breach of contract cases, the trier of fact, in applying the general rule on damages, must also bear in mind that generally speaking, the losses sustained by reason of the breach or the gains prevented are both actual and consequential damages. Of necessity, this requires consideration of the concepts of mitigation on the part of the nondefaulting party and savings realized through the breach.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgment of District Court affirmed as modified.

Timothy L. Moll, of Rembolt Ludtke & Berger, for appellant.

R. Kent Radke for appellees Tim D. Ruble and Karen L. Ruble.

Jeanelle R. Robson, of Knudsen, Berkheimer, Richardson & Endacott, for appellees Tim Francis and Woods Bros. Realty, Inc.

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

MCCORMACK, J.

## NATURE OF CASE

This is a breach of contract action brought by Tim D. Ruble and Karen L. Ruble to recover damages for a breach of a real estate purchase agreement by Harold Reich. Reich denied the Rubles' claim and brought a third-party complaint against Tim Francis and Woods Bros. Realty, Inc. (Woods Bros.), alleging that if there was a breach, any damages are the responsibility of Francis and Woods Bros. The county court found that Reich had breached the contract and awarded the Rubles damages. The county court also found in favor of Francis and Woods Bros. On appeal, the district court affirmed the judgment of the county court. Reich appealed, and on our own motion, we removed the matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## BACKGROUND

In May 1996, Reich listed his residence located at 4345 F Street in Lincoln, Nebraska, with Woods Bros. Francis, a real estate broker for Woods Bros., marketed the property.

At some point in May or June, the Rubles contacted Jackie Taylor, a mortgage loan officer with Commercial Federal Bank, and obtained preapproval for a loan, allowing the Rubles to determine the price range of a home they could afford.

On July 28, 1996, the Rubles, through their real estate agent, executed a written offer to purchase Reich's residence for $83,000. The relevant sections of the offer for purposes of this case are set forth below. Paragraph 2 of the offer stated in part:

> Buyer is to negotiate a new loan or shall assume the existing mortgage or deed of trust . . . . If processing of the loan or assumption has not been completed by the lending agency by the closing date specified elsewhere in this agreement, the time limit shall be automatically extended until the lending agency has, in the normal course of its business, advised either approval or rejection. . . . If this offer is not contingent on the sale of real estate owned by Buyer and the lender requires as a condition of granting the loan that the real estate owned by the Buyer be sold, then Seller shall have the option to declare this agreement null and void unless further written agreement between Buyer and Seller is obtained.

Paragraph 2A stated in part that the

> [b]alance shall be paid in cash, or by cashier's check at time of delivery of deed, contingent upon Buyer's ability to obtain a loan, secured by first mortgage or deed of trust, on above described Property [4345 F Street] in the amount of $62,500. The loan is to be . . . conventional.

Under "Other Provisions," the offer stated that the purchase is "contingent upon Buyers' property at 3134 NW 7th, Lincoln, closing escrow. (This property is currently under contract)." The offer also stated that closing was to occur "on August 31, 1996, or within 0 days after loan approval, whichever shall last occur." On July 29, acting through Francis, Reich accepted the Rubles' offer, thereby creating a contract between the parties.

As stated in the purchase agreement, the loan the Rubles were applying for was a conventional loan for $62,500 from Commercial Federal Bank. The purchase price for Reich's residence was $83,000. The Rubles intended to use the money they would get from the equity in the sale of their residence at 3134 N.W. 7th Street as a downpayment on the purchase of Reich's residence.

Sometime in the middle of August, the Rubles realized they would not be able to close on August 31, 1996, because of a problem with the sale of their residence at 3134 N.W. 7th Street. On August 16, Reich received a telephone message which Francis had left on Reich's answering machine. The message indicated that the Rubles would not be able to close on August 31. After the telephone message on August 16, Reich and Francis had no contact until the middle of September when Francis left another telephone message for Reich asking whether the Rubles could move into Reich's residence prior to the upcoming closing date. Upon receiving the message, Reich called Francis and told him that he did not want to proceed with the closing. On September 26, the Rubles closed on the sale of their residence at 3134 N.W. 7th Street and were ready to close on the purchase of Reich's residence on the same day. The closing on the sale/purchase of Reich's residence did not occur.

The Rubles subsequently filed suit against Reich in county court alleging that on September 26, 1996, they were advised of their loan approval and that on that date, they were ready, willing, and able to close on the purchase of Reich's residence, and that Reich failed to close on September 26, thereby breaching the contractual obligations in the agreement. The Rubles' petition sought to recover various items of special damages. Reich denied the allegations against him in his answer, and subsequently, he filed a third-party complaint against Francis and Woods Bros. alleging that any breach of the purchase agreement and any damages resulting therefrom were caused by the acts and omissions of Francis and Woods Bros.

The county court entered an order finding that Reich had breached the purchase agreement and awarded the Rubles the following damages: $307.82 for hotel rooms; $4,650 for house rental fees; $500 for earnest money; $435 for loan and inspec-

tion fees; and $263.81 for truck rental fees. As to the third-party complaint, the county court found in favor of Francis and Woods Bros. and dismissed the third-party complaint. Reich motioned for a new trial, which was overruled. Reich timely appealed to the district court, which affirmed the judgment of the county court in all respects. The district court held:

> It is the opinion of this Court that the contract to purchase was extended automatically by the terms of the contract and that there was no "loan approval" until Commercial Federal Bank was able to fund the loan. Commercial Federal would not fund the loan until the sale of [the Rubles'] property closed enabling [the Rubles] to make the required down payment on the Commercial Federal Bank loan. Regarding the issue of damages, it appears that the [Rubles] proved their damages with as much certainty as this case permits.

Reich appealed from the district court's order.

## ASSIGNMENTS OF ERROR

Reich assigns that the district court erred in affirming the county court's (1) finding that the contract between the parties obligated Reich to close on the sale of his house on a date later than the closing date stated in the contract, (2) awarding damages because a substantial portion of the damages was not actually suffered by the Rubles, and (3) finding that Francis and Woods Bros. did not breach their fiduciary duty to Reich.

## SCOPE OF REVIEW

[1] The construction of a contract is a matter 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. *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997).

[2] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997).

## ANALYSIS

### BREACH OF CONTRACT

Reich contends that he did not breach the contract by failing to close on September 26, 1996. The district court concluded that the Rubles did not have final "loan approval" until they closed on the sale of their residence at 3134 N.W. 7th Street on September 26 and that therefore, the August 31 closing date was automatically extended and Reich was obligated to close on September 26. Reich argues that the district court's interpretation of "loan approval" was incorrect and that the Rubles already had "loan approval" on August 31. Reich contends that because the Rubles had loan approval on August 31, the closing should have occurred on that date and that he was not obligated to close at a later date. We must determine at what point the Rubles had "loan approval" within the meaning of the agreement. We are specifically concerned with the provision in the agreement that stated "[c]losing of the sale shall be on August 31, 1996, or within 0 days after loan approval, whichever shall last occur."

Reich argues that "loan approval" relates to the completion of the loan application process, and not to the satisfaction of all preconditions to funding the loan. In other words, Reich argues that the sale of the Rubles' residence at 3134 N.W. 7th Street was not a condition of loan approval and that by August 31, 1996, the Rubles' lender had completed the processing of the Rubles' loan application and therefore, the Rubles had loan approval on August 31. It is worth noting that Reich's assertion to this court that the Rubles had loan approval on August 31 is inconsistent with a claim made by Reich in his answer to the Rubles' petition. In Reich's answer, he alleged that the Rubles failed to ensure that the processing of the loan was complete by the closing date in the agreement, thereby admitting that the Rubles did not have loan approval on August 31. Reich now contends that the processing of the loan was complete and that the Rubles had loan approval on August 31.

The Rubles contend that final loan approval did not occur until their home at 3134 N.W. 7th Street closed because it was at this point that Commercial Federal Bank was willing to fund the loan.

[3,4] In interpreting a contract, we must first determine, as a matter of law, whether the contract is ambiguous. *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997). When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993).

[5-9] 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. *Estate of Stine v. Chambanco, Inc., supra.* A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Id.* If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Plambeck v. Union Pacific RR. Co., supra.* In contrast, the meaning of an unambiguous contract is a question of law. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Id.*; *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993).

In this case, we are concerned with the phrase "loan approval" as used in the agreement. We determine that the phrase "loan approval" is unambiguous because it cannot be fairly interpreted in more than one way.

[10-12] We view a contract as a whole in order to construe it. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997); *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable per-

sons would understand them. *McDonald's Corp. v. Goler, supra*; *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996).

Under the plain meaning of "loan approval," approval does not exist until all of the contingencies placed on the granting of the loan by the lending agency are met and the lending agency agrees to fund the loan. In the instant case, when we construe the contract as a whole, the Rubles did not receive loan approval until they closed on the sale of their residence at 3134 N.W. 7th Street.

In making this determination, we first consider the provision in the contract which states "[c]losing of the sale shall be on August 31, 1996, or within 0 days after loan approval, whichever shall last occur." It is clear from this provision that if the Rubles did not have loan approval by August 31, the closing date was automatically extended to the date when the Rubles obtained loan approval. Similarly, if the Rubles had obtained loan approval before August 31, closing would not have occurred until August 31 because the provision stated "whichever shall last occur."

Second, we consider the provision in paragraph 2 which states that "[i]f processing of the loan or assumption has not been completed by the lending agency by the closing date specified elsewhere in this agreement, the time limit shall be automatically extended until the lending agency has, in the normal course of its business, advised either approval or rejection." This provision demonstrates that processing continues until the bank gives formal approval or rejection of the loan. Processing of the loan is not complete when the paperwork is done but there are still contingencies that must be met before the lending agency will give approval. This provision also makes it clear that the August 31 closing date specified in the agreement is automatically extended if the buyer's lending agency has yet to advise either approval or rejection of the loan.

Third, we consider another portion of paragraph 2 which states:

> If this offer is not contingent on the sale of real estate owned by Buyer and the lender requires as a condition of granting the loan that the real estate owned by Buyer be

> sold, then Seller shall have the option to declare this agreement null and void unless further written agreement between Buyer and Seller is obtained.

This provision makes it clear that if the Rubles had not made the sale of their residence at 3134 N.W. 7th Street a condition of their offer and the Rubles' lender required as a condition of approving the loan that the Rubles' residence be sold, Reich would have had the option of declaring the agreement void. However, the Rubles did make the offer contingent on the sale of their residence at 3134 N.W. 7th Street, making it apparent that the Rubles' lending agency would require the sale of the Rubles' residence as a condition of loan approval.

When we construe the terms of the contract as a whole, it is apparent that the Rubles' loan approval was contingent on the sale of their residence at 3134 N.W. 7th Street. The Rubles had not closed on the sale of their residence on August 31, 1996, so pursuant to the agreement, the closing date on the sale/purchase of Reich's residence was automatically extended until the Rubles obtained loan approval. Reich was obligated to close after August 31.

## DAMAGES

A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997).

The county court found Reich liable for the following damages: $307.82 for hotel rooms; $4,650 for house rental fees; $500 for earnest money; $435 for loan and inspection fees; and $263.81 for truck rental fees. Reich contests only the county court's calculation of the award for house rental fees. Reich contends that the amount of house rental fees awarded exceeds the actual damages suffered by the Rubles. The county court's calculation was based upon Karen Ruble's testimony that the Rubles had to rent a house for 6 months due to Reich's breaching the contract and had paid monthly rent of $775 for a total of $4,650.

Reich argues that the Rubles should not be awarded the full $775 a month they paid for rent because the evidence shows that

the Rubles did not suffer damages of $775 per month. Reich relies on the testimony of Karen Ruble, wherein she stated that while the Rubles were renting, they did not have to pay the monthly mortgage payments they would have had to pay if the closing on Reich's residence had occurred. Karen Ruble also testified that the Rubles' mortgage payment to Commercial Federal Bank was "going to be like $630." Of this amount, approximately $130 would have been applied toward taxes and insurance and the balance would have been applied to principal and interest. Reich contends that this evidence establishes that by renting, the Rubles avoided $630 per month in mortgage payments and that therefore, their actual damages in house rental fees were only $145 per month ($775 less $630) for 6 months for a total of $870, rather than $4,650 as awarded by the county court.

[13] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998).

[14] Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996).

The Rubles sufficiently proved that they incurred house rental payments of $775 per month for 6 months. The question becomes whether the district court erred in failing to reduce the amount awarded by the county court for rent payments because the Rubles would have had to pay mortgage payments in lieu of the rent payments if the contract had not been breached.

[15,16] In measuring damages for a breach of contract, any cost or other loss that is avoided by the injured party's not having to perform is deducted from the amount of damages incurred. Restatement (Second) of Contracts § 347(c) (1981). This court has also held:

> In considering the amount of damages in breach of contract cases, the trier of fact, in applying the general rule on

> damages, must also bear in mind that generally speaking the losses sustained by reason of the breach or the gains prevented are both actual and consequential damages. Of necessity this requires consideration of the concepts of mitigation on the part of the nondefaulting party and *savings realized through the breach.*

(Emphasis supplied.) *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 47, 424 N.W.2d 885, 889 (1988).

Karen Ruble testified that the total monthly mortgage payment on Reich's residence would have been $630 and that of this amount, $130 would have been applied toward taxes and insurance and $500 would have been applied toward principal and interest. We cannot conclude that the $500 per month that would have been applied toward principal and interest is equivalent to $500 paid toward a rent payment such that it should be deducted from the Rubles' damages award. A $500 payment that is applied toward principal and interest has benefits, such as building equity and creating tax deductions, that a $500 rent payment does not have. The Rubles, in making rent payments instead of mortgage payments, were denied these benefits. Therefore, we conclude that $500 of the $630 a month that the Rubles would have paid in mortgage payments should not be deducted from the damages award. However, the $130 of the monthly mortgage payment that would have been applied toward taxes and insurance was savings realized through the breach and should have been deducted from the damages. Karen Ruble also testified that the first mortgage payment on Reich's residence would not have been due until a month later than their first rent payment. Therefore, the $130 should not be deducted from the first month's rent payment. The Rubles' house rental damages are modified as follows: $775 for the first month, and $645 per month ($775 less $130) for the other 5 months of rent payments, for a total of $4,000 awarded for house rental payments. The other damages awarded by the county court and affirmed by the district court remain unchanged.

### Third-Party Complaint

Finally, Reich argues that the district court erred in affirming the county court's finding that Francis and Woods Bros. did not

breach their fiduciary duty to Reich. Reich alleges that Francis breached his duty by failing to disclose to Reich that he was obligated to close after August 31, 1996.

In 1994, the Legislature adopted a statutory system regulating the relationship between real estate agents or salespersons and persons who are sellers, landlords, buyers, or tenants of rights and interests in real property. See Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 1996). The Legislature established that the sections of the new codified system "shall supersede the duties and responsibilities of the parties under the common law, including fiduciary responsibilities of an agent to a principal." § 76-2429. Under this statutory scheme, specifically § 76-2417(1) in pertinent part, a seller's agent owes the following duties and obligations to his principal:

> (a) To perform the terms of the written agreement made with the client;
>
> (b) To exercise reasonable skill and care for the client;
>
> (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity, including:
>
> (i) Seeking a price and terms which are acceptable to the client, except that the licensee shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease;
>
> (ii) Presenting all written offers to and from the client in a timely manner regardless of whether the property is subject to a contract for sale or lease or a letter or intent to lease;
>
> (iii) Disclosing in writing to the client all adverse material facts actually known by the licensee; and
>
> (iv) Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee;
>
> (d) To account in a timely manner for all money and property received;
>
> (e) To comply with all requirements of sections 76-2401 to 76-2430, the Nebraska Real Estate License Act, and any rules and regulations promulgated pursuant to such sections or act; and

(f) To comply with any applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.

Reich has not proved that Francis breached any of these statutory duties. Reich claims that once Francis knew that the Rubles were not going to close on August 31, 1996, Francis had a duty to tell Reich that he was obligated to close after August 31. As stated above, the agreement unambiguously stated that the closing date was automatically extended if the Rubles did not have loan approval by August 31. Reich's obligation to close after August 31 was clear from the contract terms themselves. Reich had an opportunity to read the contract, and he then signed the contract. Francis did not breach a duty by failing to explain a term of the contract that was apparent from the face of the contract itself.

## CONCLUSION

The purchase agreement between the parties obligated Reich to close after the date specified in the agreement, August 31, 1996, if the Rubles did not have loan approval as of that date. The Rubles did not receive loan approval until September 26, and Reich's failure to close on this date was a breach of the contract. The Rubles are entitled to $775 for the first month, and $645 per month ($775 less $130) for the other 5 months of rent payments, for a total of $4,000 awarded for house rental payments. The other damages awarded by the county court and affirmed by the district court remain unchanged. The district court's decision upholding the county court's dismissal of the third-party complaint against Francis and Woods Bros. is affirmed.

AFFIRMED AS MODIFIED.

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

# ED HOBZA, APPELLANT, V. SEEDORFF MASONRY, INC., AND CNA INSURANCE COMPANY, APPELLEES.

611 N.W.2d 828

Filed June 9, 2000. No. S-99-1117.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Workers' Compensation.** Pursuant to Neb. Rev. Stat. § 48-119 (Reissue 1998), compensation is to be computed from the date of the injury.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1998) 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.
7. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 1998) is a question of fact.
8. **Workers' Compensation: Attorney Fees: Words and Phrases.** A reasonable controversy may exist if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Todd Bennett, of Rehm Law Firm, P.C., for appellant.

Scott A. Burcham for appellees.

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

CONNOLLY, J.

This case presents the question, From what date are permanent disability benefits computed under Neb. Rev. Stat. §§ 48-119 and 48-121 (Reissue 1998)? The appellant, Ed

Hobza, received workers' compensation benefits for temporary disability due to an injury arising out of the course of his employment with appellee Seedorff Masonry, Inc. In between periods of receiving such benefits, Hobza worked full time and did not receive benefits. Hobza subsequently provided notice to Seedorff of permanent disability. Appellee CNA Insurance Company compensated Hobza for the permanent disability computed from the date when Hobza provided notice. Hobza then sought waiting-time penalties, interest, and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1998) based on the argument that he should have been paid a lump sum within 30 days of giving notice for the periods of time during which he worked and did not receive temporary benefits. The Nebraska Workers' Compensation Court denied Hobza's request, and the review panel affirmed, with one judge dissenting.

We conclude that benefits for Hobza's permanent disability should have been computed from the date of injury. However, we also determine that because a reasonable controversy existed, Hobza is not entitled to penalties, interest, and attorney fees.

## BACKGROUND

The facts of this case are undisputed. On November 22, 1996, Hobza sustained an injury arising out of and in the course of his employment with Seedorff. Afterward, he received workers' compensation benefits for periods of temporary total disability. During some periods of time, Hobza worked part time and received benefits for temporary partial disability. During other periods of time, he worked full time and received no payments. The parties stipulated that Hobza timely received all temporary benefits for which he was entitled.

On March 2, 1998, Hobza's physician rendered an opinion stating that Hobza had sustained a 15-percent permanent partial disability. It is undisputed that Hobza was entitled to receive benefits of $395.35 per week for 33¾ weeks for the permanent partial disability. The appellees received notice of the permanent disability on March 30.

As a result of the March 30, 1998, notice, the appellees commenced payments of benefits for the permanent partial disabil-

ity computed from March 2. Thus, payments were made from the date Hobza received his permanent partial disability rating instead of from the date of the injury. It is undisputed that Hobza has received all permanent partial disability compensation that he would be entitled to under the 15-percent permanent partial disability rating.

On April 8, 1998, Hobza filed a petition in the Workers' Compensation Court seeking waiting-time penalties, interest, and attorney fees. Relying on § 48-119, Hobza contended that payment for his permanent partial disability should have been computed from the date of his injury instead of from the date the disability rating was rendered. As a result, Hobza contended that he was entitled to a lump-sum payment of all permanent disability payments through March 30 and that any payments he received after that date were delinquent. Hobza then argued that these delinquent payments entitled him to penalties, interest, and attorney fees under § 48-125.

A single judge of the compensation court concluded that payments were required to begin from the date Hobza received his disability rating. Thus, the court denied Hobza an award under § 48-125. On review, two judges of the review panel determined that § 48-121 provided that temporary benefits would cease once a permanent disability became ascertainable. The judges interpreted § 48-121 to mean that Hobza was not entitled to benefits until he attained maximum medical improvement and, thus, found that the payments at issue were timely made. The judges also concluded that the refusal to award penalties, interest, and attorney fees was not erroneous because a reasonable controversy existed due to the fact that the case involved an unanswered question of law. One judge of the review panel dissented, concluding that payments should have been computed from the date of the injury.

## ASSIGNMENTS OF ERROR

Hobza assigns that the compensation court erred in holding that he became entitled to permanent partial disability from the date of maximum medical improvement instead of from the date of his injury and in determining that he was not entitled to penalties, interest, and attorney fees.

## STANDARD OF REVIEW

[1] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Dustin H. et al., ante* p. 166, 608 N.W.2d 580 (2000); *Lyman-Richey Corp. v. Nebraska Dept. of Rev.*, 258 Neb. 908, 606 N.W.2d 813 (2000).

## ANALYSIS

Hobza contends that § 48-119 requires payment for permanent partial disability to be computed from the date of the injury. As a result, Hobza argues that he should have received permanent disability benefits during the time periods that he was working and not receiving temporary disability benefits. If true, Hobza would have then been entitled to payment of these benefits within 30 days of when he gave notice to the appellees of his permanent disability. Thus, Hobza contends that due to the failure of the appellees to make such payments within 30 days, he is entitled to waiting-time penalties, interest, and attorney fees under § 48-125.

At the time Hobza was receiving benefits, § 48-119 provided:

> No compensation shall be allowed for the first seven calendar days after disability begins, except as provided in section 48-120, but if disability extends beyond the period of seven days, compensation shall begin on the eighth calendar day after the injury; *Provided, however,* that if such disability continues for six weeks or longer, compensation shall be computed from the date of the injury.

Section 48-121(3) provided: "For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; *Provided,* the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable . . . ."

This court has never directly addressed the date from which permanent partial disability is computed when an employee has been receiving payments for temporary disability. In *Park v. School District*, 127 Neb. 767, 257 N.W. 219 (1934), we noted that compensation for a temporary total injury was to be computed from the date of the injury. Then, in *Klement v. H. P. Lau Co.*, 138 Neb. 144, 292 N.W. 381 (1940), we determined that it was not error for the compensation court to award compensation for a permanent disability from the date of the injury. However, in reaching this determination in *Klement*, we did not rely on § 48-119.

[3-5] We conclude that the plain language of § 48-119, in effect when Hobza was receiving benefits, dictates that compensation be computed from the date of the injury. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Schrader v. Farmers Mut. Ins. Co., ante* p. 87, 608 N.W.2d 194 (2000); *Lyman-Richey Corp. v. Nebraska Dept. of Rev., supra.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Schrader v. Farmers Mut. Ins. Co., supra.*

The appellees rely on § 48-121 stating that compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable. However, this language only provides when compensation for disability ends, not when it begins. It is § 48-119 which provides when compensation begins, and this section plainly provides that when disability continues for 6 weeks or longer, compensation is computed from the date of the injury. Thus, when it was determined that Hobza had reached maximum medical improvement, his entitlement to future temporary disability benefits ended, but by computing permanent disability from the date of the injury, he was entitled to a lump-sum payment of permanent partial disability benefits for the previous weeks during which he received no benefits.

[6-8] Although we determine that Hobza was entitled to a lump-sum payment for any weeks that he did not receive tem-

porary disability benefits, we also conclude that he is not entitled to waiting-time penalties, interest, or attorney fees. Section 48-125 provides in part:

> (1) Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided,* fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability.

Section 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. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Whether a reasonable controversy exists under § 48-125 is a question of fact. *McBee v. Goodyear Tire & Rubber Co., supra.* We have stated that a reasonable controversy may exist if there is a question of law previously unanswered by this court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act. *Id.*

This case involved an unanswered question of law. Accordingly, a reasonable controversy existed, precluding Hobza from any entitlement to penalties, interest, or attorney fees.

## CONCLUSION

We conclude that the compensation court review panel erred in determining that benefits for permanent partial disability are to be computed from the date of the permanent disability rating. However, we affirm the decision of the compensation court review panel that Hobza is not entitled to waiting-time penalties, interest, and attorney fees because a reasonable controversy existed.

AFFIRMED IN PART, AND IN PART REVERSED.

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I respectfully disagree with that portion of the majority opinion which holds in this scheduled injury case that permanent

partial disability benefits should have been paid to Hobza as of the date of the injury in this case. I concur with the view of the majority that a denial of attorney fees, interest, and penalties under Neb. Rev. Stat. § 48-125 (Reissue 1998) was correct.

In my opinion, the review panel correctly determined that Hobza was not entitled to permanent partial disability benefits (PPD) until he had reached maximum medical improvement (MMI), and thus, the payments at issue were timely made.

It is undisputed that Hobza received temporary disability benefits when he was unable to work as a result of his injury for the period between his date of injury and his notice of permanent disability. Based on the language of Neb. Rev. Stat. § 48-119 (Reissue 1998), the majority concludes that Hobza's PPD benefits should be computed from the date of his injury and that he should be paid PPD benefits for any dates on which he did not receive temporary disability benefits, dating back to the date of his injury. I do not think the unadorned use of "injury" and "disability" in § 48-119, when viewed within the context of the workers' compensation statutory scheme, dictates the result reached by the majority. Rather, the purpose of § 48-119 is to merely define a statutory exclusionary period, or "waiting period," prior to eligibility for workers' compensation benefits.

Hobza suffered a rotator cuff injury to his right shoulder, which is a scheduled injury under Neb. Rev. Stat. § 48-121(3) (Reissue 1998). Hobza has received a permanent disability rating of 15 percent to his shoulder. The assignment of a permanent disability rating means that Hobza has reached MMI. See *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). There is a medical determination in the record of this case that Hobza reached MMI on March 2, 1998. When an injured worker reaches MMI, his or her physical condition is permanent. See, *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991); *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990). See, also, *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Kubik v. Union Ins. Co.*, 4 Neb. App. 831, 550 N.W.2d 691 (1996).

By definition, the term "permanent" means that the condition is no longer "temporary." See, *Gibson, supra*; *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992). An injured worker such

as Hobza cannot fluctuate repeatedly between permanent and temporary disability status with respect to the same scheduled injury. See, e.g., *Heiliger v. Walters and Heiliger Electric, Inc.*, 236 Neb. 459, 472, 461 N.W.2d 565, 574 (1990) ("[w]hen an injured worker has attained maximum physical recovery after a work-related injury, any residual disability from a compensable injury is permanent and prevents the worker's entitlement to compensation for temporary disability"); *Briggs v. Consolidated Freightways*, 234 Neb. 410, 413, 451 N.W.2d 278, 282 (1990) ("claimant is not entitled to compensation for temporary total disability after he has achieved maximum medical healing"). See, also, *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); § 48-121(3) ("compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable").

By deeming the date Hobza was injured as the date Hobza's employer should have paid Hobza permanent disability benefits, the majority, incorrectly in my view, causes Hobza to receive temporary disability benefits interspersed with permanent disability benefits. Under the decision reached by the majority, Hobza will receive permanent disability benefits during the period when Hobza was temporarily disabled rather than in accordance with a linear progression anticipated by the statutes with respect to a scheduled injury during which the worker is to receive temporary disability benefits followed by permanent disability benefits. I believe the application of the workers' compensation statutes urged by the majority to be illogical.

As we recently stated,

> When construing statutes, "we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute and its amendments." *Battle Creek State Bank v. Haake*, 255 Neb. 666, 680, 587 N.W.2d 83, 92 (1998). As a further aid to statutory interpretation, "we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *Id.*

*Sheldon-Zimbelman*, 258 Neb. at 579, 604 N.W.2d at 403. In my opinion, the majority's decision to pepper payments of perma-

nent disability to Hobza while he was temporarily disabled is not sensible or required under § 48-119. Therefore, I would affirm the decision of the Nebraska Workers' Compensation Court review panel.

STEPHAN, J., joins in this concurrence and dissent.

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STATE OF NEBRASKA, APPELLEE, V.
DAVID E. BURDETTE, APPELLANT.
611 N.W.2d 615

Filed June 9, 2000. No. S-99-1210.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion.
3. **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.
4. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
5. **Motions to Suppress: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo.
6. **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.
7. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.

8. **Rules of Evidence: Other Acts: Appeal and Error.** In reviewing the admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), an appellate court considers whether (1) the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
9. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), upon objection to its admissibility, is required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.
10. **Evidence: Other Acts: Jury Instructions.** Any limiting instruction given upon receipt of other crimes evidence should likewise identify only those specific purposes for which the evidence was received.
11. **Evidence: Other Acts: Intent: Proof.** Other crimes evidence may be offered for the purpose of proving intent where intent is an element of the charged offense.
12. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
13. **Criminal Law: Intent: Proof.** Even when proof of motive is not an element of a crime, motive for the crime charged is relevant to the State's proof of the intent element.
14. **Evidence: Other Acts.** In certain circumstances, significant similarities in the manner in which a defendant carried out a prior bad act make evidence of the prior act useful for the proper purpose of establishing identity. The question is whether the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
15. **Rules of Evidence: Other Acts: Time.** The question of whether evidence of prior acts otherwise admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the probative value of evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
16. **Constitutional Law: Police Officers and Sheriffs.** Two discrete inquiries are essential to the determination of when an individual is "in custody" for Fifth Amendment purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave. The first inquiry is distinctly factual, while the second calls for application of the controlling legal standard to the historical facts.
17. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.
18. **Constitutional Law: Investigative Stops: Probable Cause: Police Officers and Sheriffs.** Police can constitutionally stop and briefly detain a person for investigative

purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.

19. **Constitutional Law: Police Officers and Sheriffs.** One who voluntarily accompanies law enforcement officers for questioning has not been seized for Fourth Amendment purposes.
20. **Constitutional Law: Investigative Stops: Probable Cause: Police Officers and Sheriffs.** If police have a reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony, then a stop may be made to investigate that suspicion.
21. ___: ___: ___: ___. If police make a stop in objective reliance on a flyer or bulletin, the evidence uncovered in the course of the stop is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop.
22. **Motions to Suppress: Confessions: Police Officers and Sheriffs.** It is fundamental that a statement must be suppressed if it is obtained by offensive police practices. However, mere deception will not render a statement involuntary or unreliable; the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.
23. **Habitual Criminals: Sexual Assault: Prior Convictions.** Neb. Rev. Stat. § 29-2221(1)(a) (Reissue 1995) provides the specific enhancement mechanism where the current conviction is for a first degree sexual assault and the defendant has two or more prior felony convictions, including at least one of which is for first degree sexual assault.

Appeal from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MILLER-LERMAN, J.

## I. NATURE OF CASE

David E. Burdette was convicted by a jury in the district court for Douglas County on August 20, 1999, of first degree sexual assault, second offense; attempted first degree sexual assault; robbery; and two counts of burglary. Burdette was found to be a habitual criminal and on September 22, was sentenced to 115 to 220 years' imprisonment. Burdette appeals his convictions and sentences. We affirm.

## II. STATEMENT OF FACTS

In 1982, Burdette was convicted of two counts of first degree forcible sexual assault and one count of attempted first degree forcible sexual assault. On March 31, 1982, an intruder entered the home of C.P. through a back window after pulling a screen off the window. As C.P. was going to bed, the intruder grabbed her from behind and threw her on the bed. He bound her arms and mouth with duct tape and blindfolded her. He then sexually assaulted her both anally and vaginally and took some money from her billfold before leaving the house. C.P. had recently been featured in a local magazine in a list of the 10 most eligible women in Omaha.

On April 19, 1982, P.G. was awakened by an intruder who tied her hands behind her back and blindfolded her before sexually assaulting her anally and vaginally. Before leaving the house, the intruder asked P.G. where her money was located.

On April 25, 1982, an intruder gained entry to the home of J.B. through a sliding glass door. J.B. was awakened in her bedroom by the intruder, who tied her hands with duct tape, blindfolded and gagged her, and then sexually assaulted her anally and vaginally. The intruder went through her billfold and drawers before leaving the house. At one point, the intruder told J.B. he had seen her picture in a magazine article featuring Omaha's 10 most eligible women. In describing the intruder, J.B. told investigators she thought that he was white but that his voice "sounded black." Burdette is white.

In May 1982, Lynn Mason was a deputy sheriff in Douglas County and a member of a task force investigating sexual assaults of women who had been featured in the local magazine article listing the 10 most eligible women in Omaha. Mason was assigned to guard P.M., one of the women featured in the article. On May 10, Mason was inside P.M.'s house at around 2 a.m. when Burdette attempted to cut the screen on a sliding glass door of the house. While attempting to gain access to P.M.'s house, Burdette saw Mason, and Burdette fled. Burdette was later found hiding in the area of P.M.'s house and was arrested.

Burdette pled guilty to the assaults of C.P. and P.G. Burdette was convicted of the attempted first degree sexual assault of P.M.

On December 1, 1982, Burdette received consecutive sentences of 11 to 15 years' imprisonment for each of the sexual assaults and a concurrent sentence of 3 to 5 years' imprisonment for the attempted sexual assault. Burdette served his sentences at the Omaha Correctional Center and was released on April 30, 1998. Upon his release, Burdette registered with the Douglas County sheriff's office pursuant to the Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 1998). On June 2, he informed the sheriff's office of a change of address.

In the early morning hours of October 14, 1998, an intruder broke into the rural Douglas County home of A.B. and her two daughters. A.B.'s husband had died in a motorcycle accident on September 30, and October 13 was the first night she and her daughters had stayed by themselves overnight in their home since his death. A.B. had gone to bed with her two daughters at around 10:30 p.m. on October 13. Some time after midnight, A.B. was awakened when the intruder placed his hand, covered in a latex glove, over her mouth. The intruder asked A.B. for her purse and then got A.B. and her daughters out of the bed and led them to the hallway. When A.B. told the intruder her purse was downstairs, the intruder returned A.B. and her daughters to the bed, tied A.B. to her daughters with plastic flexible cuffs, and ordered them to lie face down on the bed.

A.B. then heard the intruder going through the bedroom and other rooms of the house. He subsequently returned to the bedroom, blindfolded and gagged A.B., and tied her legs apart with some ripped sheets. The intruder digitally penetrated A.B. both anally and vaginally and fondled her breasts. A.B. then heard the intruder take off his pants, and he penetrated her with his penis. As he was assaulting A.B., the intruder told her daughters he was not hurting their mother and that "mommy liked this." After 5 to 10 minutes, A.B. heard the intruder say he was not "going to waste the bucket." He then withdrew and put his pants back on. The intruder went downstairs, searched for A.B.'s purse, then returned upstairs before leaving to hit A.B. and her daughters on the buttocks and to tell them not to call the police or he would kill them.

After the intruder left, A.B. freed herself and called her brother-in-law at approximately 2 a.m. She then called the 911 emergency dispatch service. A.B.'s brother-in-law and a deputy sheriff arrived shortly thereafter. A.B. was unable to identify the intruder because she never got a good look at him, but based on the sound of his voice, she thought he might be a black male. She also noted that he smelled of cigarette smoke. A.B. determined that some money and a gun were taken from her home. Investigators determined that the home had been entered through a window in the living room where a screen had been ripped off the frame.

The following day, after hearing about the break-in and assault, Jane Frost, a neighbor of A.B.'s, reported to the sheriff's office that she was driving home at around 12:30 a.m. on October 14, 1998, and noticed a black Ford Bronco with a red stripe parked on the side of the road by the driveway to A.B.'s home. Frost reported that she slowed down and read the license plate number which she thought to be "1-H8 . . . [a]nd . . . possibly a seven."

On October 17, 1998, a deputy sheriff saw a black Ford Bronco with a red stripe and a license plate number of 1-HH87 heading west on Maple Street. The deputy pulled the vehicle over because of a traffic violation and because the vehicle matched the description of the vehicle observed by Frost. The driver of the vehicle was Burdette, and Burdette identified himself to the deputy as a registered sex offender. The deputy passed the information on to investigators in the sheriff's department.

When that information reached investigators, Burdette became a suspect in the assault of A.B. Investigators began a 24-hour surveillance on Burdette on October 22, 1998, and obtained a court order from the district court for Douglas County on October 24 to install a tracking device on Burdette's vehicle. Investigators learned that subsequent to the time Burdette had completed his sex offender registration, he had changed his employer and his vehicle. In order to gain access to Burdette's vehicle to install the tracking device, investigators put out a "locate" to have Burdette stopped in his vehicle and to have investigators notified when he was stopped.

At around 5 p.m. on October 27, 1998, in reliance on the locate, deputy sheriffs stopped Burdette in his vehicle and notified two of the investigators, Deputy Sheriff William Jackson and Deputy Sheriff John Pankonin. Although the stop was based on the locate, one of the deputy sheriffs told Burdette that the stop was for the purpose of having Burdette update his sex offender registration. Jackson and Pankonin proceeded to the area where Burdette had been stopped. Jackson requested that Burdette come to the sheriff's headquarters in order to update his sex offender registration. Burdette agreed to ride with the deputies to the headquarters. Burdette's vehicle was towed to the impound lot, where an electronic tracking device was installed on the vehicle.

As the tracking device was being installed, Burdette was at the sheriff's headquarters completing the sex offender registration. Pankonin began Burdette's registration process with a blank form and went over the questions with Burdette. Pankonin asked Burdette only those questions that were on the registration form. Burdette answered the questions and volunteered additional information. Burdette told Pankonin about the sexual assaults he had committed in 1982. Burdette stated that in 1982, Burdette and his girl friend saw an issue of a local magazine featuring a list of the most eligible women in Omaha. Burdette told his girl friend the women on the list were probably better than the girl friend, and she replied that he would never know. Burdette told Pankonin that he took her reply as a challenge and that he proceeded to rape two or three of the women on the list.

Burdette went on to tell Pankonin that in 1998, he was 43 years old, and that he was too old and not in good enough shape to do something like that again. However, Burdette told Pankonin that during the 1982 sexual assaults, he was not wearing a condom but that in 1998, he would wear a condom because of sexually transmitted diseases and because police would need only a small sperm sample to make a DNA identification. Burdette also told Pankonin that during the 1982 assaults, he did not use a weapon because he believed he could physically overpower the victims with his hands and did not need a weapon.

As Pankonin went over the questions with Burdette, Jackson monitored the progress of the installation of the tracking device.

When Jackson received word that the tracking device had been installed, he and Pankonin transported Burdette to his vehicle at the impound lot.

With respect to the assault on A.B., investigators developed a theory that the intruder had found A.B.'s name by reading her husband's obituary in the Omaha World-Herald newspaper. During the 6 weeks following installation of the tracking device, investigators noticed Burdette would frequently drive slowly through and stop in certain neighborhoods in the Omaha area. Investigators were able to link nine of the areas to which Burdette paid particular attention to recent obituary notices in the Omaha World-Herald regarding men who had died and had been survived by their wives.

On November 25, 1998, investigators observed Burdette driving several times past the home of S.H. Investigators reviewed the previous day's edition of the Omaha World-Herald and found an obituary for S.H.'s husband. Burdette returned to the area of S.H.'s house five more times between November 26 and 28.

When investigators followed Burdette to the area of S.H.'s home on November 28, 1998, they saw him get out of his vehicle, walk around the house, and then leave the area. After Burdette left the area, Jackson approached S.H., explained the situation to her, and assured her Burdette was being watched. Jackson walked around the house with S.H., and Jackson noted that gates on each side of the house and a sliding screen door in the back of the house had been opened and were ajar.

Jackson left S.H.'s house some time after 11 p.m. When he got into his vehicle, Jackson was advised over the radio that Burdette had been observed heading back toward the area of S.H.'s house. Jackson returned to S.H.'s house and asked if he could wait inside her house in case Burdette returned. S.H. agreed, and Jackson waited inside the house near the sliding screen door that had been found partially open. Jackson left both the sliding glass and screen doors closed but unlocked. Jackson waited a short time and was advised by radio that Burdette had parked in an apartment complex parking lot near S.H.'s house. Shortly past midnight on November 29, 1998, Jackson heard noises in the backyard and could see someone on the back deck.

Jackson then heard the sliding doors open and saw Burdette part the blinds and enter the house.

After Burdette got inside the house, Jackson confronted him and told him he was under arrest. Burdette turned and attempted to run, but Jackson subdued him on the deck. Jackson brought him back inside and notified the other officers. At the time he entered the house, Burdette was wearing latex rubber gloves and had rope and two condoms in his possession.

In a six-count information, Burdette was charged with first degree sexual assault, second offense; burglary; and robbery in connection with the October 14, 1998, incident at A.B.'s house, and with attempted first degree sexual assault and burglary in connection with the November 29 incident at S.H.'s house. In the sixth count, Burdette was further charged as being a habitual criminal.

Prior to trial, the State gave notice that it intended to present evidence of the 1982 sexual assaults committed by Burdette. A hearing pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 1995), was held on June 15, 1999, during which evidence of the 1982 sexual assaults was presented. On June 29, 1999, the district court entered an order allowing the State to present evidence of the prior sexual assaults at trial. In the order, the court found that "evidence of the 1982 assaults [had] independent relevance"; that "admitting the previous bad acts evidence [was] for the proper purpose of showing identity, motive and opportunity"; and that the probative value of such evidence for such purposes outweighed its potential for unfair prejudice.

On July 16, 1999, this court's decision in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), was announced, requiring the State and the district court to state on the record the specific purpose or purposes for which evidence of prior bad acts is admissible. A further hearing was held on August 16, during which the State urged that evidence of Burdette's 1982 sexual assaults be admitted for the purposes of proving intent, motive, and identity. The State argued that intent and motive were at issue in regard to the charges of attempted first degree sexual assault and burglary in connection with the November 29, 1998, incident at S.H.'s house. The court stated that the conclusions set

forth in its June 29, 1999, order were still applicable and that when requested to do so during the trial, it would give limiting instructions that the evidence would be used only for the purposes of intent, motive, and identity.

Also prior to trial, Burdette filed a motion to suppress the statements he made to Pankonin on October 27, 1998, because such evidence was received in violation of his constitutional rights under the Fourth and the Fifth Amendments to the U.S. Constitution and under article I, §§ 7 and 12, of the Nebraska Constitution. Burdette argued that the statements were obtained during a custodial interrogation during which the deputy sheriffs had failed to inform him of his *Miranda* rights and that the statements were obtained without a voluntary and intelligent waiver of his right against self-incrimination and his right to counsel. Burdette further argued that the statements were not freely and voluntarily given and that they were produced by, or as the result of, threats and coercion.

A hearing was held on the motion to suppress on June 14, 1999. On June 29, the district court entered an order denying the motion to suppress and finding that the statements given by Burdette to Pankonin were voluntary and not in violation of Burdette's right against self-incrimination. In its order in conformity with *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), the district court found that law enforcement officers properly stopped Burdette for the purpose of updating his sex offender registration, that *Miranda* warnings were not required as Burdette was not in custody for interrogation purposes, that Burdette voluntarily accompanied officers to the sheriff's headquarters, and that the questioning of Burdette did not go beyond the questions on the standard sex offender registration form. The district court found that a reasonable person would have felt he was at liberty to end the questioning and leave.

At trial, J.B., C.P., P.G., Mason, Jackson, and Pankonin testified regarding Burdette's 1982 sexual assaults. Prior to such testimony, the district court instructed the jury that the evidence was admitted for the limited purposes of showing Burdette's motive or intent or to establish his identity and that such evidence was not admissible to prove Burdette's character or his propensity to act in a certain way. Burdette objected to such testimony.

Pankonin testified as to Burdette's statements on October 27, 1998. Burdette objected and reasserted the arguments originally made in his motion to suppress. Burdette's objection was overruled, and Pankonin was allowed to testify regarding Burdette's statements.

On August 20, 1999, the jury returned verdicts of guilty on all five substantive counts. A hearing was held September 22, during which the district court determined that Burdette was a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995) and that all five charges, including the charge of first degree sexual assault, second offense, were felonies, the sentences of which were to be imposed pursuant to the habitual criminal statute. The district court determined that the penalty for the charge of first degree sexual assault, second offense, pursuant to § 29-2221(1)(a) was a potential sentence of 25 to 60 years' imprisonment with a mandatory minimum of 25 years' imprisonment and that the penalty for each of the four other charges pursuant to the habitual criminal statute was a potential sentence of 10 to 60 years' imprisonment with a mandatory minimum of 10 years' imprisonment. Pursuant to such findings, the district court sentenced Burdette on count I to 35 to 60 years' imprisonment for the first degree sexual assault, second offense, and to 20 to 40 years' imprisonment on each of the other four charges, for a total sentence of 115 to 220 years' imprisonment. Burdette appeals.

## III. ASSIGNMENTS OF ERROR

Burdette assigns error to the district court's (1) admission of evidence of the 1982 sexual assaults committed by Burdette; (2) admission of evidence of statements Burdette made to Pankonin on October 27, 1998; and (3) sentencing Burdette as a habitual criminal on count I, the charge of first degree sexual assault, second offense, because such charge had already been enhanced pursuant to Neb. Rev. Stat. § 28-319(3) (Reissue 1995).

## IV. STANDARDS OF REVIEW

[1,2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those

instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995) and rule 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Sanchez, supra*; *State v. McManus, supra.*

[3,4] 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. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Konfrst, supra.* The foregoing standards of review were derived from *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), and first applied by the Nebraska Supreme Court in *Konfrst*, which was a Fourth Amendment case.

[5] Motions to suppress statements based on the Fifth Amendment involve a determination of whether an individual was "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The determination of whether an individual was "in custody" is made by reference to the circumstances of the interrogation and an analysis of whether a reasonable person would have felt that he or she was at liberty to terminate the interrogation. *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996). With respect to motions to suppress based on alleged violations of the Fifth Amendment, the U.S. Supreme Court held in *Thompson v. Keohane*, 516 U.S. 99, 116

S. Ct. 457, 133 L. Ed. 2d 383 (1995), that whether a suspect is "in custody," and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact. We note that, in reliance on *Thompson*, other appellate courts have extended the *Ornelas* standards of review to appellate review of motions to suppress based on the Fifth Amendment involving the failure to give *Miranda* warnings. See, e.g., *U.S. v. Erving L.*, 147 F.3d 1240 (10th Cir. 1998); *U.S. v. Fernandez-Ventura*, 132 F.3d 844 (1st Cir. 1998); *U.S. v. Yusuff*, 96 F.3d 982 (7th Cir. 1996). See, also, *U.S. v. Howard*, 115 F.3d 1151 (4th Cir. 1997); *U.S. v. Morgan*, 91 F.3d 1193 (8th Cir. 1996); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir. 1996). See, also, *State v. Wiernasz*, 584 N.W.2d 1 (Minn. 1998); *In re Joshua David C.*, 116 Md. App. 580, 698 A.2d 1155 (1997). See, also, *State v. McCurry*, 5 Neb. App. 526, 561 N.W.2d 244 (1997). We now adopt the *Thompson-Ornelas* standard of review with respect to motions to suppress statements based on Fifth Amendment grounds as follows: In reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo.

[6,7] 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. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

## V. ANALYSIS

### 1. Other Crimes Evidence

Burdette first assigns error to the district court's admission of evidence of the sexual assaults Burdette committed in 1982. He asserts the admission of such evidence violated rule 404(2), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he

> or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[8] In reviewing the admissibility of other crimes evidence under rule 404(2), we consider whether (1) the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). We apply this analysis in our review of the admissibility of evidence of Burdette's prior sexual assaults in the present case.

[9,10] The proponent of evidence offered pursuant to rule 404(2), upon objection to its admissibility, is required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received. *State v. Sanchez, supra.* Any limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received. *Id.*

In the instant case, the district court made a finding on the record that evidence of Burdette's prior sexual assaults was admissible for the purposes of proving motive, intent, and identity. The district court gave the jury limiting instructions at the time evidence of the prior sexual assaults was presented. In view of the above, we review the admissibility of other crimes evidence by considering whether evidence of the 1982 sexual assaults was relevant for the purposes asserted by the district court.

(a) Motive and Intent

[11-13] The district court found, and instructed the jury, that evidence of the 1982 sexual assaults was admissible to show Burdette's motive and intent in committing the charged crimes. We have held that other crimes evidence may be offered for the

purpose of proving intent where intent is an element of the charged offense. See, e.g., *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). Motive is defined as that which leads or tempts the mind to indulge in a criminal act. *State v. Sanchez, supra*. Even when proof of motive is not an element of a crime, motive for the crime charged is relevant to the State's proof of the intent element. See, *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). Therefore, to the extent intent is an element of the current crimes charged against Burdette and to the extent evidence of the 1982 sexual assaults is relevant to show Burdette's motive and intent in committing the current crimes charged, evidence of the prior crimes to prove motive and intent is admissible under rule 404(2).

Although specific intent need not be proved with respect to the first degree sexual assault charge, the State was required to prove specific intent with respect to the four remaining substantive charges. First degree sexual assault under § 28-319(1)(a) is a general intent crime. The burden on the prosecution in order to establish the general criminal intent required for first degree sexual assault is to prove beyond a reasonable doubt that the accused subjected another person to sexual penetration and overcame the victim by force, threat of force, coercion, or deception. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). Intent was therefore not an issue in regard to the charge of first degree sexual assault of A.B.

However, Burdette was also charged with committing robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 1995). Section 28-324 provides that "[a] person commits robbery if, *with the intent to steal*, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." (Emphasis supplied.) Burdette was further charged with two counts of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1995). Section 28-507 provides that "[a] person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon *with intent to commit any felony or with intent to steal* property of any value." (Emphasis supplied.) Finally, Burdette was charged with the

attempted first degree sexual assault of S.H. pursuant to Neb. Rev. Stat. § 28-201 (Cum. Supp. 1998) and § 28-319(1)(a). Section 28-201(1) provides that "[a] person shall be guilty of an attempt to commit a crime if he . . . [*i*]*ntentionally engages in conduct* which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct *intended to culminate in the commission of the crime*." (Emphasis supplied.)

The State was required to prove Burdette's specific intent with regard to four charges. On the robbery charge, the State was required to prove that Burdette intended to steal when he took the money and the gun from A.B. On the two burglary charges, the State was required to prove that Burdette intended to commit a felony or to steal property when he broke into the homes of both A.B. and S.H. On the attempted first degree sexual assault charge, the State was required to prove that Burdette's breaking into S.H.'s home on November 29, 1998, was conduct intended to culminate in the commission of first degree sexual assault upon S.H.

Evidence of the 1982 sexual assaults was relevant to prove Burdette's intent and motive in connection with each of these four charges. Burdette's prior pattern of selecting victims from an article which identified them as women likely to be living alone and then breaking into their homes to commit sexual assaults and to steal was highly probative of his motive and intent in breaking into A.B.'s and S.H.'s houses. Because intent was an element of four of the charged crimes and evidence of the 1982 sexual assaults was probative of Burdette's motive and intent in connection with those charges, the district court did not abuse its discretion by admitting such evidence for these purposes.

(b) Identity

[14] The district found and instructed that evidence of the 1982 sexual assaults was admissible for the purpose of establishing Burdette's identity as the intruder at A.B.'s house. In certain circumstances, we have found that significant similarities in the manner in which a defendant carried out a prior bad act make evidence of the prior act useful for the proper purpose of

establishing identity. In such cases, we have said that "[t]he question is whether the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature." *State v. Carter*, 246 Neb. 953, 965, 524 N.W.2d 763, 773 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

The district court in this case found that the 1982 sexual assaults and the current charged crimes were sufficiently similar that evidence of the prior acts was admissible for the purpose of proving identity. Among the similarities noted by the district court were that in 1982, Burdette

> used force to break into the homes of victims during early morning hours, that [Burdette] wanted money from the victims, that [Burdette] gagged, blindfolded and tied the victims face down on their beds, that [Burdette] attempted to orally, anally and vaginally assault the victims, and that the victims were chosen from an article in the Omaha Magazine featuring 1982's most eligible women.

The district court noted that in regard to crimes committed against A.B., the State charged that Burdette

> used force to break into the home of the victim during early morning hours, he wanted money from the victim, he gagged, blindfolded and tied the victim face down on the bed, he assaulted the victim anally and vaginally, and the victim was chosen from a newspaper article reporting the recent death of her husband.

In *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), we rejected the State's assertion that other crimes evidence was admissible under the circumstances of that case for the purpose of establishing identity. We distinguished *Sanchez* from *Carter* and *Freeman* on the basis that in *Carter* and *Freeman*, there was physical evidence that a sexual assault had occurred but no eyewitness identification of the assailant, thus leaving open the possibility that someone other than the defendant had committed the crime. Other crimes evidence in *Carter* and *Freeman* was therefore found probative of the identity of the assailant and properly admitted for that purpose. In *Sanchez*, identity was not an issue. In *Sanchez*, there was no physical evidence to establish sexual assault, only the testi-

mony of the victim who described what happened and unequivocally identified the defendant as the assailant. In *Sanchez*, there was no evidence upon which the jury could have concluded the assault occurred but that someone other than the defendant committed it.

In the present case, A.B. testified that she was sexually assaulted but that she did not see the intruder and was unable to unequivocally identify Burdette as the intruder. A.B. testified that after the assault, she told investigators that based on the sound of his voice, she thought the intruder might have been black. Because Burdette is white, it was possible that the jury could have concluded that A.B. was sexually assaulted but that someone other than Burdette committed the crimes charged. Therefore, unlike *Sanchez*, but similar to *Carter* and *Freeman*, identity was at issue in the instant case.

We conclude that evidence of the 1982 sexual assaults was admissible for the purpose of proving the identity of Burdette as the person who committed the first degree sexual assault, robbery, and burglary at A.B.'s home. Significant similarities, as listed by the district court, existed between the assaults Burdette committed in 1982 and the charged crimes involving A.B. Indeed, the fact that, with the exception of one of the victims in 1982, the assailant chose victims whose names had been featured in articles identifying them as women who would likely be living alone was "unusual and distinctive" such that it could be said that the 1982 sexual assaults and the crimes charged in the instant case bore "the same signature." See *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). See, also, *State v. Rutchik*, 116 Wis. 2d 61, 341 N.W.2d 639 (1984) (finding that evidence that defendant had previously chosen residences to burglarize by reading obituary column was probative to establish definite method of operation and was therefore admissible to show preparation, plan, identity, and intent). Because identity was at issue in this case and evidence of the 1982 sexual assaults was probative of that issue, the district court did not abuse its discretion in admitting the evidence of the 1982 sexual assaults for the purpose of proving Burdette's identity as the intruder.

(c) Probative Value and Unfair Prejudice

Having found that evidence of Burdette's 1982 sexual assaults was relevant for proper purposes under rule 404(2), we next consider whether the probative value of such evidence is substantially outweighed by its potential for unfair prejudice. In this regard, Burdette argues that the probative value of the evidence was significantly diminished by the fact that the prior sexual assaults occurred in 1982, 16 years prior to the crimes charged. Burdette argues that remoteness in time caused the potential for unfair prejudice to substantially outweigh the probative value of the evidence.

[15] The admissibility of evidence concerning prior bad acts under rule 404(2) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when prior acts are too remote to be admissible. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). The question of whether evidence of prior acts otherwise admissible under rule 404(2) is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the probative value of evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

In the instant case, we find that the district court did not abuse its discretion in concluding that the probative value of evidence of the 1982 sexual assaults was not substantially outweighed by the potential for unfair prejudice despite the fact that the prior acts occurred 16 years prior to the crimes charged. Particularly relevant to consideration of the effect of remoteness in time is the fact that during most of the 16 years between the prior assaults and the charged crimes, Burdette was in prison. See *State v. Rutchik*, 116 Wis. 2d at 75, 341 N.W.2d at 646 (stating that "in assessing the impact of the passage of time on the relevancy of prior crimes evidence, periods of confinement will not be included in computing the time between incidents").

We conclude that evidence of Burdette's 1982 sexual assaults was relevant for the proper purposes of proving identity, motive, and intent and that the probative value of such evidence was not outweighed by the potential for unfair prejudice. We further note that the district court properly instructed the jury to limit use of

the prior crimes evidence to determining identity, motive, and intent. We conclude that the trial court did not abuse its discretion by admitting evidence of Burdette's 1982 sexual assaults, and we therefore reject Burdette's first assignment of error.

### 2. Statements Made to Pankonin

As his second assignment of error, Burdette asserts that the district court improperly admitted testimony of statements he made to Pankonin on October 27, 1998, because such statements were obtained in violation of his constitutional rights. Burdette argues that his constitutional rights were violated in two respects: (1) The initial stop was an unlawful seizure under the Fourth Amendment and article I, § 7, of the Nebraska Constitution and (2) the statements were obtained during a custodial interrogation prior to which the officers had failed to give Burdette *Miranda* warnings in violation of the Fifth Amendment and article I, § 12, of the Nebraska Constitution. The district court denied Burdette's motion to suppress and determined that Burdette was properly stopped for the purpose of updating his sex offender registration and that Burdette was not "in custody" at the time he made the statements to Pankonin. Although we do not find it necessary to address the district court's conclusion that Burdette was properly stopped for the purpose of updating his sex offender registration, we conclude that the district court properly denied the motion to suppress because Burdette was properly stopped pursuant to a locate based on reasonable suspicion and Burdette was not "in custody" for *Miranda* purposes when he made the statements to Pankonin.

#### (a) Fifth Amendment: Alleged Custodial Interrogation

We first address Burdette's assertion that the statements were obtained in violation of the Fifth Amendment and that the district court erred when it concluded that Burdette was not "in custody" at the time he made the statements to Pankonin. The U.S. Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that in order to safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have the right to remain silent,

that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

[16] The U.S. Supreme Court set forth the standards governing a state court's determination of when an individual is "in custody" in *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Two discrete inquiries are essential to the determination: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave. The first inquiry is distinctly factual, while the second calls for application of the controlling legal standard to the historical facts. *Id.* See, also, *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

[17] Police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in a police station, or because the questioned person is one whom the police suspect. Rather, *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See, also, *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). What is dispositive in determining whether *Miranda* warnings should have been issued is whether a reasonable person would have felt free to leave under the circumstances. *State v. Veiman, supra.*

The district court in the instant case found the circumstances surrounding Burdette's questioning on October 27, 1998, to be as follows:

> [W]hen law enforcement officers requested that [Burdette] update the form, [Burdette] voluntarily accompanied the officers to the police station to complete the form, riding with the officers in their car to the station. The officers tes-

> tified that [Burdette] was cooperative, that no threats were made, and that handcuffs were not used. . . . [T]he only questions asked of [Burdette] were the standard questions on the Sexual Offender Registration Form. The officers testified that if [Burdette] had refused to update the form at the time he was stopped, they would have allowed him to leave.

The record of the suppression hearing supports the district court's factual findings regarding the circumstances surrounding the questioning. We have reviewed the district court's factual findings for clear error and find none. Burdette presented no evidence that would contradict the district court's finding that he voluntarily accompanied Jackson and Pankonin to the sheriff's headquarters and that his statements to Pankonin were given voluntarily. Jackson and Pankonin testified that Burdette willingly accompanied them in their vehicle and did not ask to drive himself to the sheriff's headquarters. Neither did he at any time ask to end the interview or to be allowed to leave. Burdette put on no evidence to refute this testimony.

We have reviewed the record and, upon our de novo review of the district court's conclusion, agree with the district court that as to the second inquiry under *Thompson* and under the circumstances, a reasonable person would have felt that he or she was at liberty to end the questioning and leave. Burdette went to the sheriff's headquarters voluntarily, and there was no evidence to indicate that Burdette attempted to end the questioning and was prevented from doing so. For purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Burdette was not "in custody" when he made the statements on October 27, 1998, and therefore the statements were not obtained in violation of his Fifth Amendment rights.

(b) Fourth Amendment: Alleged Illegal Seizure

Although Burdette's statements to Pankonin were voluntary and were not obtained in violation of his Fifth Amendment rights, the statements were obtained as a result of the stop of Burdette's vehicle made by deputy sheriffs based on the locate put out by investigators. The next issue we must resolve is whether Burdette's voluntary statements following this stop

should nevertheless have been suppressed because they were the product of an illegal seizure and therefore excluded as " 'fruit of the poisonous tree,' " under *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The provisions of both the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, protect against unreasonable seizures. We have recognized three levels of police-citizen encounters:

> "The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of fourth amendment protection. . . . The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a 'seizure' sufficient to invoke fourth amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. . . . The third type of police-citizen encounters, arrests, are characterized by highly intrusive or lengthy search or detention. The fourth amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime."

(Citations omitted.) *State v. Van Ackeren*, 242 Neb. 479, 486-87, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

[18] The officers' stop of Burdette on October 27, 1998, was an encounter of the second type. The officers stopped Burdette's vehicle and briefly detained him until Jackson and Pankonin arrived at the scene. Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

[19] As discussed above in connection with our Fifth Amendment analysis, after Jackson and Pankonin arrived at the scene, Burdette voluntarily accompanied them to the sheriff's headquarters. Burdette was not "seized" when Jackson and Pankonin took him to the sheriff's headquarters because one who voluntarily accompanies law enforcement officers for questioning has not been seized for Fourth Amendment purposes. See *State v Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). However, the investigators gained Burdette's compliance as a result of the initial stop. If the stop was an illegal seizure, the statements Burdette made to Pankonin were "fruit of the poisonous tree" requiring suppression. *Wong Sun v. United States, supra.*

We note that in denying the motion to suppress, the district court determined that the deputy sheriffs properly "stopped [Burdette] for the purpose of updating his Sexual Offender Registration form." In reviewing the factual record, it is clear that a locate had been put out on Burdette and that a stop would permit law enforcement officers to install a tracking device as part of their investigation of Burdette as a suspect in the felonies committed against A.B. The investigators could not disclose such purpose to Burdette and therefore told him he was stopped to update his sex offender registration. What is relevant to our analysis is the propriety of the stop for its actual purpose rather than for the purpose which the investigators represented to Burdette. We, therefore, consider whether the stop was proper for the purpose of investigating Burdette as a suspect in the felonies committed against A.B. and do not decide whether the stop was proper for the purpose of updating the sex offender registration. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

[20] Under the undisputed facts and the applicable law, the initial stop of Burdette on October 27, 1998, was proper pursuant to the standards set forth in *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). In *Hensley*, the U.S. Supreme Court stated:

> Although stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth

> Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion.

469 U.S. at 226. If police have a reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony, then a stop may be made to investigate that suspicion. *United States v. Hensley, supra.*

[21] In the instant case, the deputy sheriffs stopped Burdette's vehicle on the basis of a locate put out by the investigators who had information that Burdette and his vehicle were connected to the felonies involving A.B. The U.S. Supreme Court held in *Hensley* that

> if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, . . . to pose questions to the person, or to detain the person briefly while attempting to obtain further information.

(Citation omitted.) 469 U.S. at 232. If police make a stop "in objective reliance on a flyer or bulletin . . . the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop." 469 U.S. at 233. Based on *Hensley*, we have held that it is irrelevant whether an officer making a stop in reliance on a radio bulletin is personally aware of the factual foundation for the bulletin, so long as the factual foundation underlying the bulletin is sufficient to support a reasonable suspicion. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). In a similar vein, it has also been held that an arrest for which probable cause exists, regardless of whether or not the arresting officer is personally aware of all the facts supporting probable cause, will be deemed a proper arrest. See *State v. Hayes*, 3 Neb. App. 919, 535 N.W.2d 715 (1995).

In the instant case, the deputy sheriffs who stopped Burdette in his Bronco did so in objective reliance on a locate put out by the investigators. The investigators who issued the locate had a rea-

sonable suspicion that the driver of the Bronco was involved in the sexual assault, burglary, and robbery at A.B.'s house. The question therefore is not whether the deputy sheriffs who made the stop based on a locate personally possessed reasonable suspicion, but, rather, whether the investigators who put out the locate had reasonable suspicion, grounded in specific and articulable facts, that the driver of the Bronco was involved in or was wanted in connection with a completed felony. See, *State v. Soukharith, supra*; *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991) (officer had reasonable suspicion to stop vehicle which answered description of vehicle reported involved in robbery). In this case, investigators possessed information that a neighbor had seen a Bronco parked near A.B.'s house on the night of the crime. Specifically, the neighbor reported seeing a black Bronco with the same description as Burdette's and reported that the license plate number was "1-H8 . . . [a]nd . . . possibly a seven." The license plate number of Burdette's black Bronco was 1-HH87. Burdette had been linked to this vehicle in the traffic stop of October 17, 1998. The investigators who put out the locate, therefore, had reasonable suspicion sufficient to justify briefly detaining the driver of the vehicle for investigative purposes.

The district court found that the deputy sheriffs properly stopped Burdette for the purpose of updating his sex offender registration. Burdette asserts the stop was illegal because the address information on Burdette's registration was up to date and he was not required to update any other information until after his registration anniversary date, which had not yet passed. Because the police stopped Burdette for the purpose of investigating Burdette as a suspect in the sexual assault, robbery, and burglary at A.B.'s house based on a locate which was grounded on sufficient reasonable suspicion, the stop was proper.

[22] The record shows that the stop enabled investigators to place a tracking device on Burdette's vehicle pursuant to a court order. So long as the stop was otherwise proper, the stop was not made invalid because the investigators did not disclose this objective to Burdette. It is fundamental that a statement must be suppressed if it is obtained by offensive police practices. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). However, mere deception will not render a statement involuntary or unreliable;

the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement. *Id.* Nothing in this record indicates that Burdette's statement of October 27, 1998, was false or untrustworthy.

Because Burdette's vehicle was identified in connection with recent felonies and Burdette was a suspect in the recent felonies, we conclude that the deputy sheriffs' stop of Burdette's vehicle based on a proper locate did not violate the Fourth Amendment and did not poison Burdette's subsequent voluntary statements. We conclude there was no violation of Burdette's constitutional rights in connection with his statements to Pankonin on October 27, 1998. The district court properly admitted Burdette's statements of October 27 into evidence. We therefore reject Burdette's second assignment of error.

### 3. Sentencing as Habitual Criminal

Burdette claims generally that the district court erred because it doubly enhanced his sentence. Burdette specifically claims that given the fact that the first degree sexual assault with which he was charged and convicted in count I was first degree sexual assault, second offense, the district court erred when it sentenced him on count I as a habitual criminal. Burdette misperceives the sentencing structure applicable to count I.

Burdette was convicted of first degree sexual assault, second offense, for which the sentence found in § 28-319(3) ordinarily applies. Section 28-319(3) provides:

> Any person who is found guilty of sexual assault in the first degree for a second time when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

However, § 28-319(3) did not apply to Burdette's sentencing because Burdette was found to be a habitual criminal, one of whose prior felonies was a first degree sexual assault, and he was instead sentenced under § 29-2221(1)(a), the habitual criminal statute specifically applicable to a defendant with such a criminal record.

Burdette was charged in count VI as a habitual criminal under § 29-2221. Section 29-2221 does not create a separate offense, but, rather, provides for enhanced punishment where a defendant is found to be a "habitual criminal." Under § 29-2221(1), a defendant convicted of a felony may be deemed a habitual criminal if the defendant has been (1) twice previously convicted of a crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each. Generally, one deemed to be a habitual criminal shall be punished by imprisonment for a mandatory minimum term of 10 years and a maximum term of not more than 60 years upon each conviction for a felony committed subsequent to the prior convictions used as the basis for the habitual criminal charge. However, another portion of the habitual criminal sentencing statute, § 29-2221(1)(a), provides a specific provision which controls the habitual criminal sentencing where the defendant is convicted of one of the listed felonies, in this case, first degree sexual assault, second offense, under § 28-319, and has as one of his or her prior felonies one of the listed felonies, in this case, § 28-319. Section 29-2221(1)(a) provides:

> If the felony committed is in violation of section 28-303, 28-304, 28-308, 28-313, *28-319*, 28-502, 28-929, or 28-1222, and at least one of the habitual criminal's prior felony convictions was for a violation of one of the sections listed in this subdivision or of a similar statute in another state or of the United States, the mandatory minimum term shall be twenty-five years and the maximum term not more than sixty years.

(Emphasis supplied.) It is the habitual criminal sentencing statute found at § 29-2221(1)(a) which specifically applies to Burdette, and the district court properly applied this section when it imposed a sentence of 35 to 60 years' imprisonment on Burdette's conviction on count I.

Burdette argues that sentencing him as a habitual criminal on the count of first degree sexual assault, second offense, was a double enhancement of his penalty. We do not agree.

Burdette cites to *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999), for the proposition that the State cannot, in effect, doubly enhance a defendant's criminal conviction. In *Hittle*, we held that a conviction for driving under a suspended license in violation of

Neb. Rev. Stat. § 60-6,196(6) (Reissue 1998), which was deemed to be a felony rather than a misdemeanor, may not be used either to trigger application of the habitual criminal statute or as a prior offense for purposes of penalty enhancement pursuant thereto. We noted that a "defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute" and that "the specific enhancement mechanism contained in Nebraska's [driving under the influence] statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute." *State v. Hittle*, 257 Neb. at 355, 598 N.W.2d at 29.

[23] A comparison of the interplay of the habitual criminal statute and § 28-319 in the instant case with the habitual criminal statute and the driving under a suspended license statutes in *Hittle* shows marked differences. Section 60-6,196(6), at issue in *Hittle*, provided that a person is guilty of driving under a suspended license, a felony, if the person was driving at a time during which his or her license had been revoked pursuant to two previous driving under the influence convictions. We held in *Hittle* that one can become a felon under § 60-6,196(6) only by having first committed multiple driving under the influence offenses, at least some of which are misdemeanors, and that the penalty for the act of driving under a suspended license had in a real sense been enhanced from one of misdemeanor status to one of felony status because under other circumstances, see Neb. Rev. Stat. § 60-4,186 (Reissue 1998), driving under a suspended license is a misdemeanor. Section 28-319(3) provides that in a first degree sexual assault case where the defendant has a prior conviction for first degree sexual assault, the crime shall be deemed first degree sexual assault, second offense. Both first degree sexual assault and first degree sexual assault, second offense, are felonies, and therefore, the subsequent offense of first degree sexual assault has not been enhanced as was the case in *Hittle*. Section 29-2221(1)(a) provides the specific enhancement mechanism where the current conviction is for a first degree sexual assault and the defendant has two or more prior felony convictions, including at least one of which is for first degree sexual assault. In such a case, § 29-2221(1)(a) dictates a sentencing range of 25 to 60 years' imprisonment.

The district court did not "doubly enhance" Burdette's sentence pursuant to both § 28-319(3) and the habitual criminal statute. Instead, the district court properly sentenced Burdette pursuant to § 29-2221(1)(a) as a habitual criminal. Pursuant to count I, Burdette was convicted of first degree sexual assault, second offense, in violation of § 28-319, and at least one of Burdette's prior felony convictions was for a violation of § 28-319. Section 29-2221(1)(a) controlled the sentencing of count I and provides that in such circumstances, the mandatory minimum term shall be 25 years' imprisonment and the maximum term not more than 60 years' imprisonment. The sentence imposed by the district court of 35 to 60 years' imprisonment on count I was within these statutory limits. 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. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). We find no abuse of discretion in the district court's sentencing of Burdette, and we therefore reject Burdette's final assignment of error.

## VI. CONCLUSION

We conclude that the district court did not err in admitting evidence of the 1982 sexual assaults committed by Burdette because the district court admitted the evidence for proper purposes, the probative value of such evidence was not outweighed by the risk of unfair prejudice, and the district court gave the jury proper limiting instructions. We further conclude that the district court did not err in admitting into evidence statements Burdette made to Pankonin on October 27, 1998, because such statements were not obtained in violation of Burdette's constitutional rights. Finally, we conclude that the district court did not abuse its discretion in sentencing Burdette. We therefore affirm Burdette's convictions and sentences.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. BARRY D. McCROY, APPELLANT.

613 N.W.2d 1

Filed June 16, 2000. Nos. S-98-330, S-98-331, S-98-332.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, a defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** Where defense counsel in a criminal case fails to carry out a defendant's request to file an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. In seeking such relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with directions.

Barry D. McCroy, pro se.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

STEPHAN, J.

Barry D. McCroy appeals from the court's denial of his motions for postconviction relief without conducting an evidentiary hearing. McCroy asserts that he is entitled to postconviction relief because his counsel at the time of his plea-based convictions had been previously disbarred in Colorado, and was

subsequently disbarred in Nebraska. McCroy contends that he was denied the effective assistance of counsel (1) under a per se rule because of the disbarments and (2) because his attorney failed to honor his request to perfect a direct appeal. We conclude that the first claim is without merit, but that McCroy is entitled to an evidentiary hearing on his second claim.

## FACTS

In January 1992, McCroy pled guilty to four theft-related charges set forth in three separately docketed cases. At the time his pleas were entered, McCroy was represented by Charles M. Radosevich. The record of the proceedings reveals that prior to accepting the pleas, the district court informed McCroy of the rights he was waiving by pleading guilty. After a factual basis was offered for each of the charges, the court determined that the pleas were made freely, voluntarily, and knowingly, and found McCroy guilty on each count. The record also reveals that the guilty pleas were entered in exchange for an agreement by the State not to file six other theft-related charges. On February 27, the district court imposed four consecutive sentences consisting of three sentences of 15 to 45 months' imprisonment and one sentence of 10 to 45 months' imprisonment, with no credit for time served.

On December 17, 1997, McCroy filed motions for postconviction relief, seeking to vacate each of his convictions. In his motions, McCroy alleged that he was denied effective assistance of counsel because Radosevich had been disbarred in Colorado in 1989 and had subsequently reactivated his license to practice law in Nebraska without disclosing this fact. Radosevich was subsequently disbarred by this court in 1993. *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993). McCroy alleged that but for the incompetence of Radosevich, he would not have pled guilty to the four counts. He further alleged that on the day of sentencing, he asked Radosevich to file appeals, which Radosevich failed to do. McCroy alleges that this failure was prejudicial because it adversely affected the calculation of his sentence reduction pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1994), which was amended during the period when his appeals would have been pending. See 1992 Neb. Laws, L.B. 816.

The district court denied McCroy's motion without an evidentiary hearing, finding:

> I have examined the transcripts of McCroy's pleas and sentences, and I do not find any indication that Mr. McCroy was inadequately represented. The pleas were entered voluntarily, and Mr. McCroy clearly understood the possible consequences of his waiver, and the options that he was foregoing [sic] by entering into that waiver. Under these circumstances, the fact that his lawyer may have been disbarred in another state does not vitiate the convictions. By misrepresenting his credentials, Radosevich may have subjected himself to civil or criminal liability. However, the test for adequate representation depends upon defective performance, not accreditation. There is no indication in this record that Mr. McCroy was inadequately represented by his counsel in these proceedings. For these reasons, McCroy's Application for Post-Conviction Relief ought to be denied.

The district court did not expressly rule on McCroy's assertion that Radosevich disregarded his request to appeal.

Following this ruling on his postconviction motions, McCroy perfected timely appeals, which were consolidated for purposes of briefing and oral argument and moved to our docket on our motion pursuant to Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). The cases were subsequently submitted without oral argument by agreement of the parties.

## ASSIGNMENTS OF ERROR

McCroy assigns, restated and summarized, that the district court erred in (1) denying him an evidentiary hearing on his claims and (2) not addressing his claim that he was denied the right of direct appeal.

## STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Williams, ante* p. 234, 609 N.W.2d 313 (2000); *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

## ANALYSIS

The history of Radosevich's membership in the Nebraska bar is well documented in our jurisprudence. Pursuant to Neb. Rev. Stat. § 27-201(3) (Reissue 1995), we take judicial notice of the fact that Radosevich was admitted to practice in Nebraska in 1969 upon graduation from an accredited law school and successful completion of the bar examination. He was also admitted to practice law in Colorado, but was disbarred by the Colorado Supreme Court on October 30, 1989, based upon a finding that he improperly withdrew approximately $265,000 in client funds for his personal use. *People v. Radosevich*, 783 P.2d 841 (Colo. 1989). After allowing his membership in the Nebraska State Bar Association (NSBA) to lapse, Radosevich applied for reinstatement on January 13, 1991, but did not inform the NSBA of his disbarment in Colorado. See *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). He was reinstated to active membership in the NSBA on February 22, 1991, but following discovery of the disciplinary action taken by the Colorado Supreme Court and the filing of a motion of reciprocal discipline on August 21, 1992, he was disbarred by this court on June 11, 1993. *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993). See, also, *State v. Bennett, supra.* Radosevich represented McCroy after Radosevich's disbarment in Colorado and reinstatement in Nebraska, but before his disbarment in Nebraska.

### Per Se Ineffective Assistance of Counsel

[2] Generally, we have resolved the question of whether a criminal defendant received ineffective assistance of counsel in violation of his or her Sixth Amendment rights by applying the familiar two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to the actual performance of defense counsel. Under this test, in order to establish a right to postconviction relief based on a claim of ineffective counsel, a defendant has the burden to first 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. *State v. Williams, supra*; *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

The *Strickland* analysis necessarily involves examination of specific acts and omissions on the part of counsel which are alleged to constitute deficient performance which was prejudicial to the defense of the accused. Some courts, however, have held that in certain circumstances, legal representation by a particular individual constitutes a per se violation of a criminal defendant's Sixth Amendment right to the effective assistance of counsel, regardless of the particulars of such representation. For example, in *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), the accused was represented by an individual who had graduated from an accredited law school but was unsuccessful in passing the bar examination and thus was never admitted to practice as a lawyer. The court held that this constituted a per se violation of the defendant's Sixth Amendment right to " 'assistance of counsel' " which the court construed as signifying nothing less than "representation by a licensed practitioner." 709 F.2d at 167. In *U.S. v. Novak*, 903 F.2d 883 (2d Cir. 1990), the same court followed a similar rationale in concluding that representation by Joel Steinberg, who had been admitted to the bar on the basis of false representations regarding his legal education, constituted a per se Sixth Amendment violation. The court concluded that "[i]n general, the Sixth Amendment guarantee is not satisfied if the accused is represented by a person who, for failure to meet substantive bar admission requirements, has never been admitted to the practice of law in any jurisdiction." 903 F.2d at 887. See, also, *People v. Chin Min Foo*, 144 Misc. 2d 589, 545 N.Y.S.2d 55 (1989), and *People v. Williams*, 140 Misc. 2d 136, 530 N.Y.S.2d 472 (1988) (both holding representation by Steinberg constituted per se violation of Sixth Amendment).

Similarly, the Florida Court of Appeals has determined that representation by an individual who graduated from law school and passed the bar examination but was denied a license to practice due to lack of moral character is per se ineffective. *Huckelbury v. State*, 337 So. 2d 400 (Fla. App. 1976). The court determined that the individual who represented the defendant

was in effect an imposter, because the "right to court-appointed counsel presupposes appointment of counsel fully accredited by competency and moral standards to practice law." *Id.* at 403. It further noted that the case presented "a situation where one without proper credentials as a lawyer in any state or federal jurisdiction posed as a lawyer. And, he who so posed has not been considered to be of sufficient moral fiber to bear the stamp of approval of the Florida Bar." *Id.*

Some courts have recognized per se ineffective assistance of counsel when counsel was suspended or disbarred prior to the representation. In *In re Johnson*, 1 Cal. 4th 689, 822 P.2d 1317, 4 Cal. Rptr. 2d 170 (1992), the court found that representation by an attorney who had been suspended from the practice of law and had submitted his resignation to the state bar with disciplinary proceedings pending was per se ineffective. The court, however, based its decision on the resignation, reasoning that the submission of a resignation with charges pending caused an immediate transfer of the attorney to inactive status. Notably, it reasoned that the suspension alone did not amount to per se ineffectiveness, because

> "admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions." . . . An attorney who is professionally competent does not become any less competent upon the filing of an order . . . suspending the attorney from practice.

(Citation omitted.) *Id.* at 697, 822 P.2d at 1320-21, 4 Cal. Rptr. 2d at 173-74. See, also, *People v. Hinkley*, 193 Cal. App. 3d 383, 238 Cal. Rptr. 272 (1987) (holding criminal defendant received per se ineffective assistance of counsel when his attorney's practice had been taken over by state bar and court pursuant to statute which allowed takeover after determination that attorney was incompetent to represent clients); *Ex Parte Williams*, 870 S.W.2d 343 (Tex. App. 1994) (holding representation per se ineffective where attorney disbarred 2 months before trial and therefore no longer "counsel" within meaning of Sixth Amendment under Texas law which provides disbarred lawyer is deemed incompetent to represent criminal defendant as matter of law).

Other courts, however, have declined to apply a per se rule in assessing the performance of a disbarred lawyer in a criminal proceeding. For example, in *State v. Smith*, 476 N.W.2d 511 (Minn. 1991), the court found there was no per se ineffective assistance of counsel when the attorney was suspended during the final day of trial. The court distinguished the case from those where counsel was an imposter who had never been admitted to the bar. It found that unlike those cases, where counsel had been admitted to the bar but had lost his or her license because of suspension or disbarment, the reasons for such loss of license could be so varied in kind and degree that a per se rule was not appropriate.

In *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), the court found that representation in U.S. District Court by counsel who had been disbarred by the U.S. Court of Appeals for the 9th Circuit for unrelated conduct was not per se ineffective. In so holding, the court noted:

> The principle applied in [cases in which a person poses as a lawyer] is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute "effective representation of counsel" for purposes of the Sixth Amendment. Conversely, the infliction of discipline upon an attorney previously qualified and in good standing will not and should not transform his services into ineffective assistance.

785 F.2d at 697. The court noted that his admission to the bar allowed it to assume that counsel had the training, knowledge, and ability to represent a client, regardless of his disbarment for unrelated conduct by another court.

Circumstances similar to those before us in the present case were considered in *Vance v. Lehman*, 64 F.3d 119 (3d Cir. 1995), *cert. denied, Vance v. Horn*, 516 U.S. 1059, 116 S. Ct. 736, 133 L. Ed. 2d 686 (1996). In that case, defense counsel had originally been properly admitted to practice law in California. After disciplinary proceedings were brought against him in that state, he relocated to Pennsylvania, where he passed the bar examination but falsely reported on his application that he had no pend-

ing professional misconduct charges. The attorney's Pennsylvania license was revoked shortly after his representation of the defendant. In determining that the representation was not per se ineffective, the court noted:

> The courts have consistently looked to the licensing authorities of the legal profession to determine in circumstances of this kind the boundaries of the *per se* exception to the *Strickland* rule. If a lawyer is authorized by those authorities to practice law, his or her performance on a criminal defendant's behalf is acceptable for Sixth Amendment purposes so long as the *Strickland* criteria are not met.

64 F.3d at 122. The court further noted that the attorney was not an imposter, in that he had graduated from an accredited law school, was originally certified by California as competent to practice law, had practiced law for a decade, and had been tested and found knowledgeable about Pennsylvania law. It also noted that his breaches of conduct were unrelated to his representation of the client. See, also, *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992), *cert. denied* 507 U.S. 960, 113 S. Ct. 1383, 122 L. Ed. 2d 759 (1993) (declining to find per se ineffective assistance of counsel where attorney represented client while disciplinary proceedings were pending against him and was then suspended following trial due to health concerns); *Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988) (holding representation at a suppression hearing by lawyer disbarred on final day of hearing not per se ineffective); *Wilson v. People*, 652 P.2d 595 (Colo. 1982), *cert. denied* 459 U.S. 1218, 103 S. Ct. 1221, 75 L. Ed. 2d 457 (1983) (holding representation by attorney who met all requirements for obtaining license but failed to take oath for admission not per se ineffective, distinguishing circumstance from representation by someone impersonating lawyer); *People v Pubrat*, 451 Mich. 589, 548 N.W.2d 595 (1996) (holding attorney's suspension during proceedings did not result in per se ineffective assistance of counsel, distinguishing case from those in which laypersons masquerade as attorneys).

In *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999), we were presented with the issue of whether Radosevich's representation of a criminal defendant in Nebraska after his disbar-

ment in Colorado but before he was disbarred by this court constituted per se ineffective assistance of counsel. However, we did not reach the issue because of our determination that Bennett's failure to raise it on direct appeal procedurally barred his motion for postconviction relief. In McCroy's cases, however, no direct appeals were filed, allegedly because of Radosevich's failure to carry out McCroy's request to do so. Thus, the question of whether Radosevich's representation of McCroy constituted per se ineffective assistance of counsel is directly before us.

*Vance v. Lehman*, 64 F.3d 119 (3d Cir. 1995), *cert. denied, Vance v. Horn*, 516 U.S. 1059, 116 S. Ct. 736, 133 L. Ed. 2d 686 (1996), and other authorities discussed above recognize what we perceive to be a valid distinction between representation by one who has never been qualified to practice law and one who was properly admitted in the first instance but is subsequently suspended or disbarred. Here, Radosevich graduated from an accredited law school, passed the bar examination, and was duly admitted to practice law in Nebraska in the first instance. Although he had been disbarred in Colorado, he was licensed to practice law in Nebraska at the time of his representation of McCroy, and his subsequent disbarment by this court was unrelated to that representation. We decline to adopt a per se determination of ineffective assistance of counsel under these circumstances and conclude that McCroy's motion for postconviction relief based upon ineffective assistance of counsel should be analyzed under the *Strickland* test based upon Radosevich's actual performance in representing McCroy.

### *STRICKLAND* ANALYSIS

The first prong of the *Strickland* analysis requires a determination of whether counsel's performance was deficient. We agree with the district court's determination that the files and records reveal that Radosevich's performance in connection with McCroy's guilty pleas was not deficient. However, the district court did not address McCroy's assertions that immediately following his sentencing on February 27, 1992, he directed Radosevich to file an appeal on his behalf and that Radosevich

failed to do so. We treat this omission as a constructive denial of relief with respect to this allegation. See *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999).

[3] We have recognized that where defense counsel in a criminal case fails to carry out a defendant's request to file an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. *State v. Trotter, ante* p. 212, 609 N.W.2d 33 (2000); *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993). In seeking such relief, " '[a] defendant must show, by a preponderance of the evidence, that he was denied his right to appeal due to the negligence or incompetence of counsel, and through no fault of his own.' " *State v. Trotter, ante* at 217, 609 N.W.2d at 38, quoting *State v. Halsey*, 195 Neb. 432, 238 N.W.2d 249 (1976). In *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), the Supreme Court recognized:

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

(Citations omitted.) Thus, if Radosevich failed to carry out an instruction by McCroy to appeal his convictions, such failure would constitute deficient performance satisfying the first prong of the *Strickland* test.

As noted above, the second prong of the *Strickland* test normally requires a showing that deficient performance by counsel resulted in prejudice to the defendant's case. However, in *State v. Trotter, ante* at 222, 609 N.W.2d at 41, we held that "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." We see no logical reason not to apply the same rule with respect to a plea-based conviction.

[4] However, unlike *Trotter*, there was no evidentiary hearing in this case, and we therefore have before us only McCroy's verified allegation that he requested Radosevich to perfect the appeals. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999). Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); Neb. Rev. Stat. § 29-3001 (Reissue 1995). The files and records in these cases reflect that no appeals were filed and do not refute McCroy's allegation that he requested Radosevich to do so. Accordingly, the district court erred in not conducting an evidentiary hearing on this issue.

## CONCLUSION

We conclude that because Radosevich was properly admitted to practice law in this state in the first instance and was licensed to do so at the time of the challenged representation, there is no per se Sixth Amendment violation. However, because the files and records do not establish that McCroy is entitled to no postconviction relief, we reverse, and remand to the district court with directions to conduct an evidentiary hearing limited to the issue of whether Radosevich failed to respond to a request by McCroy that he file appeals on McCroy's behalf and thereby deprived him of effective assistance of counsel in securing appellate review of his convictions.

REVERSED AND REMANDED WITH DIRECTIONS.

# RENE MCQUINN, APPELLANT, V. DOUGLAS COUNTY SCHOOL DISTRICT NO. 66 ET AL., APPELLEES.

612 N.W.2d 198

Filed June 16, 2000. No. S-99-100.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in an error proceeding from an order terminating the contract of employment of a probationary certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. In this context, evidence is sufficient as a matter of law if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.
2. **Schools and School Districts: Teacher Contracts: Termination of Employment.** The procedural requirements of Neb. Rev. Stat. § 79-828(2) (Reissue 1996) are a prerequisite to a school board's election to amend or not renew the contract of a probationary certificated teacher. The statutes do not require either the evaluation or the listing of perceived deficiencies to be in written form.
3. ___: ___: ___. There is no statutory requirement that a probationary certificated employee be told that a perceived performance deficiency is of such a magnitude that a failure to remedy it would lead to nonrenewal of the employment contract.
4. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.
5. **Schools and School Districts: Teacher Contracts: Termination of Employment.** Neither Neb. Rev. Stat. § 79-834 (Reissue 1996) nor any other statute dealing specifically with the subject of a school district's nonrenewal of a probationary employee's contract requires that a school board deliberate in open session following an open hearing.
6. **Administrative Law: Appeal and Error.** A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
7. **Evidence: Proof: Words and Phrases.** Adjudicative facts are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Robert E. O'Connor, Jr., for appellant.

Allen E. Daubman, of Koley, Jessen, Daubman & Rupiper, P.C., for appellees.

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

STEPHAN, J.

In this error proceeding commenced in the district court for Douglas County, Nebraska, Rene McQuinn challenges the decision by the board of education (Board) of the Douglas County School District No. 66 (District) not to renew her contract as a probationary certificated teacher following the 1996-97 school year. She claims that the District failed to comply with various statutory provisions governing the procedure for evaluation of probationary employees and that the proceedings which led to the nonrenewal of her contract were conducted in violation of statutes governing teacher tenure and open public meetings. Following a judgment by the district court in favor of the school district, McQuinn perfected this timely appeal. We find no error and therefore affirm.

## I. BACKGROUND

Under Nebraska law, a public school teacher is considered a "probationary certificated employee" during the first 3 years of employment by a school district. Neb. Rev. Stat. § 79-824(3) (Reissue 1996). "The purpose of the probationary period is to allow the employer an opportunity to evaluate, assess, and assist the employee's professional skills and work performance prior to the employee obtaining permanent status." Neb. Rev. Stat. § 79-828(2) (Reissue 1996). "The contract of a probationary certificated employee shall be deemed renewed and remain in full force and effect unless amended or not renewed" in accordance with statutory procedures. § 79-828(1). A teacher who remains employed by the school district after serving the probationary period is considered to be a "permanent certificated employee." § 79-824(5).

Commencing with the 1994-95 school year, McQuinn was employed by the District as a probationary certificated employee assigned to teach at Westside Middle School. She remained employed by the District during the 1995-96 and 1996-97 school years, during which time she taught sixth grade at Oakdale Elementary School. On March 26, 1997, the Oakdale

principal, Robert Bruckner, notified McQuinn by letter that he would not be recommending the renewal of her teaching contract for the 1997-98 school year, citing problems with classroom management. On April 1, McQuinn received a letter from Lee Perkins, the assistant superintendent for the District, in which he stated that based on Bruckner's recommendation, McQuinn's probationary position with the District was "under consideration for termination" at the close of the 1996-97 school year. Perkins sent additional notice to McQuinn on April 8, in which he reiterated that McQuinn's contract was being considered for termination and notified her of her right to request a hearing before the Board. McQuinn exercised this right in a letter to Perkins dated April 12, 1997.

An informal hearing regarding the nonrenewal of McQuinn's contract was held before the Board on May 6, 1997. Both McQuinn and the District were represented by counsel. At the beginning of the hearing, the presiding member of the Board inquired of McQuinn whether she preferred the proceeding to continue in open or closed session. McQuinn responded that she preferred an open session. Perkins, Bruckner, McQuinn, and parents of several students who were taught by McQuinn testified at the hearing.

Bruckner recommended that McQuinn's contract not be renewed based on his classroom observations and evaluations of her classroom management during the 1996-97 school year. In this context, the term "classroom management" pertains generally to the ability of a teacher to maintain an appropriate level of student participation and behavior in the classroom setting. McQuinn testified that Bruckner never told her during the 1996-97 school year that her control over her students was inadequate or that her classroom management skills were otherwise deficient. She believed that classroom management was listed as an area for growth on each of the three evaluations performed by Bruckner during the 1996-97 school year because that was an area in which all teachers should strive to continuously improve. She stated that Bruckner did tell her to improve her technology skills and that she had taken steps in that direction. McQuinn claimed that Bruckner never warned her during the 1996-97

school year that her job was in jeopardy due to her problems with classroom management.

After the parties presented closing arguments, the Board announced that it would conduct its deliberations in a private room, to which neither McQuinn nor the District objected. The Board later returned to open session and announced it was recessing its deliberations "to obtain legal counsel on the options available to the Board. We would hope to be able to work out an agreement with Mrs. McQuinn and the District for a waiver of tenure and continuation of a probationary status and assignment to another school." Thereafter, the parties agreed in writing to extend the deadline for a hearing and for final action by the Board to June 15, 1997, as permitted by Neb. Rev. Stat. § 79-831 (Reissue 1996).

Attorneys for McQuinn and the District then began drafting an agreement whereby McQuinn's contract would be renewed subject to the condition that she would remain on probationary status. In a letter to McQuinn's attorney dated May 23, 1997, the attorney for the District wrote: "The next Board of Education meeting is Monday, June 2, at 7:30 p.m. I believe the Board will reconvene its deliberations on Ms. McQuinn's contract at the end of the meeting. Following deliberations, the Board will vote to renew, not renew, or extend probationary status per our negotiated Agreement." In a second letter to McQuinn's attorney, dated May 28, 1997, the attorney for the District wrote:

> Per your facsimile transmission yesterday afternoon, I have enclosed duplicate originals of the Agreement between Ms. McQuinn and the Board of Education. Please have Ms. McQuinn sign both originals and return them to me. The Agreement will be included with the materials sent to each Board member for the Board meeting on June 2.
>
> The Agreement will not be effective unless and until appropriate action is taken by the Board. As I advised in my letter of May 23, the Board will reconvene its deliberations at the end of the meeting. Following deliberations, the Board will vote to renew, not renew, or extend probationary status per the enclosed Agreement. If it votes to extend probationary status, the Agreement will be executed by the Board.

On May 30, 1997, the Board published notice in "The Daily Record of Omaha" of the agenda for its regular meeting to be held on June 2, and simultaneously made available the agenda for the June 2 meeting at the board of education offices. At the bottom of the agenda was the following heading: "*IX. Executive Session - Personnel Issue (RE: Rene J. McQuinn)."

Neither McQuinn nor her attorney was present when the Board met on June 2, 1997. At the conclusion of its regular business, the Board went into executive session "to discuss a personnel issue dealing with Rene J. McQuinn." After its deliberations, the Board returned to open session and voted in favor of nonrenewal of McQuinn's contract. In a letter dated June 3, 1997, Perkins notified McQuinn that the Board had voted at its June 2 meeting not to renew her teaching contract for the 1997-98 school year.

In her petition in error, McQuinn asserted that the Board violated her due process rights by failing to conduct its deliberations in open session pursuant to her request and the provisions of Neb. Rev. Stat. § 79-834 (Reissue 1996) and Nebraska's public meetings laws, codified at Neb. Rev. Stat. §§ 84-1408 through 84-1414 (Reissue 1994 & Cum. Supp. 1996); that the Board erred in not finding that the District failed to follow the evaluation guidelines pursuant to § 79-828(2); that the Board erred by not notifying McQuinn of its intent to reconvene the hearing adjourned on May 6, 1997; and that the Board erred in construing the contract between McQuinn and the District as not requiring just cause for termination. The district court affirmed the Board's actions, finding that McQuinn was a teacher under a probationary teaching contract, that she was properly notified that her contract would not be renewed, and that McQuinn requested a hearing and said hearing was held. The court further found that Bruckner evaluated McQuinn on several occasions during the first and second semesters of the 1996-97 school year, followed each time by a conference in which Bruckner discussed his observations with McQuinn and made suggestions for improvement. The court found that McQuinn admitted in her testimony at the hearing before the Board that these conferences with Bruckner did take place. The court concluded by finding that the hearing on May 6 was an informal hearing pursuant to

§ 79-834 and, except for deliberations and taking of the vote, was held in open session. The court held that McQuinn's due process rights were not violated and further found that "[t]he statute only requires that the formal action for non-renewal be held in open session."

McQuinn appeals the decision of the district court. We removed the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## II. ASSIGNMENTS OF ERROR

McQuinn contends, summarized and restated, that the district court erred (1) in affirming the Board's decision not to renew her contract; (2) in not finding that the District failed to follow the procedures for observation and review of a probationary teacher's performance during McQuinn's third year of employment as required by § 79-828(2); (3) in not finding that the District failed to follow its own established practice and procedures for evaluations; (4) in finding that Bruckner evaluated McQuinn on several occasions during the 1996-97 school year; (5) in finding that in an informal hearing under § 79-834 requested by the probationary employee, the Board can go into closed session to deliberate and take a vote and need only take its formal action of nonrenewal in open session and that such action does not violate due process, the public meetings laws, § 84-1410, or § 79-834; and (6) in failing to find that the District did not give McQuinn the required notice of any reconvened hearing.

## III. STANDARD OF REVIEW

[1] The standard of review in an error proceeding from an order terminating the contract of employment of a probationary certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Cox v. York Cty. Sch. Dist. No. 083*, 252 Neb. 12, 560 N.W.2d 138 (1997); *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988). In this context, evidence is " 'sufficient as a

matter of law' . . . if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions." *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 471, 364 N.W.2d 7, 11 (1985).

## IV. ANALYSIS

Section 79-828 and the statutes referred to therein clearly authorize a school board to elect not to renew a probationary certificated employee's contract. Thus, in the present case, it is clear that the Board acted within its jurisdiction and that the only question to be decided is whether the evidence is sufficient as a matter of law to support its decision.

### 1. Compliance With Statutory Observation and Evaluation Procedures

While the contract of a permanent certificated employee of a school district may be terminated only for specific grounds enumerated in Neb. Rev. Stat. § 79-829 (Reissue 1996), a school board may elect not to renew the contract of a probationary certificated employee "for any reason it deems sufficient if such nonrenewal is not for constitutionally impermissible reasons" and the nonrenewal is carried out in conformity with statutory requirements. See § 79-828(4). These include the requirement of § 79-828(2), which provides in part:

> All probationary certificated employees employed by Class I, II, III, and VI school districts shall, during each year of probationary employment, be evaluated at least once each semester, unless the probationary certificated employee is a superintendent, in accordance with the procedures outlined below:
>
> The probationary employee shall be observed and evaluation shall be based upon actual classroom observations for an entire instructional period. If deficiencies are noted in the work performance of any probationary employee, the evaluator shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain.

[2] We stated in *Cox v. York Cty. Sch. Dist. No. 083, supra,* that these procedural requirements are a prerequisite to a school board's election to amend or not renew the contract of a probationary certificated teacher. See, also, *Kennedy v. Board of Ed. of Sch. Dist. of Ogallala*, 230 Neb. 68, 430 N.W.2d 49 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, supra.* The statutes do not require either the evaluation or the listing of perceived deficiencies to be in written form. *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, supra.*

McQuinn contends that the statutory evaluation procedures were not followed during her third year of employment by the District. With respect to the first semester of that year, the record reflects that Bruckner and McQuinn developed a written growth plan dated November 2, 1996, as a followup to evaluations of McQuinn's performance during the preceding school year. The growth plan listed "Active Participation" as a goal for the 1996-97 school year. Bruckner testified that this was an aspect of classroom management. The record also reflects that Bruckner conducted two formal observations of McQuinn's performance during the first semester, each for an entire instructional period. Bruckner's contemporaneous notes of the first observation on November 8 reflect several deficiencies in McQuinn's performance, including her improper reference to some students in the class as belonging to the "upper group"; imputing one student's inability to understand the material to the entire class; alienating gifted students in the class by referring to them as "challenge" students; spending too much time addressing one child's question, allowing other students to get off task; confusing students by moving between trains of thought without forewarning; and having problems with "on-task behavior." Bruckner testified at the hearing that all of these listed items relate to classroom management and that during a conference with McQuinn immediately following his observation, he discussed all of these areas with her and offered suggestions and strategies for dealing with the areas of concern.

Bruckner conducted a second formal observation of McQuinn's classroom performance on December 10, 1996, during which he noted inattentiveness among McQuinn's students. During a conference following this observation,

Bruckner discussed the inattentiveness issue with McQuinn and offered suggestions on how to deal with students who are off task.

During the second semester of the 1996-97 school year, Bruckner conducted one formal observation for an entire instructional period on February 17, 1997, as well as three to four subsequent informal "walk-through" evaluations. Bruckner's notes from the formal observation list "management," including problems with inattentiveness, as an area for growth. Following this evaluation, Bruckner testified that he held a conference with McQuinn and discussed these classroom management issues, offering suggestions and strategies on how to deal with the problems. At some point soon after this evaluation session, Bruckner concluded that no significant improvement had been made in the classroom management problems exhibited by McQuinn since the 1995-96 school year. He testified that "up until February we were in, I guess, in a position to — to try to fix things and make things better and — and to help her improve the best we could. It occurred to me after my February observation that — that things had not, in fact, gotten any better." Based on his observations, Bruckner concluded that McQuinn did not effectively and consistently manage her class during the 1996-97 school year and that her classroom management skills declined during the 1996-97 year as compared to the preceding year. He therefore recommended that her contract not be renewed.

[3] McQuinn argues that she was never advised that failure to correct her problems with classroom management would place her contract in jeopardy. In rejecting a similar argument in *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988), we determined that there was no statutory requirement that a probationary certificated employee be specifically told that a perceived performance deficiency is of such a magnitude that a failure to remedy it would lead to nonrenewal of the employment contract.

Based upon our review of the record, we conclude that there is sufficient evidence as a matter of law to establish compliance by the District with the observation and evaluation procedures required by § 79-828(2).

### 2. Compliance With Internal Observation and Evaluation Procedures

[4] McQuinn argues and assigns as error that Bruckner failed to follow the District's established policies and procedures for evaluations by failing to complete some of the District's preprinted evaluation forms during his formal evaluations of McQuinn during the 1995-96 school year and by failing to utilize these forms during the 1996-97 school year. We do not reach this assignment of error because it was not asserted in the petition in error filed in the district court. Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). We find no basis for plain error review regarding this issue.

### 3. Compliance With Statutory Notice and Hearing Procedures

McQuinn contends that by the Board's deliberating in closed session immediately following the hearing on May 6, 1997, and during its subsequent meeting on June 2, the Board violated both § 79-834, governing informal hearings involving the nonrenewal of a probationary certificated employee's contract, and Nebraska's public meetings laws, §§ 84-1408 to 84-1414. She also contends that she did not receive adequate notice of the June 2 meeting, during which the Board announced its decision not to renew her contract. We address these issues in chronological sequence.

#### (a) May 6, 1997, Hearing

A probationary certificated teacher who receives notice that the school district has elected not to renew his or her contract may request a hearing before the school board. § 79-828(5) and (8). The hearing is governed by § 79-834, which provides:

> Hearings involving the question of the nonrenewal of a probationary certificated employee's contract or the nonrenewal of a superintendent shall not be due process hearings and shall not be required to meet the requirements of section 79-832 but shall be informal hearings at which the probationary certificated employee or superintendent, or his or her representative, shall be afforded the opportunity to discuss and explain his or her position with regard to continued employment, to present information, and to ask questions of those appearing on behalf of the school district. Such hearings shall be held in closed session at the request of the certificated employee or superintendent, or his or her representative, and upon affirmative vote of a majority of the school board members present and voting, but the formal action of the school board for nonrenewal shall be in open session.

The Board honored McQuinn's expressed preference for an open hearing, but at the conclusion of the hearing, the board announced that it would deliberate privately in another room. Although McQuinn did not object at the time, she now argues that the Board's private deliberations violated § 79-834 and Nebraska's public meetings laws, §§ 84-1408 to 84-1414.

[5] We do not construe § 79-834 or any other statute dealing specifically with the subject of a school district's nonrenewal of a probationary employee's contract to require that a school board deliberate in open session following an open hearing. The deliberations occur after the hearing is concluded. There is no specific statutory requirement that the deliberations occur on the same day as the hearing, as reflected by the fact that pursuant to § 79-831, hearings must be held within 30 days of the date of request, but the deadline for final action by the school board is May 15. As the district court correctly concluded, all the statute requires is that "formal action for non-renewal be held in open session." See § 79-834. We therefore turn to McQuinn's contention that the school board's private deliberations on May 6, 1997, violated Nebraska's public meetings laws.

Neb. Rev. Stat. § 79-554 (Reissue 1996) provides that "[a]ll meetings of [a school board or board of education] shall be subject to sections 84-1408 to 84-1414." Sections 84-1408 to 84-1414

compose Nebraska's public meetings laws. The intent of the public meetings laws can be found at § 84-1408, which provides:

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and sections 79-317, 84-1408 to 84-1414, and 85-104.

[6,7] However, the public meetings laws specifically provide that they shall not apply to "judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders." § 84-1409(1)(g)(ii). The issue we must address in determining the applicability of the public meetings laws to the Board's proceedings on May 6, 1997, therefore, is whether the Board exercised judicial functions when it conducted the hearing pursuant to § 79-834 and deliberated immediately thereafter. In this regard, we note that Neb. Rev. Stat. § 79-833 (Reissue 1996) refers to "error proceedings to reverse, vacate, or modify a final order by a school board made pursuant to sections 79-824 to 79-842." Error proceedings are limited by statute to a review of " '[a] judgment rendered or final order . . . made by any tribunal, board, or officer *exercising judicial functions* and inferior in jurisdiction to the district court.' " (Emphasis supplied.) *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 140, 517 N.W.2d 113, 115 (1994), quoting Neb. Rev. Stat. § 25-1901 (Reissue 1989). A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Id.*; *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988). "Adjudicative facts" are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party. *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988); *Kropp v. Grand Island Pub. Sch. Dist. No. 2, supra.* In *Thomas v. Lincoln Public Schools*, we recognized that a school board exercises certain "judicial functions" with respect to certificated employees.

The hearing on May 6, 1997, and the deliberations which immediately followed pertained solely to disputed adjudicative facts bearing upon whether the school district had performed the procedural prerequisites and had a sufficient basis for its decision not to renew McQuinn's contract. The proceedings pertained only to McQuinn and did not involve the exercise of rulemaking authority or the deliberation or decision upon the issuance of administrative orders. See *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). Accordingly, we conclude that because the Board's actions during the May 6, 1997, proceedings were limited to the exercise of a judicial function, the public meetings laws were inapplicable to such proceedings.

(b) June 2, 1997, Meeting

McQuinn argues that the Board's actions during its regular meeting on June 2, 1997, did not constitute a "reconvening" of the hearing conducted on May 6 and that she did not receive statutory notice of any reconvened hearing. Brief for appellant at 30. From our review of the record, we agree that the hearing was never reconvened because it was concluded on May 6. The Board did not receive any new evidence or information on June 2, but merely continued its deliberations regarding McQuinn's contract in executive session and then went into open session to take formal action with respect to McQuinn's contract. The Board's regular meeting on June 2 was subject to the public meetings laws pursuant to § 79-554. The Board published notice as required by § 84-1411. In addition, the attorney for the Board sent two letters to McQuinn's attorney, dated May 23 and 28, 1997, advising that the Board would announce its formal action with respect to McQuinn's contract at the June 2 meeting. McQuinn's contention that she did not receive adequate notice with respect to the June 2 meeting is without merit.

Finally, we address McQuinn's contention that the Board acted in contravention of her request for an open hearing when it went into executive session during its June 2, 1997, meeting before announcing its decision in open session. As we have noted, the hearing pursuant to § 79-834 was concluded on May 6 and was conducted in open session as requested by McQuinn.

As permitted by § 79-831, the parties signed an agreement dated May 9, 1997, which waived the requirement that final action by the school district be taken by May 15 and continued the period for taking such action to June 15.

The public meetings laws permit a public body to meet in closed session for various reasons, including "[e]valuation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting," but requires any formal action regarding such matters to be taken in open session. § 84-1410(1)(d). The agenda for the Board's June 2, 1997, meeting included an item listed as "*IX. Executive Session - Personnel Issue (RE: Rene J. McQuinn)." The board acted in conformity with § 84-1410(1)(d) by going into executive session to discuss the issue of McQuinn's continued employment and then returning to open session for a motion and vote with respect to the nonrenewal of her contract.

## V. CONCLUSION

Our scope of review in this error proceeding is narrow. The issue is not whether we agree with the action taken by the school district, but whether that action was supported by sufficient evidence as a matter of law. For the reasons stated above, we conclude that it was and that McQuinn's assignments of error are without merit. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V.
MICHAEL D. SUGGS, APPELLEE.

613 N.W. 2d 8

Filed June 16, 2000. No. S-99-157.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: 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 reaches a conclusion independent of the lower court's ruling.

3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
4. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded with directions to dismiss.

Jennie Dugan-Hinrichs, Deputy Douglas County Attorney, for appellant.

W. Randall Paragas, of Paragas Law Office, for appellee.

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

STEPHAN, J.

The State of Nebraska appeals from an order of the district court for Douglas County sustaining Michael D. Suggs' motion for postconviction relief. The district court found that Suggs received per se ineffective assistance of counsel because his trial attorney, Charles M. Radosevich, had previously been disbarred in Colorado and had subsequently concealed this fact when moving for reinstatement of his license to practice law in Nebraska, which had lapsed because of nonpayment of dues. In *State v. McCroy, ante* p. 709, 613 N.W.2d 1 (2000), released today, we considered another postconviction case alleging ineffective assistance of counsel on the part of Radosevich. In *McCroy*, we held that Radosevich's 1989 disbarment in Colorado and his 1993 disbarment in Nebraska did not render his 1992 representation of a defendant in a Nebraska criminal proceeding ineffective per se. Our holding in *McCroy* and our conclusion that other grounds for postconviction relief urged by Suggs are procedurally barred require that we reverse the judgment of the district court and remand the cause with directions to dismiss.

## BACKGROUND

Suggs was charged with first degree sexual assault on January 8, 1992, and retained Radosevich to defend him. Following trial, a jury found Suggs guilty of the charge, and he was sentenced to 13 to 25 years' imprisonment on August 19.

On September 14, 1992, another attorney filed a notice of appeal on Suggs' behalf. In that appeal, Suggs assigned error on the part of the trial court in overruling his motion for mistrial and imposing an excessive sentence, but he did not allege that he received ineffective assistance of counsel at trial. On July 20, 1993, the Nebraska Court of Appeals affirmed Suggs' conviction and sentence in an unpublished opinion. See *State v. Suggs*, 4 NCA 335 (1993) (not approved for permanent publication).

Nearly 5 years later, on September 23, 1998, Suggs filed an amended motion for postconviction relief. The motion alleged that Radosevich's representation before and during trial was per se ineffective due to his disbarment in Colorado and his subsequent reinstatement in Nebraska without disclosure of the Colorado disbarment. In addition, Suggs alleged that Radosevich provided ineffective assistance at trial because of Radosevich's (1) failure to properly cross-examine a police officer who appeared as a witness, (2) failure to object to certain photographs offered by the State which were received in evidence, (3) failure to take appropriate action to exclude evidence regarding alleged bribery committed by Suggs and members of his family, and (4) failure to properly prepare defense witnesses and discuss the defense with Suggs prior to trial.

Following a hearing, the district court sustained the motion for postconviction relief based upon its finding that Suggs received per se ineffective assistance of counsel and vacated his conviction. The State perfected this timely appeal.

The chronology of events relating to Radosevich's admission and disbarment in Colorado and Nebraska is set forth in detail in *State v. McCroy, supra*; *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993); and *People v. Radosevich*, 783 P.2d 841 (Colo. 1989). In view of our holding in *McCroy*, no purpose would be served in reiterating such chronology here. As in *McCroy*, Radosevich was admitted to practice law in Nebraska at the time of his representation of Suggs, and his sub-

sequent disbarment by this court was unrelated to that representation.

## ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) failing to find that the issues raised in Suggs' postconviction motion were procedurally barred due to Suggs' failure to raise them on direct appeal and (2) finding that Suggs' trial counsel was ineffective per se.

## STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Williams, ante* p. 234, 609 N.W.2d 313 (2000); *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

## ANALYSIS

As noted above, our holding in *McCroy* requires reversal of the district court's determination that Suggs received per se ineffective assistance of counsel by virtue of the fact that Radosevich had been disbarred in Colorado in 1989 and in Nebraska in 1993. However, in view of Suggs' allegations regarding specific acts and omissions on the part of Radosevich which he contends constituted ineffective assistance of counsel, we must determine whether to remand for further proceedings or with directions to dismiss.

[3] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Williams, supra.* In applying this principle, we have held that a motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were

known or apparent from the record. *State v. Williams, supra*; *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999).

[4] It is well established that where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). The present record and the related record from Suggs' direct appeal establish that although Radosevich represented Suggs at trial, a different attorney prosecuted the direct appeal on Suggs' behalf. All of the acts or omissions which are now alleged as deficient performance on the part of Radosevich were apparent from the trial record and thus were or should have been known to Suggs' appellate counsel at the time of direct appeal. Suggs' claims that Radosevich was ineffective based upon his conduct before and during trial are thus procedurally barred. Suggs did not allege ineffective assistance on the part of his counsel on direct appeal. Compare *State v. Williams, supra.*

## CONCLUSION

For the reasons set forth in *State v. McCroy, ante* p. 709, 613 N.W.2d 1 (2000), the district court erred in determining that Suggs received per se ineffective assistance of counsel at trial. All of Suggs' specific allegations of ineffective assistance are procedurally barred. Accordingly, the judgment of the district court is reversed, and the cause is remanded with directions to dismiss. During the pendency of this appeal, Suggs filed a motion to supplement the record by submitting an affidavit from his counsel on direct appeal stating that at the time he represented Suggs, he was unaware of Radosevich's disbarment in Colorado. In view of our disposition, that motion is denied as moot.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

# HELEN J. GAMMEL, APPELLEE, V. THOMAS C. GAMMEL, APPELLANT.

612 N.W.2d 207

Filed June 16, 2000. No. S-99-307.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
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. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
4. **Child Support: Rules of the Supreme Court: Taxes.** For purposes of paragraph D of the Nebraska Child Support Guidelines, a deduction pursuant to I.R.C. § 179 (1994) is "depreciation" which should be added back to income or loss in calculating a self-employed parent's average monthly income.

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

Christopher A. Vacanti, of Cohen, Vacanti & Higgins, for appellant.

Daniel A. Smith, of Smith Law Office, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Helen J. Gammel filed an application to modify the child support being paid by Thomas C. Gammel for the minor children of the parties. The district court for Burt County entered an order increasing Thomas' monthly support obligation. Thomas appeals the increased child support. Thomas claims that the district court erred in calculating the amount of his child support obligation when the district court added back to his income amounts Thomas had deducted pursuant to I.R.C. § 179 (1994 & Supp. IV 1998) (Section 179). The district court reasoned that such deductions were "depreciation" pursuant to paragraph D of

the Nebraska Child Support Guidelines. We agree with the district court and, accordingly, affirm.

## STATEMENT OF FACTS

Helen and Thomas were married October 19, 1972, in Vermillion, South Dakota. They are the parents of five sons born June 4, 1973; February 9, 1975; January 28, 1980; January 27, 1985; and November 21, 1986. Their marriage was dissolved by a decree entered in the district court of Burt County on April 7, 1992. The decree provided that Helen would have custody of the parties' minor children, and a nunc pro tunc order entered April 6, 1993, provided that Thomas would pay monthly child support of $875 for four children, $776 for three children, $610 for two children, and $390 for one child. The decree did not address which parent could claim the dependent tax exemptions for the children.

On April 16, 1998, Helen filed an application for modification of the decree. Her application requested, among other things, that Thomas' child support obligation be increased. Thomas answered and filed a cross-application requesting, among other things, that he be entitled to claim the children as dependents for tax exemption purposes.

Trial was held November 3, 1998, at which Thomas' 1996 and 1997 federal income tax returns and accompanying schedules were offered and received into evidence. Thomas' 1996 and 1997 returns showed that he earned income as a self-employed trucker. The returns reported total income of $13,086 in 1996 and $5,116 in 1997. The Schedules C, reporting income from Thomas' trucking business, showed total deductions for "Depreciation and section 179 expense" of $29,251 in 1996 and $36,308 in 1997. Of these amounts, $15,000 in 1996 and $8,000 in 1997 were Section 179 expense deductions. Thomas offered a proposed child support calculation, which was received into evidence.

The district court entered an order finding that in calculating the amount of Thomas' child support obligation, the Section 179 deductions which Thomas had claimed on his 1996 and 1997 federal income tax returns should be added back to his income. The district court's determination was based on paragraph D of

the Nebraska Child Support Guidelines which states in part that "[i]f a party is self-employed, depreciation claimed on tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income." The order entered on February 22, 1999, provided, among other things, that Thomas' monthly child support should be increased to $940.98 for three children, $786.99 for two children, and $547.88 for one child, and that Thomas was entitled to claim dependent tax exemptions as long as he remained current on his child support payments. In the worksheet supporting the calculation of Thomas' child support obligation, the full amounts of "Depreciation and section 179 expense" from Thomas' Schedules C were added back to the income from his 1996 and 1997 tax returns to determine his average monthly income. Thomas appeals the modification order increasing his child support obligation.

## ASSIGNMENTS OF ERROR

Thomas asserts that the district court erred (1) in finding Section 179 expenses to be "depreciation" to be added back to income for purposes of calculating child support under paragraph D of the Nebraska Child Support Guidelines and (2) in increasing his child support obligation pursuant to such calculation.

## STANDARDS OF REVIEW

[1,2] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Susan H. v. Keith L., ante* p. 322, 609 N.W.2d 659 (2000).

## ANALYSIS

[3] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was

entered. *Rhoades v. Rhoades, supra.* We note that in the instant case, the district court did not make a specific finding of a material change of circumstances. However, upon our de novo review, we conclude that the record establishes a material change of circumstances based on paragraph Q of the Nebraska Child Support Guidelines.

Paragraph Q of the Nebraska Child Support Guidelines states:

> **Modification.** Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

The district court ordered an increase in Thomas' child support obligation based upon the evidence which included Thomas' tax returns for 1996 and 1997. Compared to his income in 1992 reflected elsewhere in the record, Thomas' income had increased materially. The parties submitted child support calculations pursuant to the Nebraska Child Support Guidelines. Application of the Nebraska Child Support Guidelines resulted in an increase of more than 10 percent in Thomas' child support obligation. The increase resulted from changes in the parties' incomes, and because the calculations were based on 2 years' income of both parties, we find that the increase resulted from circumstances which had lasted 3 months and could reasonably have been expected to last for an additional 6 months. We therefore conclude that a material change in circumstances existed to support modification of the child support order in this case.

Thomas appeals the increase in his child support obligation, claiming that the district court erred when, in calculating the amount of his obligation, the district court treated the deductions he had taken under Section 179 as depreciation. Pursuant to paragraph D of the Nebraska Child Support Guidelines, which provides that where a party is self-employed, depreciation claimed on tax returns should be added back to income, the district court added the Section 179 deductions as well as Schedule C depreciation back to the total income reported on

Thomas' tax returns. Thomas does not take issue with the addition of the depreciation back to income but does take issue with the addition of the Section 179 deduction back to income. We agree with the district court's treatment of the Section 179 deductions.

Section 179 of the Internal Revenue Code allows taxpayers to elect to treat the cost of certain property as an expense which may be deducted from taxable income, in the absence of a carryover, in the year in which the property is placed in service. Without an election under Section 179, the cost of such property would be treated as a capital expenditure, and the cost of such property would be recovered as depreciation over a period of years pursuant to I.R.C. §§ 167(a) and 168 (1994 & Supp. IV 1998). To qualify as property for which the Section 179 expense election is available, property must be depreciable property under § 168, which generally includes tangible property such as machinery and equipment. See I.R.C. § 179(d)(1).

Thomas asserts that the Section 179 deductions he claimed on his 1996 and 1997 tax returns should not be added back to his income as "depreciation" pursuant to paragraph D. He argues that whereas depreciation is added back to income because it does not reflect an actual cash expenditure by the self-employed parent, a Section 179 deduction reflects an actual cash expenditure, thus reducing the self-employed parent's available resources from which to pay child support. Thomas' argument is unavailing.

Recognizing that a Section 179 deduction typically reflects a cash expenditure made during the year in question, whereas depreciation taken in years subsequent to the initial year property is placed in service typically does not reflect a cash expenditure made during such subsequent years, Thomas nevertheless fails to recognize the similarities between a Section 179 deduction and depreciation where the depreciation is taken in the year property is placed in service. Depreciation taken that first year, similar to a Section 179 deduction, typically reflects an actual cash expenditure made during the year. Central to both depreciation and Section 179 deductions is the fact that each reflects the cost of depreciable property.

The Nebraska Child Support Guidelines require that depreciation be added back to income whether such depreciation is taken in the year the parent makes a cash expenditure to purchase property or whether it is taken in a subsequent year when no cash expenditure has been made. See, *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000); *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999); *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992). A Section 179 deduction is, in effect, accelerated depreciation taken in the year property is placed in service. See, generally, I.R.C. §§ 167 and 168, referring to deductions taken in first year as "depreciation."

We note that in reviewing the literature from other states in regard to the treatment of depreciation in connection with the calculation of child support, several approaches have been adopted. It has been observed:

> "[T]here are three different basic approaches to the problem, namely, that (1) depreciation is a book figure which does not involve any cash outlay nor reduce actual dollar income and, therefore, should not be allowed as a deduction; that (2) depreciation diminishes income-producing capacity and leads to the eventual replacement of the asset involved thereby warranting its deduction; and that (3) depreciation should not categorically either be deducted as an expense or treated as income, but rather that the extent of its inclusion, if any, should depend on the particular circumstances of each case."

*In re Marriage of Gaer*, 476 N.W.2d 324, 328 (Iowa 1991) (quoting *Stoner v. Stoner*, 163 Conn. 345, 307 A.2d 146 (1972), and adopting third approach on facts of that case).

Although the Nebraska Child Support Guidelines do not have an explicit provision identifying treatment of Section 179 deductions, paragraph D of the Nebraska Child Support Guidelines clearly indicates that the approach adopted in this state is the first approach listed in *In re Marriage of Gaer, supra*; namely, that depreciation should not be allowed to reduce monthly income in calculating child support, but, instead, depreciation should be "added back" to income. 476 N.W.2d at 327. See, similarly, *Miller v. Miller*, 171 Wis. 2d 131, 134 n.1, 491

N.W.2d 104, 106 n.1 (Wis. App. 1992) (noting that Wisconsin child support regulations provide that gross income is to be adjusted by adding back "the business assets depreciation allowance under 26 USC 179"). See, similarly, *Major v. Major*, 124 N.M. 436, 438, 952 P.2d 37, 39 (N.M. App. 1997) (observing that "[n]one of the policy reasons underlying Section 179 bear any relation to the factors which should be taken into account when determining income for child support purposes"). Similar to the observations in *Major v. Major*, were we not to treat Section 179 deductions as depreciation pursuant to the Nebraska Child Support Guidelines, a self-employed parent could distort his or her income in any given year by purchasing depreciable property and deducting the cost pursuant to Section 179, thereby reducing income available for child support.

[4] We hold that for purposes of paragraph D of the Nebraska Child Support Guidelines, a deduction pursuant to Section 179 is "depreciation" which should be added back to income or loss in calculating a self-employed parent's average monthly income. A deduction pursuant to Section 179, sometimes referred to as a "depreciation deduction," although technically not "depreciation" under the Internal Revenue Code, serves the same tax purpose as depreciation. Both allow a taxpayer to recover the cost of depreciable property, or, in other words, to take a deduction in calculating taxable income to reflect the cost of using such property. Because a deduction elected under Section 179 has the same effect as depreciation, it should be treated as depreciation under paragraph D of the Nebraska Child Support Guidelines.

## CONCLUSION

We conclude that a Section 179 deduction is "depreciation" for purposes of paragraph D of the Nebraska Child Support Guidelines, which requires that depreciation be added back to income or loss in calculating a self-employed parent's child support obligation. The district court did not abuse its discretion in treating Thomas' 1996 and 1997 Section 179 deductions as depreciation in calculating his child support obligation and modifying such child support upward. The order modifying child support is therefore affirmed.

AFFIRMED.

# RICHARD WILKINSON, APPELLANT, V. METHODIST, RICHARD YOUNG HOSPITAL ET AL., APPELLEES.

612 N.W. 2d 213

Filed June 16, 2000. No. S-99-422.

1. **Pleadings: Demurrer: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled.
3. **Invasion of Privacy.** Neb. Rev. Stat. § 20-202 (Reissue 1997) typically applies to cases in which a photograph or other likeness of a person is distributed without that person's consent for commercial gain.
4. **Invasion of Privacy: Words and Phrases.** In order to recover under Neb. Rev. Stat. § 20-204 (Reissue 1997), the matter must be communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.
5. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.

Appeal from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

Larry A. Duff for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellees.

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

CONNOLLY, J.

The appellant, Richard Wilkinson, filed a petition alleging that the appellees Methodist, Richard Young Hospital (Methodist, Richard Young); Physicians Clinic; Loreen M. Riedler, M.D.; and D. McClean (collectively the appellees) invaded his privacy after employees of Methodist, Richard Young utilized its computer system to retrieve Wilkinson's insurance information and filed a claim for treatment provided to his daughter. The district court sustained the appellees' demurrer and dismissed the action without leave to amend. We affirm.

## BACKGROUND

Wilkinson filed a second amended petition alleging the following facts: On August 25, 1995, he was hospitalized at Methodist Hospital. At that time, Methodist Hospital obtained information regarding an insurance policy covering himself and his daughter. Methodist Hospital merged with Richard Young Hospital in 1996.

In June 1997, a probation order was signed in Douglas County Court with conditions that the daughter provide proof of a psychiatric evaluation, follow all recommendations of medication and therapy, continue in school, maintain part-time employment, and maintain residence with her grandfather. Between June 5 and October 13, the daughter ran away from her grandfather's residence several times and stole a credit card. The daughter again ran away on October 13, and on October 14, she appeared at the emergency room of Children's Hospital. When emergency room employees called Wilkinson, he told them that the daughter had run away, that she was in violation of her probation terms, and that he wanted her turned over to the police. Wilkinson also told the emergency room employees that he did not consent to the daughter's treatment because this was a scam on her part and that he wanted her to be brought before the court. Wilkinson also refused to provide any information about his health insurance policy.

The daughter was subsequently transferred by the police to Methodist, Richard Young. Wilkinson told the daughter's mother not to sign any papers. However, without Wilkinson's knowledge or consent, the mother entered into a financial agreement with Methodist, Richard Young for the total payment of the daughter's charges. Methodist, Richard Young officials approved the financial arrangement. The mother then contacted Wilkinson, asking for his Social Security number. Wilkinson refused to provide her with this information and also refused to provide information regarding his insurance policy. He refused to consent to treatment and stated that he did not want a claim filed with his insurance company due to his fear that it would raise his premiums and that he did not want to be part of a fraudulent claim. No one from Methodist, Richard Young contacted Wilkinson regarding his consent or his insurance.

Some time between October 14 and November 3, 1997, employees of Methodist, Richard Young utilized its computer system to retrieve Wilkinson's medical records housed at Methodist Hospital. The petition lists separate addresses for these hospitals. As a result, Methodist, Richard Young acquired information necessary to file the insurance claim. Methodist, Richard Young then sent a bill signed by McClean, a provider representative, with Riedler's physician number on it, to Wilkinson's insurance carrier. Wilkinson alleged that Methodist, Richard Young stated in a claim form that it had his consent signature on file when it did not and that Methodist, Richard Young indicated to the insurance company that he had assigned benefits so that payment could be made directly to Methodist, Richard Young. Wilkinson also alleged that the form included false information regarding his employment.

Some time after November 3, 1997, an employee from Methodist, Richard Young called Wilkinson, asking for payment on the account. The employee told him that Methodist, Richard Young had used its computer system to pull up his records from his previous hospitalization at Methodist Hospital. Wilkinson alleged that he was shocked, humiliated, and embarrassed to learn that his private insurance records were accessed and that a claim was filed. Wilkinson also alleged that he sustained general and nominal damages as a result of the retrieval and use of his records.

Based on these allegations, Wilkinson alleged that his privacy had been invaded pursuant to Neb. Rev. Stat. §§ 20-202 to 20-205 (Reissue 1997) on the following grounds: (1) exploitation of his person for commercial purposes, (2) trespass or intrusion upon his solitude, and, (3) placing him before the public in a false light. The appellees demurred to the petition on the basis that it failed to state sufficient facts to constitute a cause of action. The district court sustained the demurrer and dismissed Wilkinson's petition without leave to amend.

## ASSIGNMENTS OF ERROR

Wilkinson assigns that the district court erred in sustaining the appellees' demurrer without granting Wilkinson leave to amend his petition and in dismissing the action with prejudice.

## STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader. *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000).

[2] In determining whether a cause of action has been stated, a petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Id.*

## ANALYSIS

Wilkinson contends that he has stated a cause of action under §§ 20-202, 20-203, and 20-204. The tort of invasion of privacy in this state has been divided into these three statutory causes of action.

Accepting the truth of the facts that are well pled, as we do when reviewing a demurrer, Wilkinson first contends that § 20-202 applies because Methodist, Richard Young obtained his insurance information without his consent and utilized the information for the commercial purpose of filing an insurance claim. Section 20-202 provides in part: "Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy."

[3] Section 20-202 typically applies to cases in which a photograph or other likeness of a person is distributed without that person's consent for commercial gain. See, e.g., *Miller v. American Sports Co.*, 237 Neb. 676, 467 N.W.2d 653 (1991). In this case, Wilkinson alleges that his insurance information was used to file an insurance claim under an insurance policy that covered the daughter. Although Methodist, Richard Young received payment from the insurance company, Wilkinson's name or likeness was not exploited in the sense contemplated by § 20-202. We decline to extend § 20-202 to cover the facts of this case. Thus, Wilkinson cannot state a cause of action under § 20-202.

Wilkinson next contends that he has stated a cause of action under § 20-203 because Methodist, Richard Young intruded upon his private records. Section 20-203 provides: "Any person,

firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." Section 20-203 encompasses situations such as a reporter entering a hospital room and taking the photograph of a person suffering from a rare disease, "window peeking" or wiretapping by a private detective, obtaining access to a person's bank records pursuant to a forged order, or the continuance of frequent telephone solicitations. See *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991).

Wilkinson alleges that Methodist, Richard Young obtained his insurance information through a search of the records stored in the Methodist Hospital computer. Thus, Methodist, Richard Young accessed its own property to acquire the information. We decline to extend a cause of action for invasion of privacy under § 20-203 to the facts of this case. Accordingly, Wilkinson cannot state a cause of action under § 20-203.

[4] Finally, Wilkinson contends that he has stated a cause of action pursuant to § 20-204 on the basis that Methodist, Richard Young provided his insurance information to the daughter, the mother, the insurance company, and several hospital employees, thus placing him in a false light before the public. Section 20–204 provides: "Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy . . . ." In order to recover under § 20-204, the matter must be communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989).

Assuming, without deciding, that Wilkinson was put in a false light, in this case, we determine that Wilkinson's insurance information was not communicated to the public at large. Rather, the information was communicated to only the limited number of people necessary for the claim to be filed. We conclude that under the facts of this case, Wilkinson cannot recover under § 20-204.

[5] The trial court denied Wilkinson leave to amend. If, upon the sustainment of a demurrer, it is clear that no reasonable pos-

sibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000). We conclude that amendment will not allow Wilkinson to state a cause of action. Accordingly, the defect cannot be cured, and the district court was correct in dismissing the action without leave to amend.

AFFIRMED.

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MAURICE C. MCLAIN, APPELLANT, V. JEFF ORTMEIER AND KENT ADAMS, APPELLEES.

612 N.W.2d 217

Filed June 16, 2000. No. S-99-448.

1. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
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 appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.
4. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
5. ___: ___. In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error.
6. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
7. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
8. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
9. ___: ___. A trial court's denial of a motion for new trial will be affirmed when the trial court's decision is neither erroneously prejudicial nor an abuse of discretion.

10. **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.
11. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
12. ___. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
13. ___. A motion for directed verdict should state the specific grounds therefor.
14. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
15. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
16. **Negligence: Evidence.** Violations of regulations do not constitute negligence per se, but are evidence of negligence which may be taken into consideration along with all other evidence.
17. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

Andrew J. Hilger for appellant.

Susan E. Fieber, of Nolan, Roach, Olson, Fieber & Lautenbaugh, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

This negligence case involves a collision between two personal watercraft, a jet ski and a Polaris "Wave Runner," at Fremont Lakes State Park. Following trial, the jury returned a verdict for the defendants, Jeff Ortmeier and Kent Adams. The plaintiff, Maurice C. McLain, appealed and petitioned to bypass the Nebraska Court of Appeals. We granted McLain's petition to bypass. McLain appeals the orders of the district court for

Dodge County denying his motion for summary judgment, denying his motion for directed verdict, refusing to give several requested jury instructions, and denying his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. We affirm.

## STATEMENT OF FACTS

At approximately 8 p.m. on June 21, 1997, McLain was riding a jet ski at Fremont Lakes State Park. Ortmeier was traveling behind McLain on a Polaris "Wave Runner" owned by Adams. McLain and Ortmeier were both traveling east on the south side of Victory Lake. Although the testimony of McLain and Ortmeier differs as to how the collision occurred, they agree that Ortmeier's watercraft struck McLain, who was in the water, and then struck the jet ski McLain had been riding.

Ortmeier testified that as he approached McLain, the jet ski McLain was riding began to move from side to side in a "hot-dogging" fashion. Ortmeier testified that McLain sharply turned to the left without looking behind him and fell off the jet ski. Ortmeier testified that he killed his engine when he saw McLain fall off the jet ski; however, he was unable to avoid McLain, and his watercraft collided with McLain and the jet ski. Ortmeier testified that he had been traveling at approximately 20 miles per hour when he killed the engine and at some speed less than 20 but more than 5 miles per hour when his watercraft struck McLain and the jet ski. Ortmeier testified that he had not consumed alcohol on the day of the collision.

McLain admitted that he had consumed two or three beers before riding the jet ski. McLain admitted that prior to the collision, he had seen Ortmeier approximately 150 feet behind him. McLain denied moving the jet ski from side to side prior to the collision. Instead, McLain testified that he slowed the jet ski in anticipation of heading toward the shore and that he did not fall off the jet ski, but, rather, he sunk into the water as the jet ski slowed.

McLain's motion for summary judgment was heard and denied on November 30, 1998. Trial was held March 2 and 3, 1999. After the presentation of evidence by both sides, McLain moved for a directed verdict, which was denied.

McLain tendered 19 separate jury instructions. The court accepted three of McLain's requested instructions in full and one in part. The court refused two instructions in full without objection by McLain. McLain objected to the refusal in full of the remaining 13 instructions and to the partial refusal of one instruction.

The jury returned a verdict in favor of Ortmeier and Adams, and judgment was entered March 3, 1999. On March 9, McLain filed a motion to set aside the jury verdict and enter judgment in his favor, or, in the alternative, for a new trial. The motion was overruled on March 23. McLain appealed.

## ASSIGNMENTS OF ERROR

McLain asserts that the district court erred in (1) denying his motion for summary judgment, (2) denying his motion for a directed verdict regarding liability, (3) refusing to give "several" requested jury instructions, and (4) denying his motion for judgment notwithstanding the verdict or for a new trial.

## STANDARDS OF REVIEW

[1] A denial of a motion for summary judgment is not a final order and therefore is not appealable. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

[2] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

[3-6] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actu-

ally given. *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997). In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Whether a jury instruction given by a trial court is correct is a question of law. *Springer v. Bohling, ante* p. 71, 607 N.W.2d 836 (2000).

[7] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Snyder v. Contemporary Obstetrics & Gyn., supra.*

[8,9] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000). A trial court's denial of a motion for new trial will be affirmed when the trial court's decision is neither erroneously prejudicial nor an abuse of discretion. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

[10] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Lackawanna Leather Co. v. Nebraska Dept. of Rev., ante* p. 100, 608 N.W.2d 177 (2000).

## ANALYSIS

### Motion for Summary Judgment

McLain's first assignment of error challenges the district court's denial of his motion for summary judgment. A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). We, therefore, reject McLain's first assignment of error.

The denial of a summary judgment motion is neither appealable nor reviewable. Whether a denial of summary judgment should have been granted generally becomes moot after a full

trial on the merits. *Doe v. Zedek, supra.* The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. *Id.* After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. *Id.* McLain's first assignment of error is without merit.

### Motions for Directed Verdict and for Judgment Notwithstanding Verdict or for New Trial

McLain's second and fourth assignments of error are based on his assertion that Ortmeier was negligent as a matter of law because he violated certain navigational rules. For that reason, McLain argues that his motion for directed verdict on liability should have been granted. McLain further claims that his motion for judgment non obstante veredicto or for new trial should have been granted. We disagree with McLain's assertion that Ortmeier was negligent as a matter of law and, therefore, reject his second and fourth assignments of error.

In his second assignment of error, McLain asserts that the district court erred in denying his motion for a directed verdict. At the outset, we note that McLain moved for a "directed verdict for the Plaintiff." We understand that such a motion is a motion for a directed verdict on liability, not negligence. Because liability subsumes a finding of negligence, for Ortmeier to have been liable to McLain, Ortmeier would first have to have been negligent in some respect. Accordingly, we consider whether Ortmeier was negligent as a matter of law.

[11-13] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an

issue should be decided as a matter of law. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). A motion for directed verdict should state the specific grounds therefor. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Lackman v. Rousselle, supra.*

[14,15] A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996). On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

[16] We have held that the violation of traffic regulations concerning stop signs, the rate of speed, the manner of operating a motor vehicle on the highway, and similar violations are not negligence as a matter of law of any kind or degree, but are facts to be considered with the other evidence in the case in deciding

an issue of negligence. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). We have also held that violations of Federal Aviation Administration regulations do not constitute negligence per se, but are evidence of negligence which may be taken into consideration along with all other evidence. *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985). In *Tank*, we held that evidence of a violation of regulations by the defendant created a jury question on the issue of negligence and proximate cause and that therefore, a directed verdict was improper.

In the instant case, McLain asserts that even under Ortmeier's version of the facts, Ortmeier violated certain navigational rules and that therefore, Ortmeier was negligent as a matter of law. Assuming without deciding that Ortmeier violated navigational rules, such violations do not constitute negligence per se, but are merely evidence which could be taken into consideration by the jury in determining negligence. Taking the facts as testified to by Ortmeier, the instant case is similar to a situation in which we have said that a following driver need not anticipate that a motorist will suddenly stop or slow on a roadway, but when a collision occurs and a dispute exists as to whether such a stop was made, the issue of the following driver's negligence is for the jury. *Martin v. Roth*, 252 Neb. 969, 568 N.W.2d 553 (1997). The issue of negligence in the instant case was an issue for the jury to decide. Ortmeier was not negligent as a matter of law, and we conclude that the trial court did not err in denying McLain's motion for directed verdict.

In his fourth assignment of error, McLain claims that he should have been granted judgment notwithstanding the verdict or a new trial because a reasonable jury could not have found in Ortmeier's favor. For purposes of McLain's motion for judgment notwithstanding the verdict, the district court was required to deem that McLain admitted as true all relevant evidence favorable to Ortmeier, and Ortmeier was entitled to the benefit of all proper inferences deducible from the relevant evidence. *Snyder v. Contemporary Obstetrics & Gyn., supra.* Under Ortmeier's version of the facts, McLain was moving from side to side on the jet ski in a "hot-dogging" fashion and fell off his jet ski immediately prior to the collision. McLain testified that just prior to the collision, he had seen Ortmeier traveling 150

feet behind him. There is testimony from which a jury could have found that given McLain's conduct, a collision was unavoidable and that therefore, Ortmeier was not at fault. From these facts, the jury could have found that McLain's own negligence contributed to the collision and it could have found that McLain had not met his burden of proving either that Ortmeier was negligent or that Ortmeier's negligence was a proximate cause of McLain's injury and damage. The district court did not err in denying McLain's motion for judgment non obstante veredicto or for new trial.

## JURY INSTRUCTIONS

As his third assignment of error, McLain asserts that the district court "erred in refusing to grant several requested jury instructions." In his initial brief, McLain merely lists the proposed instructions that were refused and states that because they were "fundamental rules of law applicable to the facts of the case, the court's refusal to instruct accordingly was erroneous and prejudicial to appellant." Brief for appellant at 29.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997). In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Whether a jury instruction given by a trial court is correct is a question of law. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000).

[17] We have held that a generalized and vague assignment of error that does not advise an appellate court of the issue submit-

ted for decision will not be considered. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998); *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (1987); *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982). We find that McLain's third assignment of error is too generalized and vague to advise either this court or Ortmeier and Adams of the issues he submits for decision in regard to jury instructions.

McLain does not explain in his initial brief why the tendered instructions were correct statements of law, why such instructions were warranted by the evidence, or how he was prejudiced by the district court's refusal to give the tendered instructions. In response to Ortmeier and Adams' brief, which points out that McLain failed to assign, argue, or establish reversible error from the district court's refusal to give his proposed instructions, McLain provides an explanation in his reply brief. However, discussion in the reply brief was inadequate to put Ortmeier and Adams on notice of McLain's arguments in order that they might effectively respond to such arguments.

We have reviewed the jury instructions given by the district court, and we conclude that taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence in the instant case. We therefore reject McLain's third assignment of error.

## VI. CONCLUSION

We conclude that the denial of McLain's motion for summary judgment is not reviewable, that the district court did not err in denying McLain's motions for directed verdict and for judgment notwithstanding the verdict or for new trial, and that the district court properly instructed the jury. We conclude that McLain's assignments of error are without merit. We affirm.

AFFIRMED.

# EVA G. SEARS, FORMERLY KNOWN AS EVA G. LARSON, APPELLEE, V. MICHAEL K. LARSON, APPELLANT.

612 N.W.2d 474

Filed June 16, 2000. No. S-99-450.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998).
3. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both of the parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
4. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines permit a deviation whenever the application of the guidelines in an individual case would be unjust or inappropriate.
5. ___: ___. Paragraph C(5) of the Nebraska Child Support Guidelines allows a trial court in an appropriate case to deviate from the guidelines to allow a deduction from income based on a parent's student loan payment.
6. **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 acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

Charles W. Balsiger, of Balsiger & Carney, for appellant.

Gregory G. Jensen, of Jensen Law Office, for appellee.

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

CONNOLLY, J.

The appellee, Eva G. Sears, formerly known as Eva G. Larson, brought an action seeking to modify child support. The appellant, Michael K. Larson, sought a deviation from the Nebraska Child Support Guidelines based on the amount of his

student loan payments. The district court did not allow the deviation, and Larson appeals. We affirm.

## BACKGROUND

The marriage of the parties was dissolved in November 1992. The parties have two children. Pursuant to a stipulation, child support was set at $300 per month to be reduced to $150 per month when the oldest child reached the age of majority, died, or became emancipated or until further order of the court. Shortly after the decree was entered, Larson began attending school at the University of Nebraska at Kearney. Larson financed his education through a combination of part-time employment and student loans. Larson used the loans both to pay for his education and for payment of child support.

In May 1997, Larson obtained a bachelor of nursing degree. Following receipt of this degree, Larson began working full time. In May 1998, Sears brought an action seeking modification of child support based on the increase in Larson's wages and alleging that the 1996 amendments to the Nebraska Child Support Guidelines constituted a material change in circumstances. At trial, both parties presented evidence regarding their monthly income and deductions. The record reflects that there was some disagreement regarding the amount of each party's monthly income. Larson also presented an affidavit stating that he had a surplus of only $171 per month after payment of living expenses and student loan payments. At the time of trial, Larson's student loan payments were $529.99 per month. The record is silent regarding the total amount of the loans and the terms of the loans. Larson did not provide specific information regarding how much of the loan amounts was used for education and how much was used for other expenses. Larson requested that the court allow a deviation from his net income in the amount of the student loan payment.

Without specifically discussing the student loan issue in its order, the district court increased Larson's prior child support obligation for two children to $602 per month and $419 per month for one child. In reaching this determination, the court used the figures provided by Sears rather than Larson regarding the incomes of the parties, then calculated support based on

these figures without calculating a deduction for student loans. Larson appeals, contending that a deviation from his income for the amount of his student loan payment should have been allowed.

## ASSIGNMENTS OF ERROR

Larson assigns that the district court abused its discretion in failing to consider his financial circumstances and in applying the Nebraska Child Support Guidelines without consideration of the deviations provided for in those guidelines.

## STANDARD OF REVIEW

[1] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000); *Truman v. Truman*, 256 Neb. 628, 591 N.W.2d 81 (1999).

## ANALYSIS

Relying on *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998), Larson contends that his student loan payment should have been considered as a deduction from his income for purposes of figuring child support.

[2-4] In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Rhoades v. Rhoades, supra*. The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both of the parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *Rhoades v. Rhoades, supra*; Nebraska Child Support Guidelines, paragraph C. The guidelines permit deviations under specified circumstances. The provision applicable to this case is paragraph C(5), which allows a deviation whenever the application of the guidelines in an individual case would be unjust or inappropriate. Thus, it was Larson's burden to show that an application of the

guidelines without a deviation for his student loan payment would be unjust or inappropriate.

We have not previously addressed the manner in which student loan payments are to be considered under the Nebraska Child Support Guidelines. However, in *State on behalf of Elsasser v. Fox, supra*, the Nebraska Court of Appeals reversed an order of the district court that failed to consider a father's student loan payment when calculating child support. In *State on behalf of Elsasser*, the father presented evidence regarding the total amount of his student loan payment, the term of the loan, and the total monthly payment. In concluding that the amount of the student loan payment was to be deducted from income, the court stated that fostering further education of young parents benefits the children involved. The court also noted the requirements of repayment of student loans and the difficulty in discharging such loans in bankruptcy. Thus, the court treated the student loan payment as a fixed, nonavoidable obligation that should be deducted from income under the guidelines. On this basis, the court determined that under the facts and circumstances of the case, the trial court abused its discretion when it failed to deduct the father's student loan payment from his income.

In *State on behalf of Elsasser*, the dissent noted that the trial court made a specific finding that under the circumstances, it would not be reasonable or equitable to allow a deviation for student loan payments. Thus, the dissent expressed the opinion that although a court may be justified in allowing such a deviation in a proper case, there was not an abuse of discretion by the trial court under the facts presented in *State on behalf of Elsasser*.

[5,6] We conclude that paragraph C(5) of the guidelines allows a trial court in an appropriate case to deviate from the guidelines to allow a deduction from income based on a parent's student loan payment. However, in this case, we conclude that the trial court did not abuse its discretion in applying the guidelines without consideration of the amount of Larson's monthly student loan payments. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected

option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000).

The record in this case does not provide specific details regarding Larson's student loans. For example, the record is silent regarding the total amount of Larson's loans, the terms of those loans, the amount attributable to principal and interest, and the amount of the loans that were used for education, child support, or other expenditures. The record is also silent regarding whether the payment terms of the loan can be modified in a manner that would allow for a smaller monthly payment. It was Larson's burden to prove that an application of the guidelines without a deviation based on his student loan obligation would produce an unjust result. Under the circumstances of this case, where the record lacks details of the specific nature and amount of the loans, we cannot find an abuse of discretion on the part of the district court in refusing to consider Larson's student loans in its child support calculations. Accordingly, the order of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. APRIL HANSEN, APPELLANT.

612 N.W.2d 477

Filed June 16, 2000. No. S-99-1037.

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. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
3. **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.
4. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Dodge County, F.A. GOSSETT III, Judge, on appeal thereto from the County Court for Dodge County, C. MATTHEW SAMUELSON and DANIEL J. BECKWITH, Judges. Judgment of District Court reversed, and cause remanded with directions.

William G. Line for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

After a bench trial in the Dodge County Court, April Hansen was convicted of first-offense driving while under the influence of alcoholic liquor (DUI), in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1998). Hansen appealed and filed a statement of errors with the district court, challenging the constitutionality of § 60-6,196(8), a statutory provision which mandates the sentencing court to order an alcohol assessment for a first-time offender and empowers the court to order the convicted person to follow through on the alcohol assessment results in lieu of or in addition to the statutory penalty for DUI. The district court affirmed Hansen's conviction and sentence, and she timely appealed. Hansen contends that § 60-6,196(8) is unconstitutional as cruel and unusual punishment or as a disproportionate penalty because a convicted individual could be held responsible for substantial costs and alcohol treatment obligations mandated by the recommendations in the court-ordered alcohol assessment. Because Hansen's constitutional claim is not ripe for adjudication, we do not address it. Finding plain error in the sentencing order, however, we reverse, and remand with directions.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 1999, Hansen was charged with DUI. She filed a motion to quash the complaint, which was overruled by the county court on May 6. At Hansen's subsequent arraignment,

she stood mute at the time of the entry of the plea, and the county court entered a plea of not guilty on her behalf and set a date for trial.

On June 4, 1999, a bench trial was held in the county court. The parties stipulated to the following facts:

> The witnesses would testify that on or about February 27, 1999, approximately 1:29 a.m., officers of the City of Fremont, while on patrol in Fremont, Dodge County, Nebraska, did observe a vehicle drive over a curb in the area of 10th Street in Fremont. They contacted the driver of the vehicle, who was later identified as the defendant. She did have an odor of alcoholic beverage emitting from her person. She did submit to and fail a field sobriety test. It was the officer's opinion that she was under the influence of alcohol. She was subsequently arrested for driving under the influence of alcohol and taken into custody, and she did subsequently submit to a chemical test of her breath, which did show the results of an Intoxilyzer 5000 of .183 grams of alcohol per two hundred and ten liters of her breath.

It was also stipulated that the events occurred in Dodge County, Nebraska. The court adjudged Hansen guilty of DUI based on the stipulated facts, and Hansen's counsel requested a presentence investigation. The court then asked whether the State had any objection to its ordering a presentence investigation, and the following colloquy occurred:

> [Prosecutor]: Your Honor, I — I don't have an objection to it, but I don't know if it's — if it's necessary. I believe this is the defendant's first conviction, and I don't know why she would not be an appropriate candidate for probation.
>
> THE COURT: Do you have a — If we went ahead and sentenced today; [defense counsel], any objection?
>
> [Defense counsel]: That's fine, your Honor, but since it is — she would be — on the State's recommendation, she's a probation candidate, and she sure is.

Instead of proceeding to sentencing, however, the court entertained a suggestion from Hansen's counsel that the court not implement the sentence of probation with its attendant condi-

tions, including revocation of Hansen's operator's license, until Hansen could get an appeal perfected and bond set. Hansen's counsel asked the court to order the effective date of the revocation of her license to be 10 days later in order to get an appeal on file so that Hansen could retain her operator's license. The court, rather than granting Hansen's request, delayed sentencing. A presentence investigation was not conducted in this matter.

At the subsequent sentencing hearing on July 16, 1999, a different county judge sentenced Hansen to a 6-month term of supervised probation. The order of probation included a $400 fine, community service, impoundment of Hansen's operator's license, and a 60-day jail sentence that was periodically reviewable by the court. Finally, paragraph 19D of the probation order mandated:

> Referral to an appropriate Substance Abuse Center for further evaluation and/or testing (at the expense of the probationer) and follow the recommendations of treatment by that agency as directed by your probation officer. (Treatment could include inpatient treatment, outpatient treatment, chemical education classes, individual/group/family counseling, AA meetings, NA meetings, etc.)

Hansen appealed, and on July 26, 1999, she filed a statement of errors in the district court for Dodge County challenging the constitutionality of § 60-6,196(8). The district court affirmed the county court's judgment on September 2. This appeal followed.

## ASSIGNMENTS OF ERROR

Hansen alleges that the district court erred (1) in not finding § 60-6,196(8) in violation of article I, § 9, of the Nebraska Constitution prohibiting cruel and unusual punishment and article I, § 15, requiring all penalties to be proportioned to the nature of the offense, and (2) in not finding that the invalid portions were an inducement to the enactment of § 60-6,196(8) and thus not severable.

## 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. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

## ANALYSIS

### CONSTITUTIONAL ISSUE NOT RIPE FOR APPELLATE REVIEW

The Legislature, in an effort to curtail repeat occurrences of DUI, passed 1992 Neb. Laws, L.B. 291. The portion of L.B. 291 relevant to this appeal, codified at § 60-6,196(8), provides:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse *shall, during a presentence evaluation, submit to and participate in an alcohol assessment.* The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. *At the time of sentencing, the judge, having reviewed the assessment results*, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense in lieu of or in addition to any penalties deemed necessary.

(Emphasis supplied.)

Hansen argues that § 60-6,196(8) violates article I, § 9 (cruel and unusual punishment), and article I, § 15 (penalties must be proportionate to nature of offense), of the Nebraska Constitution because the statute provides no limit on the penalties that may be imposed by a sentencing judge who, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment at her or his expense in lieu of or in addition to any penalties deemed necessary. Hansen asserts that the statute is unconstitutional because it contains no upper limits on the time that a person could be required to spend in inpatient treatment or any limit on the cost of such treatment that the convicted person may be required to pay.

The problem in the instant case, however, is that pursuant to paragraph 19D of Hansen's order of probation, the alcohol assessment is yet to be conducted, and the record does not reveal what treatment recommendations, if any, may be directed by the probation officer or ordered by the court. Hansen's argument is essentially that because there is a *possibility* that the sentencing judge could exercise unbridled discretion, § 60-6,196(8) consti-

tutes disproportionate or cruel and unusual punishment. The first question before us, however, is whether the issue of Hansen's condition of probation is ripe for appellate review.

[2,3] While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). This 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. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999); *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Issues which have no existence other than in the realm of the future are purely hypothetical and are not justiciable.

Although Hansen has not yet been assessed for alcohol abuse, nor ordered to follow through on any alcohol assessment recommendations, she nonetheless urges us in this context to consider the constitutionality of § 60-6,196(8). This we decline to do.

We determine that Hansen's claim is not ripe for adjudication because "it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998), quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985). Although Hansen has been ordered to submit to a substance abuse evaluation at her own expense and to follow the treatment recommendations as directed by her probation officer, we cannot now determine whether such a sentence constitutes disproportionate or cruel and unusual punishment because we do not know what costs she may incur or what treatment, if any, she may be directed to undergo. The contingent nature of Hansen's argument illustrates that her constitutional challenge to § 60-6,196(8) is not yet ripe for appellate review, and we decline to address it at this time.

### Plain Error in Sentencing Order

The above determination, however, does not end our review of the instant case. Hansen has been placed in a procedural

Catch-22 by the nature of the sentencing (probation) order. The language of § 60-6,196(8) mandates that a first-time DUI offender shall, *prior to sentencing* (i.e., during a presentence evaluation), submit to and participate in an alcohol assessment. Then, *at the time of sentencing*, the judge, *having reviewed the assessment results*, may order the convicted person to follow through on the alcohol assessment results. In the instant case, however, the county court judge did not order the alcohol assessment during the presentence stage of the proceedings and, instead, ordered the alcohol assessment and any potential follow-up on the assessment recommendations as part of the sentencing (probation) order. Therein lies the problem.

First, this type of procedure is contrary to the plain language of § 60-6,196(8) and effectively denies a convicted offender his or her right to challenge the assessment results or the recommendations of the alcohol evaluator by way of appealing the final sentencing order. Second, the purpose of § 60-6,196(8) is to provide (1) an alcohol assessment to individuals who have not previously been assessed for alcohol abuse and (2) a tool for courts to review alcohol assessment results prior to sentencing in order to aid in an effective sentencing decision.

[4] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999); *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999). We determine that *in those cases where the county court orders an alcohol assessment pursuant to § 60-6,196(8)*, the court shall follow the mandated statutory procedure and order the convicted offender to participate in the alcohol assessment prior to sentencing. Thus, the county court's order directing Hansen to submit to and participate in an alcohol assessment after the date of sentencing rather than prior to sentencing constitutes plain error. The failure to order the alcohol assessment prior to the time of sentencing affects substantial rights of the litigant, both at sentencing and on appeal, and would result in damage to the reputation and fairness of the judicial process if left uncorrected. Therefore, we

reverse the order of the district court and remand the cause with directions to vacate the sentencing order of the county court and remand the cause to the county court for further sentencing proceedings consistent with this opinion.

## CONCLUSION

Hansen's constitutional challenge to § 60-6,196(8) is not yet ripe for judicial review, and we therefore decline to address the challenge in this appeal. However, because the county court committed plain error during the sentencing proceedings, we reverse the order of the district court and remand the cause with directions to vacate the sentencing order of the county court and remand the cause to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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CHIEF INDUSTRIES, INC., A DELAWARE CORPORATION,
APPELLANT AND CROSS-APPELLEE, V.
GREAT NORTHERN INSURANCE COMPANY,
APPELLEE AND CROSS-APPELLANT.

612 N.W. 2d 225

Filed June 23, 2000. No. S-99-045.

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 from the lower court's decision.
2. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another.

6. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate actions could be maintained for separate relief.
7. **Actions: Final Orders.** Pursuant to Neb. Rev. Stat. § 25-705 (Cum. Supp. 1998), the resolution of one cause of action constitutes a final, appealable order only if the trial court expressly directs the entry of a final judgment on that one issue and expressly determines that there is no just reason for delay.
8. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Appeal dismissed.

Daniel E. Klaus, of Rembolt Ludtke & Berger, for appellant.

Denzel R. Busick for appellee.

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

WRIGHT, J.

## NATURE OF CASE

This is a declaratory judgment action in which Chief Industries, Inc. (Chief), sought a declaration that Great Northern Insurance Company (Great Northern) had a contractual obligation to provide coverage and a duty to defend a lawsuit filed against Chief by Arabian Agriculture Services Company (ARASCO). After both parties moved for summary judgment, the trial court found that Chief was entitled to a partial summary judgment declaring that coverage attached to losses, not otherwise excluded, from the occurrence on October 10, 1995. The trial court also found that Great Northern had no duty to defend Chief in a lawsuit filed against it by ARASCO. Chief appealed, and Great Northern cross-appealed.

## SCOPE OF REVIEW

[1] 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 from the lower court's decision. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

[2] 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. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000).

## FACTS

Chief is a Delaware corporation with its principal place of business in Grand Island, Nebraska. Great Northern is an insurance corporation organized and existing under the laws of the State of Minnesota and is authorized to do business in the State of Nebraska. The insurance policy at issue herein was issued to Chief by Great Northern for the period of July 1, 1995, to July 1, 1996.

In 1991, Chief Industries U.K. Ltd. (Chief U.K.), a wholly owned subsidiary of Chief's, entered into a contract with ARASCO to manufacture, sell, and supervise the construction of 16 grain bins and related equipment in Damman, Saudi Arabia. Chief U.K. subsequently fulfilled the terms of its contract with ARASCO.

ARASCO alleges that the grain bins collapsed on October 10, 1995, causing damage to the grain bins, equipment attached to the grain bins, and the grain which was stored in the bins. On October 11, Chief notified its insurance agent of the occurrence, and Great Northern commenced an investigation. On October 24, ARASCO made written claims against Chief and Chief U.K. for the damages caused by the collapse of the grain bins.

On November 17, 1997, Great Northern notified Chief of its position regarding coverage of the claims made by ARASCO. Great Northern acknowledged that there had been an "occurrence" during the policy period which resulted in "property damage." However, it concluded that the exclusions set forth in paragraphs 12 and 13 of the insurance contract applied to exclude property damage to the named insured's products arising out of such products or any part of such products. Great Northern's position was that since a large portion of the claim by ARASCO involved the value of the 16 grain bins, the value of the bins was excluded from coverage. Great Northern informed Chief that exclusion 13 precluded coverage for property damage

to "work performed by or on behalf of [Chief] arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." The letter stated that some of the damage alleged may have arisen out of work performed under the guidance of a foreman hired by Chief U.K. Great Northern also informed Chief that the insurance contract did not apply to suits brought in the United States. In addition, Chief was informed that "should Arasco pursue this claim further, or file suit on this matter in the United States, this amendment would be triggered and you would have to look to your domestic liability insurer for coverage."

On April 2, 1998, ARASCO sued Chief in the U.S. District Court for the District of Nebraska, asserting damages arising out of the collapse of the grain bins. The lawsuit set forth claims for breach of contract, breach of express warranties, and products liability. When Chief notified Great Northern of the lawsuit, Great Northern denied coverage and declined to investigate or defend Chief in the lawsuit.

On May 6, 1998, Chief commenced this action for declaratory judgment in the district court for Hall County, Nebraska. Pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995), Chief requested the trial court to declare the rights of the parties arising by virtue of the insurance contract. Specifically, Chief requested (1) that a judgment be entered declaring that Great Northern's insurance policy provides coverage for the claims that ARASCO asserts in its lawsuit against Chief; (2) that Great Northern be ordered to investigate and provide Chief a defense in that lawsuit and be ordered to pay any judgment entered against Chief in that lawsuit to the limits of coverage provided in the contract; (3) that Chief be awarded as damages the expenses, including attorney fees, it incurs in defending the lawsuit brought against it by ARASCO and in bringing the declaratory judgment action; and (4) such other relief as the trial court deemed proper.

Both parties moved for summary judgment. The trial court determined that there were two issues presented: whether the insurance contract provided coverage and whether Great Northern had a duty to defend.

The applicable portion of the policy provided:

> The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become obligated to pay as damages by reason of liability to which this insurance applies, imposed by law or assumed by the **Insured** under any written or oral contract, for **bodily injury** or **property damage**, caused by an **occurrence** and **personal injury** or **advertising injury** caused by an offense occurring during the policy period.

The exclusions section of the policy provided:

> **This insurance does not apply:**
>
> . . . .
>
> 12. to **property damage** to the **named insured's** products arising out of such products or any part of such products;
>
> 13. to **property damage** to work performed by or on behalf of the **named insured** arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

The trial court concluded there had been an "occurrence" during the policy period which resulted in "property damage" and that the policy applied to at least part of Chief's claims. Thus, the trial court found that Chief was entitled to partial summary judgment, declaring that coverage attached to losses, not otherwise excluded, from the occurrence on October 10, 1995.

Next, the trial court addressed whether Great Northern had a duty to defend. Amendment No. 4 to the insurance policy, entitled "Foreign Suits Only Amendment," stated in part: "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made or suits brought within the policy territory herein defined."

In interpreting the contract, the trial court relied upon the policy language which this amendment replaced. The original contractual provision stated:

> This insurance applies anywhere in the world except the United States, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall apply to claims made or suits

> brought anywhere in the world provided such suit emanates from damages caused by an **occurrence** or offense arising from the **Insured's** operations in the policy territory described above.

The trial court concluded that since the lawsuit had been filed outside the policy territory, i.e., within the United States, Great Northern had no duty to defend.

The trial court stated:

> The end result is that although coverage attaches under the policy to any covered losses occurring as the result of the collapsed grain bins, defendant does not have a duty to defend lawsuits filed within the United States. Whether defendant will ultimately pay the claims of that lawsuit depends on whether such losses are covered under the policy. The Court at this time makes no determination at [sic] to the extent of losses which may be payable under the policy.

Chief has appealed, and Great Northern has cross-appealed. Pursuant to our power to regulate the caseloads of the appellate courts of this state, we moved this case to our docket.

## ASSIGNMENTS OF ERROR

Chief argues that the trial court erred in concluding that Great Northern did not have a duty to defend Chief in the ARASCO lawsuit.

On cross-appeal, Great Northern argues that the trial court erred in concluding that coverage under the policy of insurance at issue attached to losses, not otherwise excluded, arising out of damage to ARASCO's grain bins on October 10, 1995.

## ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

Here, both parties moved for summary judgment. The trial court concluded that Great Northern was entitled to partial summary judgment because the ARASCO lawsuit had been filed outside the policy territory, and therefore, Great Northern did not have a duty to defend. The trial court also granted Chief a partial summary judgment, finding that "coverage attache[d] to losses, not otherwise excluded, arising out of the occurrence on October 10, 1995."

The question presented is whether the trial court's order granting two partial summary judgments is final and appealable. Generally, appeals from partial summary judgments are not final, appealable orders. However, in *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999), we recognized an exception. In *Bargmann*, we held that where multiple causes of action are alleged, an entry of judgment on one cause of action is a final, appealable order with respect to that cause of action, despite the pendency of other causes of action in the same suit. In *Bargmann*, we acknowledged that the Legislature had addressed this issue with the passage of 1998 Neb. Laws, L.B. 234, codified at Neb. Rev. Stat. § 25-705 (Cum. Supp. 1998). However, we concluded that § 25-705 did not apply because the relevant order had been entered before the effective date of the statute.

In the case at bar, § 25-705 was in effect at the time of the trial court's order. At that time, § 25-705 provided in relevant part:

> (6) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Since multiple parties are not involved, we must determine whether there are multiple causes of action which would trigger the application of § 25-705. Chief sought a declaration that the insurance contract in question provided coverage for damages sustained as a result of the collapse of grain bins in Saudi Arabia on October 10, 1995, and that Great Northern had a duty to defend Chief in a lawsuit filed by ARASCO.

In *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981), we considered whether a homeowner's insurance contract covered an alleged assault and battery committed by the insured homeowner. The homeowner asked Allstate to provide him with a defense and to pay any sums which he might legally be obligated to pay. Allstate refused.

In addressing this issue, we stated that there were two separate and distinct obligations provided for by the insurance contract. The first contractual obligation required Allstate to pay all sums which the insured became legally obligated to pay because of bodily injury. The second contractual obligation, separate and apart from the obligation to pay, was the " 'right and duty . . . to defend any suit against the Insured.' " (Emphasis omitted.) *Id.* at 188, 313 N.W.2d at 638. We viewed the contractual duty to defend as being separate and apart from the contractual duty to pay even though both duties arose out of one insurance contract. Therefore, we treated the duties as two separate causes of action.

[5,6] In *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999), we explained that a cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action. *Id.* Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate actions could be maintained for separate relief. *Id.*

In the instant case, Chief sought declaration of two rights under its insurance contract: whether the insurance contract provided coverage and whether Great Northern had a duty to defend. Even if Great Northern has a duty to defend Chief, coverage under the insurance contract is not necessarily provided. Conversely, Great Northern might have a duty to provide coverage without a corresponding obligation to defend. Thus, the duty to defend can exist separate and apart from the duty to provide coverage, and resolution of the duty to defend and the duty to provide coverage does not revolve around one primary right or subject of controversy. Recovery on one issue does not bar recovery on the other. Furthermore, different evidence is involved in proving a duty to defend versus a duty to pay. Pursuant to our decisions in *Allstate Ins. Co.* and *Bargmann*, we conclude that Chief has pled two causes of action.

The trial court unequivocally found that Great Northern did not have a duty to defend. However, we conclude that the trial court did not fully decide the issue of whether the insurance contract provided coverage. Therefore, the trial court did not rule on both causes of action filed by Chief.

[7] Pursuant to § 25-705, the resolution of one cause of action constitutes a final, appealable order only if the trial court expressly directs the entry of a final judgment on that one issue and expressly determines that there is no just reason for delay. In the case at bar, no express declarations were made in the trial court's order. Thus, the order from which Chief appeals and Great Northern cross-appeals is not a final, appealable order.

## CONCLUSION

[8] In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *In re Interest of Dustin H. et al., ante* p. 166, 608 N.W.2d 580 (2000). For the reasons set forth herein, Chief's appeal and Great Northern's cross-appeal are dismissed.

APPEAL DISMISSED.

# JAMES CARROLL, APPELLEE, V. CHASE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

612 N.W.2d 231

Filed June 23, 2000. No. S-99-092.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.
3. **Negligence: Damages.** Any contributory negligence chargeable to a claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.
4. **Appeal and Error.** Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellant.

Katherine R. Hall and, on brief, Frankie J. Moore, of McCarthy, Gale, Moore & Hall, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

This is a negligence action originally filed by Walter Carroll, as natural parent and next friend of James Carroll, against Chase County, under the Political Subdivisions Tort

Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1994). Walter sought damages for personal injuries James sustained in an accident involving a pickup truck James was driving and a road maintainer owned by Chase County and operated by an employee of Chase County, Jonnie L. Ourada. The trial court found that the sole proximate cause of the accident was the negligence of Chase County and that James was not negligent in any manner. At the beginning of trial, James was substituted as the plaintiff in this case because he has reached the age of majority. On our own motion, we removed the matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## BACKGROUND

James was injured in an automobile accident on a county road in Chase County on October 4, 1995. James has no memory of the accident. James, who was 17 years old at the time, was driving the pickup truck west on a section of a county road commonly known as McCallum Hill. McCallum Hill is an east-west running gravel road north of Wauneta, Nebraska, which road is intersected by the Hayes County-Chase County line. Approaching McCallum Hill from the east heading west, the road slopes gradually upward to the crest of the hill. At the crest of the hill, the road becomes fairly steep and continues to descend straight west.

On the date of the accident, Ourada was operating the road maintainer on the west side of McCallum Hill, which was located in Chase County. During that afternoon, Ourada was doing maintenance work on the north and south shoulders of the road from the crest of McCallum Hill westward down the hill for approximately 100 yards. Ourada began the shoulder work around noon that day and started with the south side of the road, or the eastbound lane of traffic. The shoulder work consisted of hauling dirt from the ditches and up onto the road, which Ourada described as "wind rowing" the dirt over the shoulder, blading the dirt out evenly over the road, and then wheel-packing the loose dirt by driving over it back and forth with the maintainer.

After completing the work on the south shoulder, Ourada moved his maintainer to the north side of the road, or the westbound lane of traffic. In order to get into position on the north shoulder, Ourada had to turn the maintainer around by driving it eastward over McCallum Hill, turning into a field entrance, backing the maintainer out onto the road, and then driving west up McCallum Hill. Facing west, Ourada began the same procedure of hauling dirt from the ditch, blading it out, and then wheel-packing the loose dirt. Ourada worked on the north side of the road from the crest of the hill westward down the hill for approximately 100 yards, just as he had done on the south side of the road. Ourada then would back the maintainer up to the crest of the hill and resume blading the road westward down the hill, rather than continually turning the maintainer around each time he made a pass at the ditch or wheel-packed the loose dirt.

Prior to starting the shoulder work that afternoon, Ourada placed a sign approximately 500 feet east of the crest of McCallum Hill. The sign, mounted on a tripod and placed on the north shoulder of the road for westbound traffic to see, read "Road Construction 500 F[ee]t." A sign which read "Caution" was wired below the "Road Construction 500 F[ee]t" sign. Because of the windy conditions that existed on the day of the accident, the sign blew over during the day, and Ourada put it back up two to three times. On one of the occasions in which Ourada reset the sign, he noticed that the wire holding the "Caution" sign to the other sign had broken and that the "Caution" sign was lying front side down. Ourada left the "Caution" sign lying down on the shoulder of the road.

At the time of the accident, Ourada was in the westbound lane of traffic with the front of the maintainer facing west, backing up McCallum Hill to the east. Although Ourada testified that he was alternating his view from west to east while the maintainer traveled backward, he was looking west at the time of the accident. The evidence adduced at trial showed that at the time of the accident, James was traveling west at 45 to 51 miles per hour when he crested McCallum Hill. The posted speed limit was 50 miles per hour. The evidence also showed that James reacted within 2 seconds of first seeing the maintainer and applied his

brakes, skidding for 183 feet before running into the back of the maintainer. At the point of impact, Ourada was standing up in the cab of the maintainer, and Ourada was thrown against the back window of the cab.

Upon impact, Ourada did not realize that James' pickup truck had struck his maintainer. Rather, he thought that his maintainer had experienced some mechanical problems. After the impact and before Ourada realized what had happened, the maintainer continued to back up approximately 6 to 8 feet before Ourada stopped the maintainer from moving.

At trial, it was undisputed that Chase County had adopted the standards from the "Manual on Uniform Traffic Control Devices" regarding streets and highways to determine the type of signage used in road maintenance and that at the time of the accident, Ourada was unaware that such a manual even existed. It was also undisputed that the signage standards adopted in the manual were not strictly adhered to. The evidence further indicated that Ourada had never been trained or instructed on what signs were to be used in certain situations and that he had been told by a coworker simply to "put up a sign" when working on a hill.

The trial court found in favor of James. Specifically, it found:

> [James] was not negligent in any manner, and that the sole proximate cause of the accident was the negligence of [Chase County]. [Chase County] was negligent in failing to use appropriate signs to warn the traveling public of the road maintenance operation, in failing to properly train [Ourada] with regard to the proper signage, and in [Ourada's] proceeding backwards up the hill and not maintaining a proper lookout. The negligence of [Chase County] was the sole proximate cause of the accident and the damages suffered by [James].

The trial court awarded James $61,586.80 for past and future medical expenses and $200,000 as general damages for pain and suffering, past and future; loss of wages; and permanent disability.

Chase County filed a motion to set aside judgment or, in the alternative, a motion for new trial. The trial court overruled the motions.

## ASSIGNMENTS OF ERROR

Chase County assigns that the trial court erred in (1) finding that James was not contributorily negligent as a matter of law, (2) failing to grant Chase County's motion to dismiss at the close of the evidence, and (3) failing to grant Chase County's motion for new trial. Chase County also contends that the trial court's decision and findings are not supported by the evidence and are clearly wrong.

## SCOPE OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000); *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998).

## ANALYSIS

Chase County argues that the trial court erred in finding that James was not contributorily negligent. Specifically, Chase County contends that James was contributorily negligent in failing to slow down while cresting McCallum Hill as he customarily did and that had he done so, he could have avoided the accident. In making such an argument, Chase County relies on Walter's testimony that James had driven McCallum Hill at least 12 to 15 times prior to the accident and James' testimony that he agreed with Walter's statement. James also testified that he had ridden over McCallum Hill as a passenger a countless number of times. The evidence also indicated that James was familiar with the road, knew that the west side of McCallum Hill was very steep, and also knew that as he headed west toward the crest of the hill, he could not see over it. Chase County also relies on James' testimony that he usually slowed down while cresting McCallum Hill "because you never know what's going to be coming." Chase County further relies on the testimony of Lisa

Kerchal and Keith Kerchal, who were both familiar with McCallum Hill, and testified that they usually slowed down when cresting McCallum Hill. Chase County contends that based on this evidence, the trial court erred in finding that James was not contributorily negligent.

[2,3] A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Baldwin v. City of Omaha, supra*; *Humphrey v. Burlington Northern RR. Co.*, 251 Neb. 736, 559 N.W.2d 749 (1997). Any contributory negligence chargeable to a claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

The trial court found that James was, just prior to the accident, operating his pickup truck at a speed that was reasonable and prudent at the time, 50 miles per hour, and that this speed was the posted speed limit on the road where the accident occurred.

Neb. Rev. Stat. § 60-6,185 (Reissue 1998) provides:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. A person shall drive at a safe and appropriate speed . . . when approaching a hillcrest . . . and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Chase County's expert witness, James Summers, concluded that James was driving the pickup truck between 43 and 51 miles per hour immediately prior to applying his brakes as he crested McCallum Hill, with 50 miles per hour being the posted speed limit. Summers also testified that assuming James was going 51 miles per hour, the most time that could have elapsed between James' seeing any part of the maintainer and the start

of the skid left by James in applying his brakes was 2 seconds. There was sufficient evidence from which the trial court could and did find that James was driving within the posted speed limit of 50 miles per hour. The evidence regarding James' reaction time creates a reasonable inference that he was maintaining a proper lookout.

The evidence also indicates that James' speed was reasonable under the conditions that existed at the time of the accident. The accident happened during the daylight hours and there were no adverse weather conditions present on the day of the accident. In addition, there were no visible obstructions or maintenance-related activity within 500 feet of the warning sign.

The issue of whether James was negligent in not reducing his speed at the crest of McCallum Hill was an issue of fact, which was resolved against Chase County by the trial court.

Although James was familiar with McCallum Hill and had driven over it many times, there was no evidence to indicate he had ever encountered any type of vehicle traveling in the same lane as he, in the opposite direction of travel. Nor was there any evidence to indicate he should have anticipated the maintainer in his lane of traffic traveling against traffic. The trial court made no finding as to whether the "Road Construction 500 F[ee]t" sign was up or down at the time of the accident. However, even if the sign was up at the time of the accident, there was no road construction or maintenance-related activity within 500 feet of the warning sign. The posted sign did not give James any reason to believe that there would be a piece of road machinery operating in his lane against the flow of traffic just over the crest of McCallum Hill.

The testimony of Lisa Kerchal and Keith Kerchal does not demonstrate that James' actions were negligent. Lisa Kerchal testified that she probably drove about 40 miles per hour at the crest of McCallum Hill "because you don't know what's coming up the hill" in the opposite direction. However, she also testified that "usually you can run around 50 [miles per hour] on the dirt roads." Keith Kerchal testified that his usual speed over McCallum Hill from the east varied, depending on whether he was in a hurry, and that "most people are driving right close" to the 50-mile-per-hour speed limit, "but then they usually slow up about the crest of the

hill." The testimony of Lisa Kerchal and Keith Kerchal does not demonstrate that James' speed was unreasonable.

The evidence indicates that James was operating the pickup truck within the speed limit at a safe and appropriate speed, maintained a proper lookout, and conducted himself in a reasonable and prudent manner. Considering all the evidence in a light most favorable to James and giving every inference which can reasonably be deduced from such evidence to James, we cannot say that the trial court was clearly wrong when it found that James was not negligent in any manner.

[4] The above analysis does not cover Chase County's assignments of error other than its assignment that relates to contributory negligence because the other assignments of error were not discussed in Chase County's brief. Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999); *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998).

## CONCLUSION

The evidence demonstrates that James was driving in a reasonable and prudent manner immediately prior to the accident. The trial court was not clearly wrong in finding that James was not contributorily negligent.

AFFIRMED.

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LEO D. MACH AND BETSY CLARK, APPELLANTS, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, AND JULIE M. HANEY, AS TREASURER OF DOUGLAS COUNTY, NEBRASKA, APPELLEES.

612 N.W. 2d 237

Filed June 23, 2000. No. S-99-266.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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: Trial: Pleadings: Pretrial Procedure.** When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something else.
3. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted.
4. **Constitutional Law: Civil Rights: Pleadings.** Only two factual allegations are necessary to state a cause of action under 42 U.S.C. § 1983 (Supp. III 1997): (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) that the deprivation occurred under color of law.
5. **Constitutional Law: Equal Protection: Discrimination.** A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. A discriminatory purpose will not be presumed; there must be a showing of clear and intentional discrimination.
6. **Constitutional Law: Ordinances.** The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity.
7. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
8. **Decedents' Estates: Taxation.** Neb. Rev. Stat. § 77-2018 (Reissue 1996) is the exclusive means by which erroneously paid inheritance tax may be recovered under state law.
9. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
10. **Trial: Pleadings: Pretrial Procedure.** When a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect.

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

Monte Taylor, of Taylor, Kluver, Peters & Drews, for appellants.

James S. Jansen, Douglas County Attorney, and Timothy J. Buckley for appellees.

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

MCCORMACK, J.

## NATURE OF CASE

Appellants, Leo D. Mach and Betsy Clark, sued the County of Douglas and the Douglas County treasurer (collectively the

County) alleging that the County's system for enforcement and collection of inheritance tax violates the constitutional rights of those who are compelled to pay the tax. The action was initially filed in the county court, but was later transferred to the district court. The district court entered summary judgment against appellants, and they appeal.

## FACTUAL BACKGROUND

The following facts are alleged in appellants' petition: Mach succeeded to the ownership of real and personal property to which he was a joint tenant with right of survivorship. Independent proceedings to determine inheritance tax pursuant to Neb. Rev. Stat. §§ 77-2001 and 77-2002 (Reissue 1996) were commenced in the Douglas County Court, and the court assessed a tax in the amount of $547.56. Mach paid the tax to the Douglas County treasurer in order to remove a lien imposed on the real estate pursuant to Neb. Rev. Stat. § 77-2003 (Reissue 1996).

Clark was bequeathed a sum of cash under the terms of a friend's will. Probate proceedings were commenced in the county court, and as a part of those proceedings, the court assessed tax against Clark in the amount of $270. That sum was paid to the Douglas County treasurer.

Appellants allege, generally, that the County collects inheritance tax only from persons who succeed to real property through joint tenancy or to personal property through probate proceedings. Appellants further allege, generally, that inheritance tax is not collected from heirs who succeed to personal property through nonprobate proceedings unless those persons voluntarily come forward to pay the tax. Appellants allege that these circumstances create "a de facto policy of selective enforcement" that systemically discriminates against appellants and others similarly situated and that there is no justifiable distinction between those required to pay tax and those who are not. Appellants did not allege that they were discriminated against because of race, gender, or other suspect classification.

Appellants claim entitlement to relief pursuant to 42 U.S.C. § 1983 (Supp. III 1997) and Neb. Rev. Stat. § 77-2018 (Reissue 1996). In their § 1983 cause of action, appellants claim that the

County's inheritance tax collection policies violate appellants' rights under the Equal Protection Clause of the U.S. Constitution. In their § 77-2018 cause of action, appellants claim that they are entitled to an erroneous payment refund; they argue that their payment was erroneous because it was collected in violation of the Equal Protection Clause of the U.S. Constitution and Neb. Const. art. I, § 25.

Appellants moved to certify their action as a class action, which motion was granted by the county court. Class action certification is not at issue in this appeal. We do not comment on the propriety of the class action certification.

The County moved for summary judgment, arguing, inter alia, that the petition failed to state a cause of action. The County did not adduce evidence in support of its motion. Appellants introduced 15 exhibits, most of which consisted of various pleadings, and the remainder of which tended to substantiate the factual allegations made in appellants' petition regarding the County's procedures for collecting inheritance tax. The district court entered summary judgment against appellants, stating:

> I am going to find that in viewing the evidence in the light most favorable to the plaintiff, that there is no genuine issue of material fact under either the first claim or the second claim of the petition. That as to the 1983 action, that there is no evidence that the County has deliberately attempted to deprive anybody of any right, privilege, or principle of our immunities secured by the Constitution, and the cause of action fails.
>
> And as to the collection of the inheritance tax claim on the erroneous request for a refund on the erroneously collected tax, that there's no evidence that shows that the tax was not calculated and collected pursuant to statute. So I'm going to sustain the motion for summary judgment.

## ASSIGNMENTS OF ERROR

Appellants assign, consolidated and restated, that the district court erred in determining that appellants' petition does not state a cause of action and in granting the County's motion for summary judgment.

## STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Durkan v. Vaughan, ante* p. 288, 609 N.W.2d 358 (2000); *Callahan v. Washington Nat. Ins. Co., ante* p. 145, 608 N.W.2d 592 (2000).

[2,3] When it has been asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something else. *Rodriguez v. Nielsen, ante* p. 264, 609 N.W.2d 368 (2000); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Becker v. Hobbs, supra.*

## ANALYSIS

### § 1983 CLAIM

[4] Only two factual allegations are necessary to state a cause of action under § 1983: (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) that the deprivation occurred under color of law. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999); *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (1992). See, also, *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998), *cert. denied* 528 U.S. 814, 120 S. Ct. 50, 145 L. Ed. 2d 44 (1999). Thus, in order to determine whether appellants stated a cause of action under § 1983, our inquiry first turns to whether their petition alleges a deprivation of a federal constitutional right; specifically, whether appellants have alleged a violation of the Equal Protection Clause.

Appellants do not make any claim pursuant to the equal protection clause of the Nebraska Constitution, adopted in the 1998

amendment to Neb. Const. art. I, § 3. Moreover, the events alleged in appellants' petition occurred prior to that amendment. See *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). Thus, this case does not involve Neb. Const. art. I, § 3.

[5] A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980). A discriminatory purpose will not be presumed; there must be a showing of clear and intentional discrimination. *Id.*

In *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the petitioner claimed that West Virginia had prosecuted him under a habitual criminal statute while failing to prosecute others with similar offenses. The U.S. Supreme Court determined that

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.

368 U.S. at 456.

In *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985), the petitioner was required by federal law to register with the Selective Service System, but failed to do so. Instead, the petitioner wrote letters to governmental officials, including the President of the United States, stating that he had not registered and did not intend to do so. *Id.* Selective Service had adopted a policy of "passive enforcement" under which it did not investigate and prosecute nonregistration cases unless the young men who failed to register informed the government that they refused to register or were reported by others. 470 U.S. at 601. When the petitioner was prosecuted for failing to register, he raised a defense of selective enforcement, alleging that he had been prosecuted for his political activities. *Id.* The district court dismissed the indictment on that ground, but the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal.

The U.S. Supreme Court affirmed the decision of the Court of Appeals, stating:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. . . . "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.
>
> As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not " 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." . . . In particular, the decision to prosecute may not be " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' " . . . including the exercise of protected statutory and constitutional rights. . . .
>
> It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. . . . Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. . . .

> " '. . . Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." . . . In the present case, petitioner has not shown that the Government prosecuted him *because* of his protest activities. Absent such a showing, his claim of selective prosecution fails.

(Citations omitted.) *Wayte v. United States*, 470 U.S. 598, 607-610, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). Accord, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999); *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Several courts in other jurisdictions have applied these federal equal protection standards specifically in the context of tax collection and enforcement. See, e.g., *Argabright v. U.S.*, 35 F.3d 472 (9th Cir. 1994); *Matter of F. W. Koenecke & Sons, Inc.*, 533 F.2d 1020 (7th Cir. 1976), *cert. denied* 429 U.S. 1038, 97 S. Ct. 734, 50 L. Ed. 2d 749 (1977); *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 665 N.E.2d 795, 216 Ill. Dec. 537 (1996), *cert. denied* 519 U.S. 866, 117 S. Ct. 175, 136 L. Ed. 2d 116; *N.Y. Dept. of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75, 667 N.Y.S.2d 141 (1997); *Tucson Mech. Contr. v. Dept. of Revenue*, 175 Ariz. 176, 854 P.2d 1162 (Ariz. App. 1992); *Lang v. City of Philadelphia*, 31 Pa. Commw. 537, 377 A.2d 849 (1977); *McElrath Poultry Co., Inc. v. State, Dept. of Revenue*, 332 So. 2d 383 (Ala. App. 1976); *Radiofone Corp. of New Jersey v. Director, Div. of Taxation*, 4 N.J. Tax 420 (1982).

In *Argabright v. U.S., supra*, the Ninth Circuit specifically considered whether the plaintiffs' complaint, seeking judicial review of an Internal Revenue Service decision to deny refund of penalty interest, stated a constitutional claim. The court stated:

> [T]he complaint makes no allegation that the IRS intentionally discriminated against [plaintiffs] or acted on the basis of an improper or arbitrary classification, a necessary predicate of an equal protection or due process claim. *Cf., Oyler v. Boles*, 368 U.S. 448, 457, 82 S.Ct. 501, 506, 7

> L.Ed.2d 446 (1962) (noting that "the exercise of some selectivity in enforcement is not in itself a federal constitutional violation" and holding that where petitioner did not state that "the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification[,] . . . grounds supporting a finding of a denial of equal protection were not alleged").
>
> Accordingly, we conclude that, even when the allegations in the amended complaint are construed broadly, and interpreted in the light most favorable to the appellants, the amended complaint does not state a constitutional claim.

*Argabright v. U.S.*, 35 F.3d at 477.

[6] The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity. *City of Omaha v. Lewis & Smith Drug Co., Inc.*, 156 Neb. 650, 57 N.W.2d 269 (1953); *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N.W.2d 643 (1951).

In *Brown's Furniture, Inc. v. Wagner, supra*, the plaintiff, a Missouri retailer, sought an injunction against the State of Illinois Department of Revenue regarding the retailer's obligation to collect use tax on sales to Missouri residents. The plaintiff alleged, inter alia, that other similarly situated Missouri retailers were not required to collect Illinois use tax. *Id.* The Supreme Court of Illinois rejected this claim, stating:

> It has long been established that the guarantee of equal protection applies not only to facial legislative classifications, but also to the administration of laws as well. . . . Thus, it has been held that principles of equal protection are violated when the selective enforcement of a statute is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." . . . However, so long as a statute is rationally based, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." . . .
>
> [The plaintiff] offers no evidence to suggest that it was targeted by the Department for an invidious reason, such as race, religion, or political beliefs. . . . The Department's legitimate objective of collecting revenue, coupled with its finite resources, necessarily requires it to exercise

> some discretion in selecting which tax collector to audit. The exercise of that discretion in the case at bar was neither discriminatory nor arbitrary. Therefore, we conclude that [the plaintiff's] equal protection claim is without merit.

(Citations omitted.) *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 430-31, 665 N.E.2d 795, 805-06, 216 Ill. Dec. 537, 547-48 (1996).

In *Lang v. City of Philadelphia*, 31 Pa. Commw. 537, 377 A.2d 849 (1977), the appellant, a resident of the State of New Jersey, appealed from the taxation of income earned while working at a naval shipyard in Pennsylvania. The appellate court rejected appellant's equal protection claim, citing *Oyler v. Boles, supra*, and stating that "[a]ppellant's complaint only makes the bare assertion that there is unlawful selective enforcement of the tax by the taxing authority. Such a statement, without more, is insufficient to state a proper cause of action." *Lang v. City of Philadelphia*, 31 Pa. Commw. at 541, 377 A.2d at 851.

A factual situation similar to that of the instant case was presented in *McElrath Poultry Co., Inc. v. State, Dept. of Revenue*, 332 So. 2d 383 (Ala. App. 1976). In that case, the Alabama state use tax, by its terms, applied equally to all property brought into the state. *Id.* In effect, however, the Department of Revenue did not enforce the tax except on personal property requiring a license, such as motor vehicles, boats, or airplanes. *Id.* The taxpayers in that case claimed that this method of enforcement violated their equal protection rights. *Id.* The appellate court rejected this argument, stating that

> we do not perceive the manner of enforcement as outlined in the stipulation to be arbitrary or unjust. Indeed, it demonstrates a rational and sensible method to collect the tax.
>
> . . . .
>
> . . . Only by fielding an army of inspectors, inquiring into the origin of people's shoes, suits, washing machines, food or other personal property could the State enforce the use tax as regards individuals. By limiting its attempts to enforce the use tax to personal property of individuals

> requiring licenses, the Department enforces the tax in the only rational and reasonable way possible.

*Id.* at 385.

Appellants rely upon a separate line of cases from the U.S. Supreme Court, which have generally established that an equal protection claim can be stated when similar properties are not assessed with equal valuation for purposes of taxation. See, e.g., *Cumberland Coal Co. v. Board*, 284 U.S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931); *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923). Those cases are distinguishable, however, in that they apply to the valuation of real property. In that limited context, the taxing authority has no discretion to treat similarly situated property owners differently. In the instant case, however, as in a criminal prosecution, it is necessary to preserve the discretion of the relevant agent of enforcement regarding the investigation and prosecution of claims.

[7] Appellants also rely on *Knoefler Honey Farms v. County of Sherman*, 196 Neb. 435, 243 N.W.2d 760 (1976). That case, however, was resolved on a question of statutory interpretation. This court concluded by determining that the tax statute in question was not intended by the Legislature to apply to the type of personal property at issue in that case. Thus, the equal protection discussion contained in the opinion was unnecessary to resolution of the appeal and was dicta. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *Brown v. Kindred, ante* p. 95, 608 N.W.2d 577 (2000); *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999).

The U.S. Supreme Court has made it clear that an equal protection claim in the context of selective enforcement must allege discrimination based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Appellants have failed to plead facts sufficient to state a claim for an Equal Protection Clause violation. Absent a violation of the Equal Protection Clause, appellants have failed to state a claim for relief under § 1983.

While we agree with appellants' contention that certain property is not being taxed, this is not a matter for this court, but for the Legislature.

## § 77-2018 CLAIM

[8] Appellants also claim relief under § 77-2018, which provides that when inheritance tax has been erroneously paid to the county treasurer, the court may order a refund of the erroneously paid tax. This statute is the exclusive means by which erroneously paid inheritance tax may be recovered under state law. See *In re Estate of Woolsey*, 113 Neb. 218, 202 N.W. 630 (1925). This theory of recovery, however, is simply another vehicle for appellants to advance their equal protection argument, as the claimed violation of equal protection is the sole reason that appellants claim the payment of the tax was in error.

Under this theory of recovery, appellants claim rights pursuant to Neb. Const. art. I, § 25. That section provides that "[t]here shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law."

[9] This court, however, has not held this section of the constitution to be any more demanding than the Equal Protection Clause of the U.S. Constitution. See, e.g., *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965); *City of Ord v. Biemond*, 175 Neb. 333, 122 N.W.2d 6 (1963); *Creigh v. Larsen*, 171 Neb. 317, 106 N.W.2d 187 (1960); *Panebianco v. City of Omaha*, 151 Neb. 463, 37 N.W.2d 731 (1949); *Richter v. City of Lincoln*, 136 Neb. 289, 285 N.W. 593 (1939). The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

Appellants' claim under § 77-2018 is entirely dependent on the supposed violation of their rights to equal protection under the state and federal Constitutions. As appellants have failed to allege a cause of action for violation of equal protection, their claim under § 77-2018 must fail as well.

[10] When a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect. *Ohio Nat. Life Ins. Co. v. Rust*, 255 Neb. 372, 585

N.W.2d 438 (1998); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Appellants conceded at oral argument that they had completed discovery in this case and that there were no facts they could allege that would support a claim of invidious discrimination. Consequently, no amendment of their petition could cure the defect in their equal protection claim, and this court need not remand the cause in order to grant appellants leave to replead. See *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000).

## CONCLUSION

Appellants failed to state a cause of action relating to a violation of their equal protection rights and conceded that no amendment of their petition would allow them to state such a cause of action. Consequently, the judgment of the district court was without error and is affirmed.

AFFIRMED.

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MARK RAY, APPELLANT, V. ARGOS CORPORATION, A DISSOLVED IOWA CORPORATION, ET AL., APPELLEES.

612 N.W.2d 246

Filed June 23, 2000. No. S-99-301.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
4. **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.
5. **Negligence: Liability: Contractors and Subcontractors.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's

work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.

6. **Negligence.** A special or peculiar risk differs from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence that are usual in the community.
7. **Negligence: Words and Phrases.** A special or peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellant.

Paul D. Lundberg, of Hellige, Lundberg, Meis, Erickson & Frey, for appellee Argos Corp.

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

McCORMACK, J.

## NATURE OF CASE

Mark Ray was injured while working on the construction of a building for Mid-Continent Bottlers in Omaha, Nebraska. Mid-Continent Bottlers had hired the Christensen Corporation as the general contractor, and Christensen in turn had hired the Argos Corporation as an independent contractor to provide all labor, materials, and equipment to complete certain aspects of the construction, including the erection of the structural steelwork. Argos subcontracted with Northwest Erection Services, Inc. (Northwest), to perform the structural steelwork.

Ray, an employee of Northwest, was injured when he fell from the partially completed steel structure. Ray sued Christensen and Argos, alleging negligence. Argos moved for summary judgment, which was granted by the district court. The issue presented in this appeal is whether Restatement (Second) of Torts § 413 (1965 & Supp. 1969) gives rise to a duty from Argos to Ray, such that summary judgment should not have been entered.

## FACTUAL BACKGROUND

The factual circumstances surrounding Ray's accident are not at issue in this appeal. On December 15, 1995, Ray climbed down a ladder from the 25-foot-high steel beam on which he was working and assisted in moving pads used to stabilize outriggers on a mobile truck crane being used by Northwest. Ray then removed the overshoes which he had worn while on the ground and returned to the 25-foot-high beam, which had become covered with slippery patches of mud and moisture that had been tracked on its surface. Ray slipped off the damp, muddy beam, fell 25 feet to the ground, and was injured.

Argos filed a motion for summary judgment, which was granted. The district court determined that Argos exercised no control over the worksite and thus owed no duty to Ray. The district court further noted that any duty owed by Argos to Ray under § 413 was satisfied by Argos' hiring of a competent subcontractor. Ray appeals.

Northwest and GAB Robins North America, Inc., are parties only insofar as they, as Ray's employer and workers' compensation insurance carrier, have a subrogation interest in any recovery by Ray. The parties agree that Christensen was not served with process, never appeared in the district court, and was not a party to the case at the time that summary judgment was entered. Consequently, the district court's order disposed of all the remaining issues in the case, and Neb. Rev. Stat. § 25-705 (Cum. Supp. 1998) does not affect our review of this matter.

## ASSIGNMENTS OF ERROR

Ray assigns, consolidated and restated, that the district court erred in granting summary judgment, as Argos had a nondelegable duty to take precautions against injuries.

## STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Turner v. Fehrs Neb. Tractor & Equip., ante* p. 313, 609 N.W.2d 652 (2000).

[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. *Id.*

[3,4] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

## ANALYSIS

Ray's brief states his theory of the case as follows:

> Plaintiff's theory of recovery can be briefly summarized as follows: **Argos expressly assumed the duty to provide for safety precautions on the construction project under its written contract to provide steel materials and labor with the general contractor Christensen. Argos then employed an independent subcontractor, Northwest Erection, essentially to provide the labor to erect the steel frame of the building. Argos admitted that it failed to provide in a contract with Northwest or otherwise for the taking of safety precautions.**
>
> Such failures give rise to direct liability against Argos under Restatement (Second) of Torts § 413 and for contractually assumed duties as a matter of law.

(Emphasis in original.) Brief for appellant at 11-12.

Restatement (Second) of Torts § 413 at 384-85 (1965 & Supp. 1969) provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Ray argues that for purposes of this appeal, by virtue of the terms of the contract between Argos and Christensen, Argos

should be regarded as the "employer" and Northwest the "independent contractor" under § 413. Even assuming Ray's argument regarding Argos' status as employer to be correct, Ray's assignment of error is without merit.

[5] Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

Ray concedes that Argos did not retain control over Northwest's work, and instead argues that § 413 states a rule of law that places on Argos a nondelegable duty to protect others from harm. The rule of law stated in § 413 only gives rise to a duty, however, if the activity in question is one which "the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken." Thus, if the work performed in this case did not create a peculiar risk, then summary judgment was properly granted.

The Restatement, *supra*, comment *b.* at 385, provides that § 413

> is not concerned with the taking of routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work. . . .
>
> This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions.

[6,7] We have defined a special or peculiar risk as one that differs from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence that are usual in the community. It must involve some special hazard

resulting from the nature of the work done, which calls for special precautions. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998); *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997). We have also described a special or peculiar risk in terms of the risk associated with an "inherently dangerous" activity. See, e.g., *Parker v. Lancaster Cty. Sch. Dist. No. 001, supra*; *Kime v. Hobbs, supra.*

It should be noted that neither party has argued that the type of work involved in this construction project was an "ultrahazardous" activity implicating principles of strict liability, and we do not address "ultrahazardous" activity. See *Anderson v. Nashua Corp., supra.*

Ray relies upon *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). In that case, the decedent was killed while welding steel cross-members to steel columns as part of the framework inside a building. *Id.* When the cross-member supporting the platform on which the decedent was working collapsed, the decedent fell to his death. *Id.* This court concluded, based upon the above-stated proposition, that "[w]ithout question, steel construction work involves risks which an average person does not ordinarily encounter on a day-to-day basis." *Id.* at 800, 496 N.W.2d at 913.

However, contrary to Ray's suggestion, *Parrish* does not resolve the issue presented in the instant case. In *Parrish*, given the facts noted above, the risk that resulted in the decedent's injury was clearly peculiar to steel erection work. However, in order to fall within the scope of the duty defined by Restatement (Second) of Torts § 413 (1965 & Supp. 1969), not only must the work carry a peculiar risk, but the injury must result from that risk. In other words, even assuming that steel construction work may involve some peculiar risks, there remains the question of whether Argos' duty included protecting Ray from slipping and falling from the partially completed building.

We conclude that it did not. Regardless of the type of work being conducted, the risk of a slip and fall from a partially completed structure is inherent in any kind of construction, from steel erection work to residential home building. To hold that such a slip and fall is a "peculiar risk" would be to expand the

meaning of that term to encompass practically all construction work.

In *Clausen v. R.W. Gilbert Const. Co., Inc.*, 309 N.W.2d 462 (Iowa 1981), the plaintiff was repairing a roof. The sloping areas of the roof were covered with patches of frost, and the plaintiff was injured when he fell off the roof, 16 to 20 feet to the ground. *Id.* The plaintiff claimed that the fall was caused by a gusty wind. *Id.* The Supreme Court of Iowa concluded that the work did not involve a peculiar risk, as "[n]othing in this record persuades us this work was so inherently dangerous that, as a matter of public policy, we should declare it nondelegable and allow a jury to consider [the contractor's] vicarious liability." *Id.* at 467. See, also, *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873 (Iowa 1996) (holding that ordinary building projects are not covered by peculiar risk doctrine).

Similarly, in *Sievers v. McClure*, 746 P.2d 885 (Alaska 1987), the decedent, an employee of a roofing company, was instructed to climb onto the roof of a partially completed fourplex and thaw the ice that had formed there. The decedent slipped on the ice and fell to his death. *Id.* The Alaska Supreme Court rejected the appellant's argument that this work involved a peculiar risk, stating:

> The risk of harm which [the decedent] encountered was the risk that all roofers routinely face—the danger of falling off a sloped roof during its construction or repair. The presence of ice on the roof does not make the risk a peculiar one, as there is nothing abnormal about ice in Alaska in November. Indeed, the risk of falling from a roofing surface made slippery by ice, rain, oil, or loose materials is a risk with which the roofer must be prepared to deal every day. Because no reasonable mind could find that the risk of falling from a sloped roof was abnormal to a contract to install a roof, [the contractor] could not be held responsible for the fall which led to [the decedent's] death. The trial court properly dismissed all claims against [the contractor] based on a peculiar risk theory.

*Id.* at 890. See, also, *Edwards v. Franklin & Marshall College*, 444 Pa. Super 1, 663 A.2d 187 (1995) (falling through rotten roof not peculiar risk where business was repair of old, deteriorating structures.)

In *Hofstetter v. Union Elec. Co.*, 724 S.W.2d 527 (Mo. App. 1986), the appellant was injured stepping down from a "ringer" crane that was being erected for use on a construction site. The appellant argued that the use of the ringer crane fell within the peculiar risk doctrine. *Id.* The Missouri Court of Appeals rejected this argument, stating:

> In the present case, to say that the erection of the ringer crane is inherently dangerous does not answer the critical issue. If we assume that, in general, the erection of the crane is an inherently dangerous activity, it does not necessarily follow that every act associated with that job, is per se, inherently dangerous. For example, in the context of this case, if, in the course of [the contractor's] performing its contract with [the landowner], the ringer crane would have given way, causing plaintiff to fall, then perhaps [the landowner] would be liable to plaintiff. In this example, the injury would have arisen as a direct result of the nature of the work of erecting the crane. Plaintiff's fall would have been a "peculiar risk" of the work itself which should have been anticipated by [the landowner]. Under these proposed set of facts, [the landowner] would not have been shielded from liability by [the contractor].
>
> Under the facts of the present case, however, plaintiff was injured because [the contractor] did not follow the rudimentary safety standards which [the landowner] reasonably could expect to be carried out with proper care. [The contractor's] negligence consisted solely of the improper manner in which it did the work. This collateral negligence gave rise to a new risk, one not anticipated by [the landowner]. Plaintiff's injury resulted from the common risk of not providing steps from the five-foot high platform of the ring and from not setting planks over the railroad ties, rather than from some special hazard intrinsic to the work itself.
>
> Plaintiff's cause of action does not fall within the inherent danger exception to the general rule which absolves a landowner of liability for the acts of an independent contractor. To hold that the activity in this case falls within the exception would be to hold that all the construction work

> is *per se* inherently dangerous. Whether or not this is a socially desirable or economically feasible result is a legislative decision best left to that body constitutionally empowered to deal with it.

(Citations omitted.) *Id.* at 530-31.

We find the above-stated authority to be persuasive and likewise conclude that Ray's slip and fall does not fall within the peculiar risk doctrine. Even assuming that steel construction work carries peculiar risks, a slip and fall from the structure is not one of those peculiar risks, and thus Ray's injury does not fall within the scope of any duty that Argos may have had. Argos had no duty to provide for precautions, in its contract with Northwest or otherwise, to ensure that Ray did not slip and fall from the structure. Thus, the district court properly granted summary judgment against Ray.

[8] Since we have concluded that Ray was not injured due to a peculiar risk within the meaning of Restatement (Second) of Torts § 413 (1965 & Supp. 1969), we do not reach nor do we comment on the question whether we would adopt § 413 or whether employees of independent contractors are third parties within the context of the Restatement, § 413 or § 416. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert, ante* p. 160, 608 N.W.2d 588 (2000).

## CONCLUSION

Argos had no duty to protect Ray from the type of ordinary risk that resulted in his injury. Absent such a duty, Argos could not be held liable for Ray's injury, and the district court properly granted Argos' motion for summary judgment. The judgment of the district court is therefore affirmed.

AFFIRMED.

# ALLIED MUTUAL INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, V. MIDPLAINS WASTE MANAGEMENT, L.L.C., ET AL., APPELLEES, AND STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, AND UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, APPELLANT AND CROSS-APPELLEE.

612 N.W. 2d 488

Filed June 23, 2000. No. S-99-595.

1. **Actions: Equity.** An interpleader suit is an action in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; however, 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.
3. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
4. **Taxes: Liens.** Pursuant to the Internal Revenue Code, I.R.C. § 6321 (1994), a federal tax lien arises upon the property of a person who neglects or refuses to pay a federal tax liability.
5. **Liens.** Lien priority for purposes of federal law is governed by the common-law principle that the first in time is the first in right.
6. **Taxes: Debtors and Creditors: Liens: Notice.** A federal tax lien imposed by I.R.C. § 6321 (1994) is not valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice of the federal tax lien has been filed.
7. **Property: States: Liens.** For purposes of the first in time rule, a competing state lien is in existence only when it has been perfected in the sense that the identity of the lienor, the property subject to the lien, and the amount of the lien are established.
8. **Taxes: Liens.** It is a matter of federal law as to whether a lien created under state law has acquired sufficient substance and has become so perfected as to defeat a subsequently filed federal tax lien.
9. **Liens.** A lien is considered perfected for federal purposes when there is nothing more to be done to have an enforceable lien.
10. **Security Interests: Taxes: Words and Phrases.** For purposes of the Internal Revenue Code, the term "security interest" is defined as any interest in property acquired by contract for the purpose of securing payment of an obligation.
11. **Security Interests: Liens.** A security interest exists when the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation.

12. ___: ___. A security interest is deemed protected against a subsequent judgment lien on the date on which all actions required under local law to establish the priority of a security interest have been taken.
13. **Security Interests: Taxes: Liens.** If the security interest is sufficiently perfected under state law to be perfected against an unsecured creditor's judgment lien, then it is also perfected for purposes of determining federal tax lien priority.
14. **Courts: States: Liens.** If a state court determines that a lien created under state law is unperfected, this classification is practically conclusive that the lien is unperfected under the federal standard as well.
15. **Security Interests: Real Estate: Mortgages.** In order to perfect a security interest in fixtures, a financing statement must be filed in the office where a mortgage on the real estate would be filed or recorded.
16. **Security Interests: Real Estate: Mortgages: Notice.** A financing statement filed as a fixture filing must show that it covers this type of collateral, must recite that it is to be filed for record in the real estate records, and must contain a description of the real estate sufficient if it were contained in a mortgage of real estate to give constructive notice of the mortgage under the law of this state.
17. **Security Interests: Real Estate: Debtors and Creditors.** If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.
18. **Security Interests: Parties.** The test of substantial compliance is not whether a particular party was actually misled to its detriment by the irregularities in a financing statement, but whether or not a reasonably diligent researcher would be misled by the irregularity.
19. **Debtors and Creditors: Liens.** The right of the United States to enforce its liens does not depend on state law regulating the rights of creditors generally.
20. **Insurance: Liens.** A lienholder generally has no claim to the benefit of fire insurance proceeds unless the lienholder is named as a loss payee or the policy has otherwise been assigned to the lienholder.
21. **Liens: Equity.** An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts.
22. ___: ___. An equitable lien is not a right to recover the property.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Loretta C. Argrett, Assistant Attorney General, William S. Estabrook, Tamara W. Ashford, and, of Counsel, Thomas J. Monaghan, U.S. Attorney (District of Nebraska), and Paul D. Boeshart for appellant United States of America, Internal Revenue Service.

Don Stenberg, Attorney General, and William L. Howland for appellee State of Nebraska.

Jeanelle R. Robson and Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Cedar Security Bank.

Robert B. Lundholm, of Willson & Pechacek, P.C., for appellee North Central Regional Solid Waste Management Committee.

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

HENDRY, C.J.

## I. INTRODUCTION

The United States of America, Internal Revenue Service (IRS), appeals and the State of Nebraska cross-appeals a judgment in favor of the North Central Regional Solid Waste Management Committee (Committee), determining that the Committee was entitled to the remainder of an interpleader fund established by Allied Mutual Insurance Company (Allied). We moved this case to our docket pursuant to our power to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## II. FACTUAL BACKGROUND

Midplains Waste Management, L.L.C. (Midplains), operated a recycling and solid waste processing plant (facility) in the town of O'Neill, which is located in Holt County, Nebraska. George Haase and two other individuals purchased the facility from Arens Sanitation, Inc. (Arens), in February 1995. The land and building which housed the facility was leased from Dowd Grain Co., Inc., of O'Neill.

On June 16, 1994, prior to Haase's purchase of the facility, Arens received a grant in the amount of $201,988 from Nebraska's Department of Environmental Quality (DEQ) for the purchase of four pieces of equipment. The grant funds were used to purchase a compost turner, baler, electromagnet, and skid-steer loader. Arens had issued the checks in payment for the equipment, had been listed as the purchaser on the invoices for each piece of equipment, and had exclusive use and possession of the equipment.

DEQ assigned an expected service life to each piece of equipment. Conditions of the grant required Arens to properly maintain the equipment, submit an annual report to DEQ, and be subject to periodic DEQ inspections during the equipment's service life. If the equipment was no longer used for its original purpose during its service life, the equipment would be redistributed through the DEQ redistribution program. DEQ also had the option to allow the equipment to be sold and to then be entitled to a return of its share of the proceeds. DEQ approved transfer of ownership from Arens to Midplains when Midplains took over the facility.

On June 19, 1995, Midplains executed a promissory note in the amount of $77,789.75 in favor of the Committee. The Committee, composed of 40 towns served by the facility, was established to control a "protection fund" (fund) that had been accumulated for protection of the landfill in the area. While the facility was under the ownership of Arens, an extra fee was charged for garbage collection services which was accumulated into the fund. The fund was to be used in the event that the landfill caused an environmental problem. Arens had not segregated the moneys which were part of the fund from its own accounts. When Midplains took over the facility, Midplains executed a promissory note in favor of the Committee for $77,789.75, the amount accumulated in the fund.

On July 31, 1995, the Committee filed with the Holt County clerk a financing statement and security agreement on the note, with the collateral described as "equipment, machinery and accounts receivable" of Midplains. The Committee's financing statement did not describe the collateral as fixtures, did not indicate that it was to be filed in the real estate mortgage records, did not contain a description of the real estate, and did not include the name of the record owner of the real estate.

On October 10, 1995, Midplains obtained grant funds of $132,000 from the Nebraska Environmental Trust Fund (Trust), which were used to purchase another piece of equipment. The sales invoice listed Midplains as the purchaser of the equipment. Midplains wrote the checks in payment for the equipment and had exclusive use and possession of the equipment. The grant agreement provided that Midplains was not to "sell, lease,

transfer, exchange, mortgage or encumber" grant property without approval from the Trust. In the event that the Trust did not approve the proposed transfer or sale, Midplains had the option to repay the value of the grant to the Trust and be "released from all further obligations." If Midplains violated the terms of the grant agreement, the Trust had the right to cancel the funding and/or demand repayment of funds already disbursed.

The United States, through the IRS, had assessed several tax deficiencies against Midplains for various tax periods in 1995 and 1996. Midplains did not pay the deficiencies, resulting in federal tax liens against Midplains' property. Notices of the federal tax liens were filed on July 16, September 24 and 25, and October 10, 1996.

On June 26, 1996, Midplains' facility was destroyed by fire. Midplains was insured under two policies of insurance with Allied. Cedar Security Bank (bank), which had a security interest in the property covered under the policies, was listed as "loss payee" on the policies. The State of Nebraska and the Trust were each listed as "lien holders" on one of the policies. Allied determined that it would pay proceeds in the amount of $675,000 under the policies.

Several parties asserted competing claims on the insurance proceeds. On October 28, 1997, Allied filed an interpleader action requesting that the court determine which of the various parties were entitled to the proceeds. Allied deposited the $675,000 in insurance proceeds into an interpleader fund.

The parties agreed that the bank had first priority in the interpleader fund in the amount of $661,818.70 by virtue of the bank's security interest in Midplains' property. Several of the other claimants were dismissed from the case, leaving the IRS; the Committee; and DEQ and the Trust (collectively State) as the remaining claimants. The case was tried to the court to determine who among these claimants should be awarded the remainder of the interpleader fund. At the time of trial, there was approximately $20,800 remaining in the interpleader fund. The individual claims asserted by each of these claimants exceeded the amount remaining in the interpleader fund so that the

claimant found to have first priority would be entitled to all of the remaining funds.

On March 30, 1999, the trial court determined that the Committee was entitled to the remainder of the interpleader fund because it had a valid fixture lien. The court found that the insured items were fixtures and determined that the Committee had a valid fixture lien by filing the financing statement with the Holt County clerk on July 31, 1995. The court determined that because the Committee's fixture lien was first in time, it had priority over the IRS tax liens, all of which were filed subsequent to the Committee's Holt County filing.

The trial court determined that the State had no lien interest in the insurance proceeds. The court found that the State had no ownership interest in the property and had no lien on file with respect to the property purchased with the grants. The court further determined that the State did not have an equitable lien on the insurance proceeds because under the grant agreements, the State had only the option of requiring repayment of the grant funds if Midplains sold or transferred the property. In this case, the property had not been sold, but was destroyed by the fire. The court found that the State did not require Midplains to insure the property or require that it be named as loss payee on any insurance policies, did not file a lien, and did not retain a specific property interest in the property purchased with the grant funds. The court concluded that the Committee had priority in the remainder of the interpleader fund in an amount not to exceed $77,789.75.

The IRS now appeals, and the State cross-appeals.

## III. ASSIGNMENTS OF ERROR

The IRS claims the trial court erred in determining that the Committee's interest had priority over the federal tax liens.

In its cross-appeal, the State claims, rephrased, that the trial court erred in (1) failing to find that the State owned, held title to, or had an insurable interest in the insured property; (2) determining that the State did not have an equitable lien on the insured property; and (3) determining that the State's ownership or equitable interests were not superior to the Committee's interest and the IRS tax liens.

## IV. STANDARD OF REVIEW

[1,2] An interpleader suit is an action in equity. *Citizens Nat. Bank of Wisner v. McNamara*, 120 Neb. 252, 231 N.W. 781 (1930). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; however, 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. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[3] Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Susan H. v. Keith L., ante* p. 322, 609 N.W.2d 659 (2000).

## V. ANALYSIS

### 1. Priority of Federal Tax Liens

[4,5] Pursuant to the Internal Revenue Code, I.R.C. § 6321 (1994), a federal tax lien arises upon the property of a person who neglects or refuses to pay a federal tax liability. See, also, *United States v. McDermott*, 507 U.S. 447, 113 S. Ct. 1526, 123 L. Ed. 2d 128 (1993). The lien normally arises at the time the assessment of unpaid tax liability is made and continues until the tax is paid. I.R.C. § 6322 (1994). See, also, *McDermott, supra*. Lien priority for purposes of federal law is governed by the common-law principle that " ' "the first in time is the first in right." ' " 507 U.S. at 449.

[6-9] A federal tax lien imposed by § 6321, however, is not valid against "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until notice of the federal tax lien has been filed. I.R.C. § 6323(a) (1994). See, also, *McDermott, supra*. When § 6323 is applicable to a competing state lien, the federal tax lien is deemed to commence no sooner than the filing of the notice. *McDermott, supra*. For purposes of the "first in time" rule, a competing state lien is in existence only when it has been "perfected" in the sense that the identity of the lienor, the property subject to the lien, and the amount of the lien are established. *United States v. New Britain,*

347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520 (1954). See, also, *McDermott, supra*. It is a matter of federal law as to whether a lien created under state law has acquired sufficient substance and has become so perfected as to defeat a subsequently filed federal tax lien. *U.S. v. Pioneer American Ins. Co.*, 374 U.S. 84, 83 S. Ct. 1651, 10 L. Ed. 2d 770 (1963). A lien is considered perfected for federal purposes when "there is nothing more to be done" to have an enforceable lien. *New Britain*, 347 U.S. at 84.

The notices of federal tax liens in the present case were filed on July 16, September 24 and 25, and October 10, 1996. The Committee filed the financing statement for its security interest on July 31, 1995, prior to the filing of any of the federal tax lien notices. Thus, if the Committee is a holder of a perfected security interest, its interest would have priority over the federal tax liens.

[10-12] For purposes of the Internal Revenue Code, the term "security interest" is defined as "any interest in property acquired by contract for the purpose of securing payment . . . of an obligation." I.R.C. § 6323(h)(1). A security interest exists when "the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation." I.R.C. § 6323(h)(1)(A). See, also, 26 C.F.R. 301.6323(h)-1(a)(1)(i) (1996). A security interest is deemed protected against a subsequent judgment lien on the date on which all actions required under local law to establish the priority of a security interest have been taken. 26 C.F.R. 301.6323(h)-1(2)(i)(A).

[13,14] I.R.C. § 6323(h)(1)(A) explicitly provides that the standard of security perfection is dependent on " 'local law.' " *Donald v. Madison Industries, Inc.*, 483 F.2d 837, 841 (10th Cir. 1973). If the security interest is sufficiently perfected under state law to be perfected against an unsecured creditor's judgment lien, then it is also perfected for purposes of determining federal tax lien priority. *Id.* If a state court determines that a lien created under state law is unperfected, this classification is " 'practically conclusive' " that the lien is unperfected under the federal standard as well. *U.S. v. Security Tr. & Sav. Bk.*, 340 U.S. 47, 50, 71 S. Ct. 111, 95 L. Ed. 2d 53 (1950). See, also, *Walker v. Paramount Engineering Company*, 353 F.2d 445 (6th Cir. 1965).

Thus, we must look to the law of Nebraska providing for perfection of security interests to determine whether the Committee was a holder of a security interest which has priority over the subsequently filed federal tax liens. The IRS contends that its federal tax liens have priority over the Committee's interest with respect to the interpleader fund because the Committee did not properly perfect its security interest under Nebraska law.

The trial court found that the Committee had priority over the federal tax liens because it had a perfected security interest in Midplains' fixtures due to its Holt County filing of July 31, 1995. The Committee's Holt County filing did not perfect a security interest in property other than fixtures because other types of security interests must be filed with the Secretary of State in order to be perfected. See Neb. U.C.C. § 9-401(1)(c) (Reissue 1992). The Committee made no filings with the Secretary of State. Thus, if the Committee did not have a valid fixture lien with respect to the Holt County filing, it could not be a "holder of a security interest" under I.R.C. § 6323(a) because its interest would not be protected under local law against a subsequent judgment lien arising out of an unsecured obligation.

[15-17] In order to perfect a security interest in fixtures, a financing statement must be filed in the office where a mortgage on the real estate would be filed or recorded which, in this case, is the Holt County register of deeds. See Neb. U.C.C. §§ 9-302 (Cum. Supp. 1998) and 9-401. A financing statement filed as a fixture filing

> must show that it covers this type of collateral, must recite that it is to be filed for record in the real estate records, and the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of real estate to give constructive notice of the mortgage under the law of this state.

Neb. U.C.C. § 9-402(5) (Cum. Supp. 1996). Furthermore, if the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner. *Id.*

The Committee's financing statement contained none of the information required under § 9-402 for a proper fixture filing. The financing statement described the collateral as "equipment,

machinery and accounts receivable of Midplains Waste Management L.L.C.," but did not describe the collateral as fixtures. The financing statement did not recite that it was to be filed in the real estate records, did not contain a description of the real estate, and did not show the name of a record owner of the real estate. The Committee's financing statement was deficient because it did not include any of the required information.

The Committee claims that it had substantially complied with the requirements of a fixture filing, pursuant to § 9-402(8), which provides, "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." However, this case does not merely involve a financing statement which contained "minor errors." This financing statement does not contain any of the additional information required for a financing statement to constitute a valid fixture filing. To find that the Committee's financing statement substantially complied with the filing requirements would be to effectively write the fixture filing requirements out of the statute. See *Southwest Bank of Omaha v. Moritz*, 203 Neb. 45, 277 N.W.2d 430 (1979).

[18] The Committee claims that the IRS was not misled by the Committee's filing and that the IRS' interest was not harmed by the Committee's filing. However, the test of substantial compliance is not whether a particular party was actually misled to its detriment by the irregularities in a financing statement, but "'"whether or not a 'reasonably diligent researcher' would be misled by the irregularity."'" *Brams Ltd. v. Elf Enters.*, 253 Neb. 932, 937, 573 N.W.2d 139, 142 (1998). See, also, *Lindsay v. First National Bank*, 211 Neb. 285, 318 N.W.2d 275 (1982); *Mid-Amer. Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc.*, 191 Neb. 74, 214 N.W.2d 18 (1974). The Committee's financing statement does not provide the information required to put a reasonably diligent researcher on notice of a security interest in fixtures with respect to this real estate. The financing statement did not indicate that it was to be filed with the real estate records. The Committee's financing statement does not substantially comply with the filing requirements for a fixture filing.

Based on our de novo review, we find that the Committee did not have a perfected security interest in fixtures that would take priority over the subsequently filed federal tax liens. Even though the Committee's interest arose before the notices of federal tax liens were filed, the Committee's interest does not have priority over the federal tax liens. The Committee does not have an interest protected under local law against a subsequent judgment lien arising out of an unsecured obligation because it failed to file an effective fixture filing. The trial court erred in finding that the Committee's interest had priority over the federal tax liens.

### 2. State's Cross-Appeal

The State claims that the federal tax liens do not have priority over the State's interest in the interpleader fund for the following reasons: (1) the State owned and held title to the property, (2) the money paid under the insurance policies was not "proceeds" under the U.C.C., (3) the State was listed as a "lienholder" on one of the insurance policies, and (4) the State had an equitable lien on the property.

#### (a) Ownership Interest

The State first claims that the trial court erred by failing to recognize that the State "owned and held title to the insured property." The State claims that Midplains did not own the property and that therefore, the tax liens could not attach to the insurance proceeds resulting from the destruction of the property.

To support its contention that the State held title to the property, the State relies on a letter from DEQ with a date stamp of August 7, 1995, and the terms of the 1995 trust grant agreement. The State focuses on language in the DEQ letter stating that DEQ "will relinquish interest in the equipment once the expected service life expiration date is reached." However, this does not establish that the State owned or held title to the property. The only "interest" the State had in the property under the DEQ grant was the right to inspect the property or redistribute the property if Midplains no longer used the equipment for the purposes intended under the grant.

With respect to the grant from the Trust, Mary Harding, executive director of the Trust, testified that the Trust's grant agree-

ment did not specify that the State held title to the equipment purchased with the grant. The Trust grant agreement gave the State a right to cancel the funding and/or demand repayment of funds already disbursed if Midplains violated the terms of the trust agreement. In the event that the Trust did not approve a proposed transfer or sale, Midplains had the option to repay the value of the grant to the Trust and to be released from all further obligations. The trust grant agreement does not establish that the State held title to the property.

The terms of both grants are simply restrictions on Midplains' use of the property and do not show that the State itself owned or held title to the property. The terms of the grants gave the State only the right to recover the property if it was no longer used for the purposes of the grant, or the option of requiring Midplains to repay the grant if Midplains desired to sell the equipment without the State's permission. Midplains used the equipment for grant purposes and did not sell the equipment. Instead, the equipment was destroyed by the fire. The terms of the grants have no provisions regarding accidental destruction of the property, and the State did not require Midplains to insure the property. The State's contention that it owned the property is not supported by the record.

(b) Proceeds

The State next claims that the federal tax liens could not attach to the interpleader fund because the money paid under the insurance policy was not "proceeds" under Neb. U.C.C. § 9-306 (Cum. Supp. 1996). The State claims, citing *Terra Western Corp. v. Berry and Co.*, 207 Neb. 28, 295 N.W.2d 693 (1980), that proceeds of an insurance policy covering destroyed property do not become " 'proceeds' " within the meaning of the U.C.C. until the money is received by " 'the owner.' " Brief for appellee on cross-appeal at 5. The State asserts that because the insurance money was never received by Midplains, but was instead deposited into an interpleader fund, the money was never received by the owner and thus never became proceeds.

[19] However, whether the insurance payment constituted proceeds under article 9 of the U.C.C. is not determinative of the issue as to whether the federal tax liens could attach. The right

of the United States to enforce its liens does not depend on state law regulating the rights of creditors generally. *Broday v. United States*, 455 F.2d 1097 (5th Cir. 1972); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970). A federal tax lien attaches to the delinquent taxpayer's "property and rights to property." I.R.C. § 6321. The insured property upon which the insurance money was paid was property of Midplains. The insurance money was clearly paid as a result of the destruction of Midplains' property. Furthermore, the State itself argues that article 9 is not applicable to the transaction between the State and Midplains. Whether the insurance money became "proceeds" under article 9 is not relevant for purposes of determining whether the federal tax liens attached.

(c) Lienholder

[20] The State claims it has a right to the insurance proceeds because it was listed as a lienholder on one of the insurance policies. However, the record shows that no lien was ever filed by the State in regard to either of the grants. Furthermore, a lienholder generally has no claim to the benefit of fire insurance proceeds unless the lienholder is named as a loss payee or the policy has otherwise been assigned to the lienholder. *Calvert Fire Ins. Co. v. Environs Development Corp.*, 601 F.2d 851 (5th Cir. 1979). The State's contention that it is a lienholder entitled to the insurance proceeds is without merit.

(d) Equitable Lien

The State next claims the trial court erred in determining that it did not have an equitable lien on the property that was superior to both the Committee's interest and the federal tax liens. The State claims that the State's equitable lien was the "first in time" event and that thus, the State has priority in the interpleader fund.

[21] An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. *Schroeder v. Ely*, 161 Neb. 252, 73 N.W.2d 165 (1955). It is not an estate or property in the thing itself, nor is it a right to recover the thing; that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it. *Id.*

[22] The State did not have an equitable lien on the property purchased with the grant funds. An equitable lien arises when there is a right to have proceeds applied " 'to the payment of a particular debt or class of debts.' " *Id.* at 262, 73 N.W.2d at 171. In this case, Midplains did not owe a debt to the State. Midplains was granted these funds to purchase equipment and had no obligation to repay the funds as long as it complied with the terms of the grants. There is no cognizable debt to serve as the basis of a lien. Further, an equitable lien is not "a right to recover" the property. *Id.* As discussed previously, the terms of the grants gave the State only the right to recover the property if it was no longer used for grant purposes or to recover the funds if Midplains sold the property without the State's permission, neither of which occurred in this case. The State did not have an equitable lien giving it priority in the interpleader fund.

The State did not have an interest in this property that would entitle it to priority over the federal tax liens. As the trial court correctly noted:

> The State made an affirmative decision not to require the grantee to insure the property, not to require that the State be named a payee of insurance proceeds, not to define or retain a specific property interest in property purchased with grant funds, and not to file a lien. The State designed the terms of the grant and could have specified a property interest or a lien, if it chose.

The State's assignments of error are without merit.

## VI. CONCLUSION

The trial court erred in determining that the Committee had a perfected security interest in fixtures that had priority over the subsequently filed federal tax liens. The trial court's determination that the Committee had priority in the interpleader fund is reversed.

The trial court correctly determined that the State did not own or hold title to the insured property and that the State had no interest that would entitle it to priority in the remainder of the interpleader fund. The trial court's decision with respect to the issues raised in the State's cross-appeal is affirmed. Thus, we

affirm in part, and in part reverse, and remand with directions to the trial court to enter judgment consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

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## FRATERNAL ORDER OF POLICE, LODGE NO. 2, APPELLEE, V. THE COUNTY OF DOUGLAS, NEBRASKA, APPELLANT

612 N.W.2d 483

Filed June 23, 2000. No. S-99-982.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
3. **Contracts: Appeal and Error.** The construction of a contract is a matter 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.
4. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
5. ___. A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
6. **Contracts: Intent.** A contract which is written in clear and unambiguous terms is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms.
7. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
8. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

James S. Jansen, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Thomas F. Dowd, of Dowd & Dowd, Attorneys at Law, for appellee.

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

STEPHAN, J.

This case presents an issue of law as to whether a 1995 amendment to the Douglas County Employees' Retirement Plan resulted in a reduction in benefits which, pursuant to the plan, could be accomplished only with the approval of the electorate. The district court for Douglas County resolved this question in the affirmative and ordered that the amendment be stricken and set aside because it had not been submitted to and approved by the voters of Douglas County. Upon consideration of the appeal by Douglas County (County) from this order, we find no error and affirm.

## BACKGROUND

The facts relevant to the controversy are undisputed. As amended through January 1, 1989, the Douglas County Employees' Retirement Plan (the Plan) provided in part as follows:

> 5.8 Disability Pension. After six calendar months of total disability, an employee with at least five years of service shall be entitled to benefits in the amount of 70% of his compensation on the July 1 preceding disability. In the computation of this percentage, Social Security and workers' compensation payments shall be included in the initial computation. However, subsequent adjustments in such Social Security and workers' compensation payments after the commencement of a member's disability income payments will not reduce the amount of disability pension payable under this Plan.
>
> . . . .
>
> 12.1 Amendment and Termination. The County expects the Plan to be permanent; but since future conditions affecting the County cannot be anticipated or foreseen, the County must necessarily and does hereby reserve the right to amend or modify the Plan at any time by the action of

> the Board of County Commissioners, except that the Plan may not be discontinued or terminated and the benefits provided by the Plan may not be reduced without approval of a simple majority of the voters of Douglas County in a regular primary or general election of the County.

Prior to July 1, 1995, two county employees eligible for disability pensions under the Plan challenged the County's attempt to offset their pensions by the amount of Social Security benefits received by their dependents. The County elected not to contest these challenges and refunded the money which it had attempted to offset. In four other cases where the affected employees did not object, the County offset disability pension benefits by the amount of Social Security benefits received by the employees and their families.

Effective July 1, 1995, the County amended § 5.8 of the Plan by adding the following language:

> For this purpose, Social Security includes Social Security disability payments to a member, spouse or family members that result from the member's disability. Social Security also includes for this purpose Social Security retirement payments of a disabled member that are payable to that member, their spouse or family members if the member elects to receive a Social Security retirement payment in lieu of a Social Security disability payment.

The County concedes that this amendment was in reaction to its previous attempts to offset dependents' Social Security benefits from disability pensions and its decision not to contest the challenges to the attempted offsets by two affected employees. The 1995 amendment to the Plan was not submitted to a vote of the county electorate.

This declaratory judgment action was commenced in 1998 by the Fraternal Order of Police, Lodge No. 2 (FOP), a labor organization which represents a bargaining unit of Douglas County deputy sheriff employees who are enrolled in and covered by the Plan. Alleging that the County, through its agent, had stated its intent to deduct Social Security benefits paid to dependents from the disability pension of one of its members pursuant to § 5.8 of the Plan as amended in 1995, FOP contended that the

amendment was void ab initio because it had not been approved by a majority of voters as required by § 12.1 of the Plan. FOP prayed for a judgment declaring that the 1995 amendment should be set aside and declared null and void. The County filed an answer consisting of a general denial and moved for summary judgment. FOP filed a cross-motion for summary judgment. The district court conducted a hearing and determined that there was no genuine issue as to any disputed fact. It sustained FOP's cross-motion for summary judgment and denied the County's motion based upon its determination that

> the amendment of July 1, 1995, to Section 5.8 of the Douglas County Employees' Retirement Plan constitutes a reduction which required the approval of a simple majority of the voters of Douglas County in a regular primary or general election of the County and that the disabled members represented by the Plaintiff are entitled to disability benefits from the plan without an offset for Social Security disability benefits or workers' compensation benefits received by their spouse and/or family members on account of such disability and that the amendatory language to Section 5.8 of the plan should be stricken and set aside.

The County perfected this timely appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENT OF ERROR

The County contends on appeal that the district court committed reversible error in finding that the amendatory language of § 5.8 was a "reduction in plan benefit" for purposes of § 12.1 of the Plan and, therefore, erred in granting summary judgment for FOP.

## STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Callahan v. Washington Nat. Ins. Co., ante* p. 145, 608 N.W.2d 592 (2000); *Schrader v. Farmers Mut. Ins. Co., ante* p. 87, 608 N.W.2d 194 (2000).

[2] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination. *Smith v. Paoli Popcorn Co.*, 255 Neb. 910, 587 N.W.2d 660 (1999).

[3] The construction of a contract is a matter 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. *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997).

## ANALYSIS

The County argues that the amendatory language is a clarification, not an addition of a new offset, and that the amendment does not constitute a reduction in benefits because the "benefit" remains at 70 percent of an employee member's compensation and that only the source of the payment changed. The County contends that it has always followed the practice and understanding that Social Security benefits include benefits received by the member, the member's spouse, and the member's dependents. The County argues that it intended that disability payments made through the Plan would supplement the Social Security benefits received by the member and the member's family but would not duplicate such benefits. The County contends that the Plan member employees know or should know that if a member becomes totally disabled, Social Security will send disability benefits not only to the member, but also to the member's spouse and dependents.

[4-7] As the County acknowledges in its brief, the Plan is a contract between the County and its employees. To resolve the issue raised in this appeal, we must therefore look to the contract itself. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Callahan v. Washington Nat. Ins. Co., supra*; *American Family Ins. Group v.*

*Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998); *Ray Tucker & Sons v. GTE Directories Sales Corp., supra.* A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Callahan v. Washington Nat. Ins. Co., supra*; *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997); *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996). A contract which is written in clear and unambiguous terms is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995); *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997); *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997).

We find no ambiguity in the 1989 version of the Plan. It contains no language stating or even suggesting that Social Security benefits paid to a member's spouse or dependents would be applied as an offset in calculating the member's disability benefits payable under the Plan. In contrast, the 1995 version clearly provides that such amounts will be included in the amount offset against the benefit calculated on the basis of 70 percent of the employee's compensation on the July 1 preceding the disability. Thus, the 1995 amendment plainly enlarged the class of permissible offsets against the 70-percent benefit by expanding it to include Social Security benefits received by the employee member's spouse and dependents.

Likewise, it is clear from the language of both versions of the Plan that offsets operate to reduce the amount of the benefit payable under the Plan. Each version of the Plan is set forth in a booklet which includes the full text of the Plan itself, preceded by a section in question-and-answer format which, according to the introductory section of each booklet, "describes the main

provisions of the Plan in what is hoped to be understandable terms." The booklets provide that any conflict between the explanatory section and the text of the Plan will be governed by the latter. The explanatory section of the 1989 Plan booklet includes the following:

> **HOW MUCH DISABILITY PENSION WILL I RECEIVE?**
>
> The amount of your disability pension will total 70% of your basic monthly earnings rate on July 1 before you became disabled to a maximum of $3,000 per month. Your disability benefit will include any payments *you receive* from Social Security . . . .

(Emphasis supplied.) The corresponding provision in the 1995 Plan booklet states:

> HOW MUCH DISABILITY BENEFITS WILL I RECEIVE?
>
> The amount of your disability benefits will total 70% of your basic monthly earnings rate on July 1 before you became disabled to a maximum of $4,800 per month. *This benefit will be reduced by any payments* you *or your family members* receive from Social Security as a result of your disability . . . .

(Emphasis supplied.) These explanatory provisions do not conflict with the corresponding provisions of each Plan, but, rather, reflect their plain meaning. Consistent with the language of § 5.8 of the 1989 Plan, the Plan booklet explains that Social Security benefits paid to the employee ("payments you receive") are included in the 70-percent disability benefit and thus may be applied as an offset in determining the amount payable under the Plan. Likewise, consistent with the language of § 5.8 of the 1995 Plan, the Plan booklet explains that the 70-percent benefit "will be reduced" by Social Security payments received by the employee or his or her family members.

[8] We have stated that " 'the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.' " *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 769, 545 N.W.2d 714, 722 (1996), quoting *Nowak v. Burke Energy Corp.*, 227 Neb. 463,

418 N.W.2d 236 (1988). The explanatory language utilized in each Plan booklet demonstrates that the County construed the language of § 5.8 of the Plan prior and subsequent to the 1995 amendment precisely as it was construed by the district court.

We reach the same result on the basis of our independent review of this question of law. The 1995 amendment expanded the class of Social Security payments which could be offset against the 70-percent disability pension benefit by including payments received by the spouse and family of the employee. This necessarily resulted in a reduction of the benefits which would have been payable prior to the amendment. The amendment required but did not receive approval by the voters of Douglas County pursuant to § 12.1 of the Plan and is therefore void.

## CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining as a matter of law that the amendatory language contained in § 5.8 of the 1995 Plan constitutes a reduction in the Plan benefits which may not be implemented because the amendment was not approved by a simple majority of voters in Douglas County in a regular primary or general election, as required by the Plan. The judgment of the district court is affirmed.

AFFIRMED.

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# IN RE INTEREST OF CHARLENE R. BATTIATO, AN INCAPACITATED PERSON.
# NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, APPELLANT, V. MARY L. WILSON, SUCCESSOR CONSERVATOR AND SUCCESSOR GUARDIAN, APPELLEE.

613 N.W.2d 12

Filed June 23, 2000. No. S-99-1120.

1. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.

2. **Federal Acts: Social Security.** Under the Social Security Act, 42 U.S.C. § 407(a) (1994) does not apply to voluntary payments made by a recipient of Social Security benefits.
3. **Administrative Law: Jurisdiction: Claims.** The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme.
4. **Administrative Law.** Whether the purposes of the administrative act require that the administrative agency should first pass on a question depends on whether the question raises issues of policy that should be considered by the administrative agency in the interests of uniformity and administrative expertise.
5. **Administrative Law: Jurisdiction.** Under the doctrine of primary jurisdiction, preliminary resort to the administrative agency is required where the inquiry is essentially one of fact and of discretion in technical matters and when uniformity can be secured only if determination is made by that agency.
6. ___: ___. The effect of the application of the doctrine of primary jurisdiction is to preclude resorting to the courts in the first instance, or to preclude a court from supplying a remedy, or passing upon particular issues until the issues have been passed upon by the administrative agency.
7. ___: ___. The nature of the controverted question and the nature of the inquiry necessary for its solution are the determining factors in regard to application of the doctrine of primary jurisdiction.
8. ___: ___. The doctrine of primary jurisdiction does not apply where a pure question of law is at issue.
9. ___: ___. The doctrine of primary jurisdiction does not apply in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact, but one of pure law, is determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal.
10. **Administrative Law.** The interpretation of administrative regulations presents a question of law.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the County Court for Douglas County: EDNA R. ATKINS, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Gerald W. Pankonin, Special Assistant Attorney General, for appellant.

Richard S. McMillin, P.C., of Marks, Clare & Richards, for appellee.

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

McCORMACK, J.

## NATURE OF CASE

Charlene R. Battiato, an incapacitated person, has a monthly income of $814.99, derived entirely from Supplemental Security Income and Railroad Retirement Act benefits. The cost of Charlene's nursing home care exceeds her entitlement income, so the Nebraska Department of Health and Human Services Finance and Support (the Department) compensates Charlene's nursing home for the remaining expenses. The primary question presented in this appeal is whether attorney fees incurred on behalf of Charlene may be paid from her federal entitlement income.

## FACTUAL AND PROCEDURAL BACKGROUND

Charlene is a severely mentally retarded spastic quadriplegic with seizures, who cannot talk, is visually and hearing impaired, and cannot care for or feed herself. In 1989, the county court appointed Charlene's parents, Charles and Rose Battiato, to be Charlene's conservators and guardians. In 1993, Charlene was transferred from her parents' home to the Maple Crest nursing home (Maple Crest) in Omaha, Nebraska. In 1996, Charles died, and Rose, due to physical infirmity, resigned as Charlene's conservator and guardian.

Attorney Joseph P. Inserra was appointed by the county court as Charlene's successor conservator and guardian. In 1998, Donna J. Compau was appointed by the county court as successor conservator and guardian to Inserra. Shortly thereafter, the county court entered an order disposing of moneys paid into the court from a bank account held in Charlene's name. The county court ordered that the bulk of the moneys be paid to Maple Crest to settle outstanding debt and that the remaining moneys be paid to Inserra in partial satisfaction of outstanding legal expenses. The county court ordered that the balance of Inserra's attorney fees should be the subject of a plan to be presented to the county court.

Compau filed a plan with the county court recommending that the attorney fees be paid from Charlene's entitlement income and that while such payments were being made, the Department should allow the expense and provide additional

compensation to Maple Crest for the expense of Charlene's care. Compau later filed a "Notice of Petition for Approval of Account of Conservator," stating that the Department had declined to approve Compau's plan for payment of attorney fees and requesting the county court to enter an order directing that the attorney fees be paid from Charlene's entitlement income and that in the interim, the Department be ordered to pay a corresponding increase in the cost of Charlene's care at Maple Crest.

The Department filed an objection to the allowance of attorney fees. The county court overruled the objection and entered an order directing the Department to "develop a budgetary plan and implement the plan . . . setting aside at least one half of the ward's monthly income to pay the attorney fees and costs to said attorneys with the plan to remain in effect until the fees and costs are paid in full." The county court ordered that the fees to Inserra be paid, as well as additional attorney fees claimed by Richard S. McMillin, Compau's attorney. The county court further ordered that the Department "shall pay the increased costs of the ward's nursing home care for the duration of reduction of ward's income while said attorney fees and costs are being paid under the plan." The Department appeals. We note that in September 1999, the county court discharged Compau of her duties as successor conservator and successor guardian and appointed Mary L. Wilson in her stead.

## ASSIGNMENTS OF ERROR

The Department assigns, restated, that the county court erred in determining that federal anti-attachment statutes did not apply to the payment of attorney fees and that the doctrine of "primary jurisdiction" should have been applied to the case.

## STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Cole v. Loock, ante* p. 292, 609 N.W.2d 354 (2000); *Schrader v. Farmers Mut. Ins. Co., ante* p. 87, 608 N.W.2d 194 (2000).

## ANALYSIS

### FEDERAL ANTI-ASSIGNMENT STATUTES

The Social Security Act provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (1994).

Similarly, the Railroad Retirement Act states in relevant part that "no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. § 231m(a) (1994).

This court has held with respect to § 407 that it

> operate[s] to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. . . .
>
> . . . .
>
> . . . § 407 is concerned only with the protection of Social Security benefits from legal proceedings by creditors.

*Boersma v. Karnes*, 227 Neb. 329, 336-37, 417 N.W.2d 341, 347 (1988). See, also, generally, *Bennett v. Arkansas*, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988); *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973); *Havelock Bank v. Hog Confinement Systems*, 214 Neb. 783, 335 N.W.2d 765 (1983).

There is no dispute that the federal benefits received by Charlene in this case are within the scope of §§ 407 and 231m(a). The critical issue presented by the Department's assignment of error, then, is whether the county court's order, in response to the motion made by Compau, constituted "legal process" within the meaning of §§ 407 and 231m(a).

[2] Authority from federal and state courts indicates that § 407 does not apply to voluntary payments made by a recipient

of Social Security benefits. See, e.g., *Johnson v. Wing*, 178 F.3d 611 (2d Cir. 1999), *cert. denied* 528 U.S. 1162, 120 S. Ct. 1177, 145 L. Ed. 2d 1085 (2000); *Fetterusso v. State of N.Y.*, 898 F.2d 322 (2d Cir. 1990); *Moore v. Colautti*, 483 F. Supp. 357 (E.D. Pa. 1979), *affirmed* 633 F.2d 210 (3d Cir. 1980); *C.G.A. v. State*, 824 P.2d 1364 (Alaska 1992); *Tunnicliff v. Com., Dept. of Public Welfare*, 483 Pa. 275, 396 A.2d 1168 (1978); *Russo v. Russo*, 1 Conn. App. 604, 474 A.2d 473 (1984); *French v Dep't of Soc Serv*, 92 Mich. App. 701, 285 N.W.2d 427 (1979). But see *U.S. v. Univ. Hosp. of State Univ. of New York*, 575 F. Supp. 607 (E.D.N.Y. 1983), *affirmed* 729 F.2d 144 (2d Cir. 1984).

The Second Circuit has stated:

> Congress intended the words "or other legal process" to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions. . . . Thus, section 407(a) is violated when the state places itself in the position of a preferred creditor or coerces payment from protected benefits. *Philpott* [*v. Essex County Welfare Board, supra*,] and the statute, however, do not eliminate the underlying debt but merely preclude states from enforcing an obligation against protected federal funds.

*Fetterusso v. State of N.Y.*, 898 F.2d at 328. The Second Circuit concluded in that case that § 407 had not been violated by New York's collection of Social Security benefits to pay for the care and treatment of individuals in state institutions, as there was "no basis for concluding that any of the appellants did not voluntarily agree to the use of their social security benefits to pay the costs of their care and treatment." *Id.*

This reasoning regarding § 407 is persuasive and applies equally to the interpretation of the similar language of § 231m(a). In the instant case, the payment of Charlene's attorney fees has been volunteered, not by Charlene, but by Compau as Charlene's conservator and guardian.

The appointment of a conservator vests in him or her title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. Neb. Rev. Stat. § 30-2649 (Reissue 1995).

Neb. Rev. Stat. § 30-2653(c) (Reissue 1995) provides, in relevant part:

> A conservator, acting reasonably in efforts to accomplish the purpose for which he [or she] was appointed, may act without court authorization or confirmation to
>
> . . . .
>
> (19) pay or contest any claim; to settle a claim by or against the estate or the protected person . . . by compromise, arbitration, or otherwise.

Neb. Rev. Stat. § 30-2654(a) (Reissue 1995) further provides, in relevant part:

> (2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his [or her] affairs and the estate which has been conserved for him [or her]; (ii) the accustomed standard of living of the protected person and members of his [or her] household; (iii) other funds or sources used for the support of the protected person.
>
> . . . .
>
> (4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

The Department has not challenged the propriety of the attorney fees or the payment thereof, nor is there any question presented regarding a breach of Compau's fiduciary duty in allowing payment of the fees. The sole argument advanced by the Department in this regard is that payment of the fees, pursuant to the allowance of the county court, violates §§ 407 and 231m(a). Those sections, however, would not preclude Charlene from paying attorney fees with her federal entitlement income if she chose and was competent to do so. Given that fact, those

sections cannot bar Compau, as Charlene's conservator and guardian, from making that determination on her behalf. See *Texas Baptist Children's Home v. Corbitt*, 321 S.W.2d 610 (Tex. Civ. App. 1959).

The Department's reliance on *Woodall v. Bartolino*, 700 F. Supp. 210 (D.N.J. 1985), is misplaced. In that case, and in *Kriegbaum v. Katz*, 909 F.2d 70 (2d Cir. 1990), the trial courts ordered payment of debts owed to New Jersey and New York, respectively, from accumulated money in the possession of a guardianship estate. Those cases stand for the principle that § 407 protects income received by a guardian where "legal process" within the meaning of § 407 is used to obtain payment of a debt. In this case, however, Compau is not resisting payment of the debt. Therefore, no "legal process" has been utilized within the meaning of §§ 407 and 231m(a).

Although the county court in this case entered an order allowing payment of the attorney fees, the court did so at the express request of Compau. Thus, "legal process" was not used within the meaning of §§ 407 and 231m(a). Compau determined that the debt should be paid and went to the court to secure the approval of the county court in advance for payment of the debt and to obtain an order for the Department to supplement Charlene's income to fully pay Maple Crest for the costs of Charlene's care.

The Department is not, in this appeal, challenging that part of the county court's order directing the Department to supplement Charlene's income while her federal entitlement income is being diverted to pay the attorney fees. The Department's assignments of error are limited to the effect of the federal anti-attachment statutes and the application of the doctrine of primary jurisdiction, discussed below. These assignments of error do not address the propriety of ordering the Department to supplement Charlene's income, and we do not comment on that issue.

The Department's first assignment of error is without merit. The county court order was not "legal process" within the meaning of §§ 407 and 231m(a), but was simply a ratification of Compau's determination that Charlene's attorney fees should be paid from her only available source of income. As Charlene's conservator and guardian has volunteered payment of the debt

on Charlene's behalf, no coercive "legal process" has been invoked, and federal law has not been violated.

PRIMARY JURISDICTION

The Department argues that the county court should have applied the doctrine of primary jurisdiction and referred the terms of Charlene's payment of the attorney fees to the Department.

[3,4] The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. *Humphrey Feed & Grain, Inc. v. Union P. R.R. Co.*, 199 Neb. 189, 257 N.W.2d 391 (1977). Whether the purposes of the administrative act require that the administrative agency should first pass on a question depends on whether the question raises issues of policy that should be considered by the administrative agency in the interests of uniformity and administrative expertise. See *id.*

[5-7] Preliminary resort to the administrative agency is required where the inquiry is essentially one of fact and of discretion in technical matters and when uniformity can be secured only if determination is made by that agency. See *id.* The effect of the application of the doctrine of primary jurisdiction is to preclude resorting to the courts in the first instance, or to preclude a court from supplying a remedy, or passing upon particular issues until the issues have been passed upon by the administrative agency. *Id.* The nature of the controverted question and the nature of the inquiry necessary for its solution are the determining factors in regard to application of the doctrine of primary jurisdiction. *Id.*

[8,9] The doctrine does not apply where a pure question of law is at issue. *Aged Hawaiians v. Hawaiian Homes Com'n*, 78 Haw. 192, 891 P.2d 279 (1995), *cert. denied* 516 U.S. 819, 116 S. Ct. 77, 133 L. Ed. 2d 36. See, also, *Baltimore & Ohio Chicago R. Co. v. Wisconsin Central*, 154 F.3d 404 (7th Cir. 1998), *cert. denied* 526 U.S. 1019, 119 S. Ct. 1254, 143 L. Ed. 2d 351 (1999); *Gross Common Carrier v. Baxter Healthcare Corp.*, 51 F.3d 703 (7th Cir. 1995); *I. C. C. v. Chicago, Rock*

*Island and Pacific Railroad Co.*, 501 F.2d 908 (8th Cir. 1974), *cert. denied* 420 U.S. 972, 95 S. Ct. 1393, 43 L. Ed. 2d 652 (1975); *Kovarsky v. Brooklyn Union Gas. Co.*, 279 N.Y. 304, 18 N.E.2d 287 (1938). See, also, generally, 2 Am. Jur. 2d *Administrative Law* § 515 (1994). The doctrine does not apply in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact, but one of pure law, is determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal. *Id.*, citing *Brown Lumber Co. v. L. & N. R. Co.*, 299 U.S. 393, 57 S. Ct. 265, 81 L. Ed. 301 (1937).

Consequently, the initial inquiry for this court is the nature of the question the Department claims should have been referred to the Department as the relevant administrative agency. See *Humphrey Feed & Grain, Inc. v. Union P. R.R. Co., supra.* In that regard, the Department's argument is that

> [t]here is a distinct factual question regarding the application of the "special requirements" provision of the Department's regulations. . . .
>
> [The county court's] order violates the doctrine of primary jurisdiction because the Court made a ruling that more properly lies within the purview of the administrative agency which not only has the legislative mandate to administer the Medicaid rules and regulations, but also has the knowledge and expertise to properly interpret and apply these regulations.

Brief for appellant at 9.

[10] Contrary to the Department's assertion, however, the interpretation of administrative regulations presents a question of law. See, *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue, ante* p. 24, 607 N.W.2d 857 (2000); *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998); *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997); *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997). The Department argues that it has the expertise to interpret its own regulations and federal medi-

caid regulations. Such interpretation, however, is clearly a question of law; this case presents no dispute regarding the underlying factual circumstances, and the Department's expertise in interpreting regulations is certainly no greater than that of the courts. Since the case presents only questions of law, the doctrine of primary jurisdiction is inapposite.

[11] We are aware of authority stating that the primary jurisdiction doctrine does not apply where the agency to which the case would be referred is a party to the action before the court. See *Austin Lakes Joint Venture v. Avon Util.*, 648 N.E.2d 641 (Ind. 1995). But see *Luskin's v. Consumer Protection*, 338 Md. 188, 657 A.2d 788 (1995). As we have determined that the doctrine of primary jurisdiction does not apply to the issues presented in this case, we need not comment on the question of whether the administrative agency to which the case would be referred can invoke the doctrine where the agency is itself a party to the court proceedings. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert, ante* p. 160, 608 N.W.2d 588 (2000).

The Department's assignment of error is without merit. The only issues the Department claims should have been referred to it are issues of regulatory interpretation, presenting questions of law outside the scope of the primary jurisdiction doctrine.

## CONCLUSION

The federal statutes cited by the Department do not preclude Charlene, or her legal conservator and guardian, from voluntarily paying attorney fees incurred on Charlene's behalf. The doctrine of primary jurisdiction does not apply, because the questions presented in this appeal are questions of law fully within the competence of the court. As the Department's assignments of error are without merit, the judgment of the county court is affirmed.

AFFIRMED.

# GERING - FORT LARAMIE IRRIGATION DISTRICT, APPELLANT, V. JOHN T. BAKER, DOING BUSINESS AS BAKER & ASSOCIATES, AND MARLE G. SMITH, APPELLEES.

612 N.W.2d 897

Filed June 30, 2000. No. S-98-1247.

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. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Limitations of Actions: Malpractice.** Nebraska follows the occurrence rule, under which a professional negligence suit accrues at the time the act or omission in rendering or failing to render professional services takes place.
4. ___: ___. A plaintiff may be relieved of the strictures of filing within 2 years after the negligent act or occurrence by virtue of the "discovery exception." The discovery exception is applicable only where the cause of action is not discovered and could not have reasonably been discovered during the 2-year limitation period of Neb. Rev. Stat. § 25-222 (Reissue 1995), which 2-year period commences with the negligent act or omission. However, if facts are found that constitute the basis of a cause of action within 2 years from the alleged act of negligence, the discovery exception to the statute of limitations is inapplicable.
5. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury, and it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed.
6. ___: ___. "Discovery of a cause of action" occurs when there is knowledge of facts constituting the basis of the cause of action or awareness of the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of the cause of action.
7. **Limitations of Actions: Malpractice.** In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.
8. **Malpractice: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct.
9. **Limitations of Actions: Damages.** A lack of knowledge of the extent of damages is not the equivalent of a lack of discovery of a cause of action as set out in Neb. Rev. Stat. § 25-222 (Reissue 1995).
10. **Fraud: Estoppel: Limitations of Actions: Malpractice.** The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when

the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence.

Petition for further review from the Nebraska Court of Appeals, HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John H. Skavdahl, of Skavdahl & Wickersham, for appellant.

Thomas J. Guilfoyle, of Erickson & Sederstrom, P.C., for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Gering - Fort Laramie Irrigation District filed a petition in the district court for Scotts Bluff County against John T. Baker, doing business as Baker & Associates (Baker), and Marle G. Smith, alleging professional negligence in connection with a project relocating irrigation structures along Highway 92, west of Scottsbluff, Nebraska. Baker and Smith filed a motion for summary judgment on October 9, 1998, claiming that the district failed to comply with the 2-year professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1995). The district thereafter filed a second amended petition on October 21, and the district court permitted the parties to submit additional affidavits. The district court concluded the action was time barred and that the doctrine of fraudulent concealment was unavailable to the district. The district court sustained Baker and Smith's motion for summary judgment on November 5.

The district appealed to the Nebraska Court of Appeals, which reversed the district court's grant of summary judgment based in part on the Court of Appeals' determination that a genuine issue of material fact existed as to whether the district's discovery of one improperly constructed joint would lead a reasonably prudent person to inquire regarding the construction of the

remaining joints. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 8 Neb. App. 1001, 606 N.W.2d 826 (2000). Baker and Smith petitioned for further review of the Court of Appeals' decision. We granted Baker and Smith's petition for further review and now reverse the Court of Appeals' decision.

## STATEMENT OF FACTS

A more complete recital of the underlying facts in this case may be found in the Court of Appeals' opinion, *Gering - Ft. Laramie Irr. Dist. v. Baker, supra.* The facts of particular relevance on further review are summarized herein.

The district hired Baker to design and oversee the construction of the relocation of irrigation structures near Scottsbluff, Nebraska. Baker assigned Smith, an engineer employed by Baker, to design the project and to provide construction supervision. Paul Reed Construction & Supply, Inc., was hired as the contractor responsible for the actual construction. The contractor was not named as a defendant in this action. Construction was substantially completed on August 25, 1993. Baker certified the construction project complete on April 5, 1994.

The record in this case contains an affidavit of Smith which establishes that Smith prepared payment estimate No. 7 covering cost overruns and underruns for the relocation project for the period June 26 to August 25, 1993. Payment estimate No. 7 noted, among other things, that 37 "concrete bends," or joints, had been used in the structure relocation project during this period. The record also contains a copy of a letter dated November 24, 1993, from Ricky Preston, general manager of the district, to Jim Jensen, district engineer for the State Department of Roads, enclosing copies of several documents, including payment estimate No. 7 containing the reference to the 37 concrete bends.

The district discovered a leak in the joints in the PVC pipe near station 407 in the spring of 1994. When the district excavated, Preston observed that at the transition point where the PVC pipe changes directions, the two PVC pipes were field cut and wrapped in duct tape. The duct tape was then covered with a concrete collar and wire reinforcement, instead of utilizing a prefabricated PVC coupler to join the ends of the PVC pipe. The

district did not contact Baker or the contractor regarding the leak, but fixed the leak itself by replacing the concrete collar with a prefabricated PVC coupler. In his deposition testimony, Preston admitted that at the time he inspected the joint for the district in the spring of 1994, he determined that the joint was not properly constructed. Preston further stated that he did not give any thought as to whether other joints were similarly constructed.

Approximately 2 weeks after the leak near station 407 was repaired, a second leak became apparent at another point in the system. As the leak was not causing damage, the district decided not to shut down the line. The site of this leak was not excavated nor was the leak repaired at this time.

The district found another leak in a PVC joint in the fall of 1996. The joint was excavated on November 6, 1996, and found to be improperly constructed. The district notified the contractor, which fixed the joint and backfilled the area. Neither the district nor Baker inspected the repair. Preston contacted Baker at that time and spoke with an engineer who told Preston that the construction Preston described was improper, that there might have been other such improperly constructed joints, and that the district should put the contractor on formal notice.

An additional PVC joint was excavated on June 4, 1997, after the district discovered a clogged pipeline in the area. This joint was also found to be improperly constructed. The district advised the contractor of the problem by letter dated June 9, 1997. The contractor responded that all of the PVC joints or bends had been constructed in the same manner and that use of that method of construction had been approved by Smith. The district filed the present professional negligence action against Baker and Smith on August 19. Following entry of summary judgment in favor of Baker and Smith, the district appealed to the Court of Appeals, which reversed the district court. Baker and Smith filed a petition for further review, which we granted.

## ASSIGNMENTS OF ERROR

On further review, Baker and Smith assert the Court of Appeals erred in reversing the district court's order which had concluded the action was time barred and had granted summary

judgment. Specifically, Baker and Smith claim the Court of Appeals erred in (1) holding that discovery of one defective joint did not constitute discovery as a matter of law under § 25-222 and therefore reversing the district court's order, which had determined that the district discovered its cause of action within the 2-year period of the statute of limitations and (2) reversing the district court's grant of summary judgment on the issue of fraudulent concealment.

## STANDARDS 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. *Sherrets, Smith v. MJ Optical, Inc., ante* p. 424, 610 N.W.2d 413 (2000).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Id.*

## ANALYSIS

*Accrual of Action.*

The district court in this case sustained Baker and Smith's motion for summary judgment on the basis that the district's suit was controlled by the special statute of limitations for professional negligence found in § 25-222 and was barred thereunder. The Court of Appeals also concluded that § 25-222 was the applicable statute of limitations, and on further review, neither party assigns error to that conclusion. We agree that § 25-222 is the controlling statute of limitations.

Section 25-222 requires that an action based on professional negligence be commenced within 2 years after the alleged "act or omission" in rendering or failing to render professional services. That is, an action for professional negligence ordinarily accrues when the negligent "act or omission" occurs. In the instant case, the district court found that Baker and Smith's work was concluded on April 5, 1994, the date that Baker certi-

fied the project complete, and that the 2-year period started on that date. In contrast, the Court of Appeals found that the "act or omission" occurred on August 25, 1993, the date on which the construction work was substantially completed. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 8 Neb. App. 1001, 606 N.W.2d 826 (2000). However, the Court of Appeals further found that there was an issue as to whether the statute of limitations began to run on August 25, 1993, or was postponed due to lack of discovery. *Id.* As more fully explained below, we conclude that accrual of the action was not postponed by the discovery exception, and because the action was not filed until August 19, 1997, the action was time barred, whether measured from August 25, 1993, or April 5, 1994.

[3,4] Nebraska follows the occurrence rule, under which a professional negligence suit accrues at the time the act or omission in rendering or failing to render professional services takes place. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A plaintiff may be relieved of the strictures of filing within 2 years after the negligent act or occurrence by virtue of the "discovery exception." *Weaver v. Cheung*, 254 Neb. 349, 354, 576 N.W.2d 773, 777 (1998). The discovery exception permits an action to be commenced within 1 year from the earlier of the date of discovery of the cause of action or the date of discovery of facts which would reasonably lead to such discovery. The discovery exception is applicable only where the cause of action is not discovered and could not have reasonably been discovered during the 2-year limitation period of § 25-222, which 2-year period commences with the negligent act or omission. However, if facts are found that constitute the basis of a cause of action within 2 years from the alleged act of negligence, the discovery exception to the statute of limitations is inapplicable. *Reinke Mfg. Co. v. Hayes, supra.*

Although the district commenced the present action more than 2 years after the alleged professional negligence, the district argued to the trial court and to the Court of Appeals that the "discovery exception" found in § 25-222 was applicable. The district court concluded that the discovery exception was inapplicable and that the action was time barred. The district court based its conclusion on the undisputed fact that the district knew

in the spring of 1994 that one PVC joint had been improperly constructed. The district court reasoned that knowledge of this defect established that the district knew a problem existed with the construction and that reasonable inquiry at that time would have led the district to the knowledge that this joint and all the joints had been constructed in the same manner at the behest of or with the approval of Baker and Smith.

The Court of Appeals reversed the district court's grant of summary judgment, concluding that a question of fact existed as to whether the knowledge of one improperly constructed joint "would lead a reasonably prudent person to inquire regarding the construction of the remaining . . . joints." *Gering - Ft. Laramie Irr. Dist. v. Baker*, 8 Neb. App. at 1012, 606 N.W.2d at 836. We determine that in so concluding, the Court of Appeals misperceived the applicable law.

[5-7] "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury, and it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). "Discovery of a cause of action" occurs when there is knowledge of facts constituting the basis of the cause of action or awareness of the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of the cause of action. *Weaver v. Cheung*, 254 Neb. at 356, 576 N.W.2d at 778. In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 390 (1999).

In the instant case, the district's general manager, Preston, testified in his deposition that when the district excavated the leaking joint in the spring of 1994, he was able to determine at that time that the joint was improperly constructed. Preston's affidavit and deposition testimony further establish that when the district eventually inquired into the matter after discovering additional leaks in joints, the district was readily able to deter-

mine that the defendants had approved the improper method used to construct the joints. Furthermore, the record in this case establishes that as of November 24, 1993, the district had possession of payment estimate No. 7, which was prepared by Smith and indicated that 37 concrete bends had been used in the project, and thus, the district had the means of knowing that at least 37 concrete bends had been installed. The undisputed facts establish that, as a matter of law, discovery of the allegedly negligent act or omission occurred in the spring of 1994 when the district knew that at least one joint was improperly constructed and that inquiry at that time would have led to knowledge of the fact that Baker and Smith had approved such improper construction, thus giving the district knowledge of facts constituting the basis for the cause of action. Because the cause of action could reasonably have been discovered during the 2-year limitation period, the discovery exception to the statute of limitations is inapplicable.

[8,9] The Court of Appeals states in its opinion that there is a question of material fact as to whether knowledge of the one improperly constructed joint would reasonably lead the district to inquire as to whether the remaining joints were constructed in the same manner. While there may have been a fact in issue as to the number of improperly constructed joints in the spring of 1994, this fact is not material. The relevant inquiry in the instant case was not the number of additional joints that may have been improperly constructed, but, rather, an inquiry as to who authorized the improper construction in general and whether the improperly constructed joint was the act or omission of Baker and Smith in particular. In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A lack of knowledge of the extent of damages is not the equivalent of a lack of discovery of a cause of action as set out in § 25-222. *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988).

The district did not need to know the extent of its damages in the spring of 1994 to inquire and thus learn that it had a cause of action. The record in this case establishes that in the spring of

1994, which is within 2 years of the alleged negligence, the district discovered that at least one joint had been improperly constructed and the district could reasonably have learned that such construction was approved by the engineers. Indeed, by reference to its own files which contained the letter of November 24, 1993, the district would have confirmed that 37 concrete bends had been used in the project. The basis of the district's cause of action was readily discoverable within the 2-year statute of limitations period, and we, therefore, conclude that the district court properly concluded that the "discovery exception" to the statute of limitations was not applicable in this case and that the Court of Appeals' reversal of that ruling was error.

*Fraudulent Concealment.*

The district court also rejected the district's contention that the doctrine of fraudulent concealment was applicable in the instant case. According to the district, application of the doctrine of fraudulent concealment would prevent Baker and Smith from asserting the statute of limitations. In view of its reversal and remand, the Court of Appeals did not address in detail the merits of the district's contention that the doctrine of fraudulent concealment applied, but did conclude that the district was not precluded from relying on the doctrine of fraudulent concealment upon remand.

[10] The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence. *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997). In the present case, the district court rejected the district's assertion that the doctrine of fraudulent concealment applied to the case because the district court found that within the 2-year period of the alleged negligent act or omission, the district had in fact discovered information that would, as a matter of law, reasonably have led to knowledge of the facts giving rise to the district's cause of action.

Because the Court of Appeals held there was a question of material fact as to whether the district was placed on inquiry

after finding the first leak in 1994, the Court of Appeals reasoned that the district was not necessarily precluded from relying upon the doctrine of fraudulent concealment upon remand. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 8 Neb. App. 1001, 606 N.W.2d 826 (2000). The Court of Appeals found it unnecessary to further address the elements of fraudulent concealment in order to dispose of the appeal before it. *Id.*

We agree with the district court's conclusion, based on the undisputed fact that the district discovered the improperly constructed joint and thus could reasonably have learned of its cause of action within the limitations period and that, therefore, the doctrine of fraudulent concealment was inapplicable in the instant case. The Court of Appeals erred in reversing the district court's conclusion in this regard.

## CONCLUSION

We conclude that the evidence before the district court on the motion for summary judgment established that within the 2-year period of limitations, the district knew facts such that it could reasonably have discovered its cause of action against Baker and Smith. The district court did not err in concluding that the discovery exception to the statute of limitations and the doctrine of fraudulent concealment were inapplicable to this case and in, therefore, sustaining Baker and Smith's motion for summary judgment. The Court of Appeals erred in reversing these rulings. Accordingly, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to enter an order affirming the district court's grant of summary judgment in favor of Baker and Smith.

REVERSED AND REMANDED WITH DIRECTIONS.

# HERBERT WAIT ET AL., APPELLANTS AND CROSS-APPELLEES, V. LYNDALL CORNETTE, PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD P. WAIT, APPELLEE AND CROSS-APPELLANT.

612 N.W.2d 905

Filed June 30, 2000. No. S-99-126.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Trusts: Conveyances: Presumptions: Intent: Words and Phrases.** A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties; the intention of the resulting trust is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
5. **Trusts: Property: Consideration.** Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made.
6. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
7. ___: ___: ___: ___. A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.
8. ___: ___: ___: ___. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title.
9. **Trusts: Statute of Frauds.** Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds, and resulting and constructive trusts fall within the exception.
10. **Limitations of Actions: Real Estate.** Parties are given 10 years after a cause of action accrues to make a claim for real estate.
11. **Trusts: Limitations of Actions.** The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates the trust.

12. ___: ___. In the case of a constructive or implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his or her rights; not from the time when demand is made on the trustee, or the trust is repudiated by the trustee, for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion. The rule is otherwise when the trust grows out of a consensual arrangement. In the latter case, the statute does not begin to run until there has been a repudiation of the trust.
13. **Pleadings: Appeal and Error.** Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal.
14. **Appeal and Error.** An appellate court is not required to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Affirmed.

Robert W. Mullin, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellants.

Steven W. Olsen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

This is an appeal from an order of summary judgment entered by the district court in favor of Lyndall Cornette, personal representative of the estate of Edward P. Wait, on the basis of the statute of limitations and laches. Herbert Wait, Elna Sampy, Madeline Bedient, Vernon Wambaugh, Louise Bakka, Ilo Fosket, Raymond Boren, Sharon D'Loughy, Rick Henderson, Susan Magnuson, Donald Ottoway, Terri Braun, Winona Carlson, Betty Sullivan, Dick Moscrip, Bill Moscrip, Bob Moscrip, Mary Edwards, Rex Moscrip, and Max Moscrip appeal, and Cornette cross-appeals. On our own motion, we removed the matter to our

docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## BACKGROUND

On July 23, 1928, Minnie S. Wait purchased a farm/ranch for $21,600. It is referred to by family members as the "home place." The money to purchase the home place came from cash in a trust Minnie had inherited from her mother's estate. That trust gave Minnie a life estate in the money and gave Minnie's children the remainder interest in the money. When Minnie purchased the home place, she had nine children: Gladys C. Wambaugh, Ruth H. Boren, Frankie M. Ottaway, Elna, Edward, Albert Wait, Vera Moscrip, Madeline, and Herbert. At the time of the transfer of principal from the trust to Minnie for the purpose of purchasing the home place, there was a family agreement created wherein the trust money could be used to purchase the home place and in return, upon Minnie's death, the home place would be divided equally among the nine children. It was also agreed among the family members that as each child reached the age of 21, he or she would sign a release to the trustees that had held the money in trust. When the home place was purchased, some of the children were 21 years or older and others were not. Five of the nine releases have been located and appear in the record. The releases transferred the children's complete interest in the money to their mother, Minnie.

Ownership in the home place was held by Minnie, and the home place was operated by the family until December 30, 1954. At that time, Minnie transferred the home place by warranty deed to her son, Edward, for $36,000. Minnie's children did not consent to the transfer nor did they know that it took place until after it occurred. There is some evidence that after the transfer of the home place to Edward, Minnie's children were led to believe by Edward that he was to have the home place for his lifetime and that upon his death, Minnie's children and their heirs would each get a one-ninth share of the home place. However, this arrangement is contrary to the written instruments (the 1928 deed to Minnie, the releases signed by the children, and the 1954 deed to Edward), all of which are absolute and describe no such limitation or trust.

Minnie died on October 25, 1964. Minnie's estate was probated, and a decree of distribution was issued on July 13, 1965. Minnie's heirs were her nine surviving children. No mention of the home place was made in the probate of Minnie's estate. At the time of Minnie's death, Edward was still title owner of the home place. Edward died on February 28, 1997. Six of Minnie's children are now deceased, leaving heirs. The three living children (Madeline, Elna, and Herbert) and the heirs of the six deceased children are the appellants and cross-appellees (appellants) in this case. Cornette, Edward's stepdaughter, is the personal representative of Edward's estate and the appellee and cross-appellant (appellee) in this case.

Appellants filed an amended petition to recover their interest in the home place on August 24, 1998, alleging that a resulting trust was created in 1928 when Minnie purchased the home place because the home place was purchased in substantial part by Minnie's children's interest in the trust of Minnie's mother. The amended petition also alleged that a constructive trust was created when the home place was transferred to Edward in 1954 because Edward obtained title to the home place by fraud, misrepresentation, or an abuse of an influential or confidential relationship.

Appellee motioned for summary judgment, which the trial court sustained. The trial court found that appellants were correct in the assertion that there are genuine issues of fact about whether they proved by clear and convincing evidence the existence of a resulting trust when Minnie purchased the home place and the continuation of that resulting trust and establishment of a constructive trust when that same home place was purchased from Minnie by Edward. However, the trial court found that those events occurred in 1928 and 1954, respectively, and that the affirmative defenses of the statute of limitations and laches barred appellants from pursuing their claims.

## ASSIGNMENTS OF ERROR

Appellants assign that the trial court erred in (1) finding that a constructive trust cannot be a consensual trust; (2) determining that the cause of action accrued at the time of the deed to Edward in 1954 and not at the time of his repudiation of the trust on his

death in 1997; (3) determining as a matter of law that appellants' burden included a showing that they, or some of them, consented to the lifetime ownership and use by Edward prior to the deed to Edward in 1954; and (4) finding that "[i]f Edward got the home place by promising that his brothers and sisters would share it upon his death, that doesn't mean the trust was changed by consent. It just means he got that deed by a false promise."

Appellee assigns that the trial court erred in (1) not granting appellee's motion for summary judgment as to the creation of a resulting and constructive trust, (2) finding that there were facts sufficient to make a claim for a resulting trust, (3) finding that there were facts sufficient to claim a constructive trust, and (4) failing to find that appellants' claims were barred by the statute of frauds.

## SCOPE OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Callahan v. Washington Nat. Ins. Co., ante* p. 145, 608 N.W.2d 592 (2000); *Schrader v. Farmers Mut. Ins. Co., ante* p. 87, 608 N.W.2d 194 (2000). 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. *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

[3] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000); *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999).

## ANALYSIS

The trial court found that appellants' claims were barred by the statute of limitations and the doctrine of laches. In order to

analyze the statute of limitations question within the framework of this case, it is also necessary to analyze resulting trusts and constructive trusts and, if a constructive trust was formed, whether or not the constructive trust arose out of a consensual arrangement, as all of these bear on the issue of when the statute of limitations began to run.

RESULTING TRUST

[4,5] Appellee argues that there are not sufficient facts to make a claim that a resulting trust was created when Minnie purchased the home place in 1928. A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties; the intention of the resulting trust is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Superior Hybrids Co. v. Carmichael*, 214 Neb. 384, 333 N.W.2d 911 (1983). Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made. *Brtek v. Cihal, supra*; *Superior Hybrids Co. v. Carmichael, supra.*

The evidence indicates that the money from the trust of Minnie's mother, of which Minnie's children were beneficiaries, was used to buy the home place. The three living children of Minnie all testified to this effect. The record also contains letters written in 1928 by three of Minnie's daughters, in which they corresponded about the use of the trust money to purchase the home place. The evidence also indicates that when each of Minnie's children turned 21 years of age, they were to sign a document approving of the transaction and releasing the trustees from liability. Five of the documents signed by Minnie's children are contained in the record.

The evidence also indicates that in buying the home place with the money from the trust of Minnie's mother, there was a family agreement that upon the death of Minnie, each of the nine children would receive one quarter section from the nine quarter sections making up the home place. The evidence raises genuine issues of fact as to the existence of a resulting trust when Minnie purchased the home place in 1928.

## CONSTRUCTIVE TRUST

[6] Appellee also contends that the trial court erred in finding that there were sufficient facts to make a claim that a constructive trust was established when Edward got title to the home place in 1954. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998); *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997).

[7] A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof. *Hanigan v. Trumble, supra.*

[8] A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title. *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978).

Appellants' amended petition alleges that a constructive trust arose in 1954, when the home place was transferred to Edward, because Edward obtained title to the home place "by fraud, misrepresentation or an abuse of an influential or confidential relationship that he had with his mother and father, Minnie S. Wait and John H. Wait and the family members whose money went to the purchase of the 'Home Place.' " There is evidence to indicate that at the time Minnie transferred title to Edward, she was ill and not thinking well, Edward had considerable influence over her, and Edward told his siblings that the home place would ultimately go to them upon Edward's death. These facts raise the issue that Edward acquired the property either by fraud, undue influence, or abuse of a confidential relationship, which would support a claim to establish a constructive trust.

STATUTE OF FRAUDS

Appellee assigns as error that the statute of frauds bars appellants' claims. Neb. Rev. Stat. § 36-103 (Reissue 1998) is the statute of frauds which states:

> No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

[9] We have held that trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds and that resulting and constructive trusts fall within the exception. *Light v. Ash*, 174 Neb. 44, 115 N.W.2d 903 (1962). Because we determine that there are material disputed facts that establish a resulting trust and a constructive trust, appellants' claims are not barred by the statute of frauds.

STATUTE OF LIMITATIONS

Appellants contend that the trial court erred in determining that their cause of action accrued in 1954, when the home place was transferred to Edward, rather than upon Edward's death in 1997.

In regard to the resulting trust that may have been established in 1928, the resulting trust continued until 1954 when Minnie transferred the home place to Edward. At that time, Minnie repudiated the resulting trust by transferring the home place to Edward because she was no longer holding the home place for her life with the intention of transferring it to her children upon her death.

[10,11] Parties are given 10 years after a cause of action accrues to make a claim for real estate. See Neb. Rev. Stat. § 25-202 (Reissue 1995). The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates the trust. *Jirka v. Prior*, 196 Neb. 416, 243 N.W.2d 754 (1976).

The 1954 transfer by Minnie to Edward was a repudiation of the resulting trust. Therefore, the cause of action based on the

resulting trust accrued on December 30, 1954, when the home place was transferred to Edward. The 10-year statute of limitations on the resulting trust has expired.

[12] In the case of a constructive or implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his or her rights; not from the time when demand is made on the trustee, or the trust is repudiated by the trustee, for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion. *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978); *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945). The rule is otherwise when the trust grows out of a consensual arrangement. In the latter case, the statute does not begin to run until there has been a repudiation of the trust. *Fleury v. Chrisman, supra.*

The trial court found that if a constructive trust arose in 1954, it would be one that arose on account of a wrong, rather than on account of a consensual arrangement. Therefore, it found that the cause of action on the constructive trust accrued at the time it was created, which was in 1954, when the home place was transferred to Edward. Appellants contend that the cause of action did not accrue until Edward's repudiation of the trust upon his death on February 28, 1997. Under *Fleury v. Chrisman, supra*, in order for a cause of action based on a constructive trust to accrue at the time of repudiation, the constructive trust must be one that arose out of a consensual arrangement.

Appellants assign that the trial court erred in finding that a constructive trust cannot be a consensual trust. This is not what the trial court found. Rather, the trial court found that in the case at bar, there was no evidence of a trust formed by a consensual arrangement when Edward received title to the home place in 1954. The trial court found that if a constructive trust was established when Edward took title to the home place, based on the evidence, it would have to be a trust established on account of

an alleged wrong committed by Edward, rather than a trust established by consent.

[13] Appellants have argued to this court that the 1954 transfer to Edward created a constructive trust that grew out of a consensual arrangement. However, appellants' only allegation in their amended petition as to the creation of a constructive trust was that a constructive trust was created because Edward obtained title to the home place "by fraud, misrepresentation or an abuse of an influential or confidential relationship." The amended petition does not allege that the 1954 transfer created a constructive trust by consent. Appellants apparently now attempt to assert this theory due to the trial court's conclusion that a cause of action does not accrue on a constructive trust that arises out of a consensual arrangement until the time of repudiation. Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994).

Even if a consensual arrangement theory had been raised before the trial court, the evidence does not support it. Appellants admit that there is no proof that Edward's siblings consented to the transfer of the home place in advance of the 1954 deed to Edward. However, they contend that the consent of Edward's siblings can be inferred from the fact that the siblings took no action to challenge Edward's ownership of the home place for his lifetime.

Assuming without deciding that consent could have occurred after the transfer to Edward, we find that there is no evidence that Edward's siblings ever consented to the transfer of the home place to Edward. Rather, the evidence indicates that upon learning about the transfer, Edward's siblings were surprised and upset about the transfer. However, they did not confront Edward or Minnie, but, instead, chose to remain silent. Under the facts of this case, their silence does not indicate their consent because the evidence shows they were upset about the transfer to Edward. Rather, the silence of Edward's siblings and their failure to take any action to challenge the transfer to Edward indicates their failure to assert their rights.

Therefore, if a constructive trust was established in 1954, it would be one that arose out of a wrong, not one that arose out of a consensual arrangement. Appellants' cause of action based on a constructive trust accrued when the trust relation was created. The trust relation was created in 1954, when the home place was transferred to Edward. The trial court did not err in concluding that the cause of action based on the constructive trust accrued in 1954, when the home place was transferred to Edward.

[14] We conclude that the trial court was correct in granting appellee's motion for summary judgment on the basis of the statute of limitations. This conclusion is dispositive of the case. We do not address the other assignments of error raised by the parties, as an appellate court is not required to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert, ante* p. 160, 608 N.W.2d 588 (2000).

## CONCLUSION

There are genuine issues of fact as to whether a resulting trust was created when Minnie purchased the home place in 1928. There are also genuine issues of fact as to whether a constructive trust was established when the same home place was transferred from Minnie to Edward in 1954. However, appellants' claims are barred by the statute of limitations.

AFFIRMED.

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# THE AIRPORT AUTHORITY OF THE VILLAGE OF GREELEY, NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLEE, V. MARVIN W. AND MARY C. DUGAN, APPELLANTS.

612 N.W.2d 913

Filed June 30, 2000. No. S-99-191.

1. **Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

4. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
5. ___: ___. An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered.
6. ___: ___. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right.
7. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Appeal from the District Court for Greeley County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Greeley County, ALAN L. BRODBECK, Judge. Judgment of District Court reversed, and cause remanded with directions.

Steven M. Curry, of Sampson, Curry & Hummel, P.C., for appellants.

William J. Panec for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Marvin W. and Mary C. Dugan appeal from an order of the district court for Greeley County which denied their application for an injunction and granted a writ of assistance to the Airport Authority of the Village of Greeley, Nebraska.

## SCOPE OF REVIEW

[1] An action for an injunction sounds in equity. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[2] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

## FACTS

The Greeley Airport Authority (hereinafter referred to as "former airport authority") was created by the village of Greeley on July 20, 1971. In 1991, the former airport authority instituted

condemnation proceedings to enlarge the municipal airport. Part of this expansion included the condemnation of real estate located in Section 2, Township 18 North, Range 11 West of the 6th P.M., Greeley County, Nebraska. This property was owned by the Dugans, who refused to sell the land to the former airport authority. The former airport authority then attempted to obtain the real estate through condemnation.

In July 1994, Marvin Dugan petitioned the Greeley County District Court, alleging that the former airport authority was no longer a legal entity and should be dissolved. In support of his position, Dugan relied upon Neb. Rev. Stat. § 3-502 (Supp. 1971), which provided that an airport authority's board and its corporate existence should continue only for a period of 20 years from the date of appointment of the members and thereafter until all its liabilities have been met and its bonds have been paid in full or have otherwise been discharged.

The district court denied the relief that Marvin Dugan sought in his petition. However, in an unpublished opinion filed October 29, 1996, the Nebraska Court of Appeals reversed on the basis that the former airport authority had failed to prove its continuing corporate existence after May 10, 1994, which was the point 20 years after its inception at which the former airport authority had no outstanding liabilities that would justify its continued existence. See *Dugan v. Greeley Airport Auth.*, 96 NCA No. 42, case No. A-95-352 (not designated for permanent publication).

In its continuing attempts to expand the Greeley Municipal Airport, the board of trustees of the village of Greeley "activated" the former airport authority on December 3, 1996. The newly activated airport authority became known as the Airport Authority of the Village of Greeley, Nebraska (hereinafter referred to as "new airport authority"). The new airport authority board approved condemnation proceedings on June 3, 1997. The board of trustees of the village of Greeley approved the new condemnation proceedings on June 25.

On October 23, 1997, the new airport authority filed a petition for appointment of appraisers to assess the damages which the Dugans would sustain by reason of the condemnation proceedings. The same day, the county court for Greeley County

appointed three appraisers for purposes of assessing damages which the Dugans would sustain by reason of the appropriation of the property and the related easements. The court also notified the Dugans that the petition for appointment of appraisers had been granted. The Dugans subsequently moved to dismiss, alleging that the new airport authority had failed to comply with chapter 25, article 25, of the Nebraska Revised Statutes by neglecting to give notice of its intention to acquire the real estate at least 45 days prior to beginning the negotiations; failed to hold a public meeting on the proposed acquisition at least 30 days prior to the negotiations with the Dugans; and failed to give proper notice of the hearing as required by law. The court denied the motion.

The return filed by the appraisers on February 19, 1998, concluded that the damages sustained as a result of the appropriation of title to the property and easements or any interest therein would amount to $55,551.50. This amount was calculated by multiplying 157.29 acres by $350 and then adding $500 for the easements.

On March 2, 1998, the Dugans appealed the assessment of damages to the district court for Greeley County. On appeal, the Dugans' first cause of action alleged, inter alia, that the new airport authority failed to comply with the provisions of chapter 25, article 25, in that it (1) failed to give notice to the Dugans of its intention to acquire the real estate at least 45 days prior to the beginning negotiation for such acquisition, (2) failed to hold a public meeting on the proposed acquisition at least 30 days prior to negotiation and give proper notice thereof, and (3) failed to attempt to negotiate with the Dugans prior to filing its petition in the county court. The Dugans' second cause of action alleged that the award of damages by the appraisers was not just compensation for the taking of their property. The Dugans requested that the new airport authority be enjoined from entering upon their land or from acquiring any interest in the property as the result of the actions and, in the alternative, for judgment in the amount of actual damages sustained in the taking, reasonable attorney fees, and costs in the event that the condemnation was allowed.

The Dugans subsequently filed an application for an injunction, alleging that the actions of the new airport authority were

without legal authority for the reasons that it had failed to comply with the provisions of chapter 25, article 25, and that it failed to give proper notice of the hearings, as required by Neb. Rev. Stat. § 25-2504 (Reissue 1995). The Dugans alleged an illegal taking of the property by the new airport authority which would result in irreparable injury and damage to the Dugans' right in the property.

On June 9, 1998, the new airport authority petitioned for writ of assistance in accordance with the provisions of Neb. Rev. Stat. § 76-711 (Reissue 1996). The airport authority requested that it be placed in possession of the land described in the petition and that an order be entered directing the Dugans to peaceably give up possession of the area condemned and to in no way interfere with, hinder, or prevent the airport authority from entering upon the land.

The district court denied the injunction and granted the writ of assistance. The court concluded that "[d]uring the period from May 10, 1994, to the date the mandate was returned by the Court of Appeals to this Court, some time after October 29, 1997 [sic]," the former airport authority was a de facto body politic and corporate. The court concluded therefore that all acts of the airport authority during that time were totally valid and that the notice given was sufficient to comply with the provisions of chapter 25, article 25. The Dugans timely appealed.

## ASSIGNMENTS OF ERROR

The Dugans assert that the district court erred in overruling their request for an injunction and in granting a writ of assistance to the new airport authority.

## ANALYSIS

The following issues are relevant to our consideration: whether the order denying the injunction and granting the writ of assistance is a final, appealable order; whether the new airport authority must bring the condemnation action in the name of the village of Greeley; whether the actions of the former airport authority apply to the subsequent condemnation action; and whether the new airport authority complied with the requirements of chapter 25, article 25.

[3-5] We first consider whether the order which granted the writ of assistance and denied the injunction is a final, appealable order. 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. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000). A party may appeal from a court's order only if the decision is a final, appealable order. *Raney v. Blecha*, 258 Neb. 731, 605 N.W.2d 449 (2000). An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered. *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999). The district court granted the writ of assistance, but it has not yet determined the merits of the Dugans' appeal.

[6] When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). The district court's order placed the new airport authority in possession of the property at issue. In *Monarch Chemical Works, Inc. v. City of Omaha*, 203 Neb. 33, 277 N.W.2d 423 (1979), the owner of an industrial property filed an action to enjoin condemnation proceedings allegedly instituted under the authority of a community development law. The district court permanently enjoined the condemnation proceedings, and the city appealed. We held that an injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain and that proof of the attempt to so deprive a private citizen of his or her property made the resulting damage irreparable and the legal remedy inadequate.

In *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967), the city instituted condemnation proceedings to take restrictive easements over the plaintiffs' land, and the plaintiffs sought to enjoin the condemnation proceedings. In addressing the city's argument that an injunction was not a proper remedy, we stated that "[t]his court is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain." *Id.* at 217, 147 N.W.2d at 788.

In *Greater Omaha Realty Co.*, the city petitioned to condemn property which was the subject of proposed redevelopment, and the property owners brought separate actions for declaratory judgment that the takings were unconstitutional. In the declaratory judgment actions, the trial court granted summary judgment in favor of the city and other defendants, and the property owners appealed. During the appeal, construction on the property continued. The property owners did not request a stay of condemnation proceedings or a temporary injunction pending the outcome of the appeal. At the time the case was argued before this court, construction of the three-story building had been completed, and the city had taken possession of the property. We held that because of the equitable relief that was sought, the appeals were moot. The takings that the property owners claimed were unconstitutional had already occurred, and therefore, equitable relief was not available because equity would not seek to declare unlawful an action that had already been completed.

Here, the Dugans have requested equitable relief before the project and construction have been commenced. We therefore conclude that the denial of a temporary injunction in the condemnation proceeding is an order that affects a substantial right and determines the action with regard to the request for equitable relief. The order of the district court was final and therefore appealable.

We next consider whether the district court erred in denying the application for an injunction. The Dugans assert that they are entitled to an injunction because the new airport authority failed to comply with the provisions of chapter 25, article 25, by neglecting to give notice of its intention to acquire the real estate at least 45 days prior to beginning the negotiations; failed to hold a public meeting on the proposed acquisition at least 30 days prior to the negotiations with the Dugans; and failed to give proper notice of the hearing as required by law. The Dugans allege that they will suffer irreparable injury from the taking of the real estate by the airport authority.

Section 3-502 (Reissue 1997) provides that any city may create an airport authority to be managed and controlled by a board, which board, when and if appointed, shall have full and

exclusive jurisdiction and control over all facilities owned or thereafter acquired. The existence of an airport authority is dependent upon the city which created it, and it is an agency of that city. See *Airport Authority of City of Millard v. City of Omaha*, 185 Neb. 623, 177 N.W.2d 603 (1970). Municipal airport authorities are authorized to acquire property by condemnation for establishing airports. See *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976). Every airport authority has the power to sue and be sued and, pursuant to Neb. Rev. Stat. §§ 3-503 (Reissue 1997) and 3-504(4) (Cum. Supp. 1998), has authority to acquire in the name of the city, by purchase or condemnation, real property or rights or easements therein necessary or convenient for its corporate purposes.

There are certain notice requirements that must be satisfied when private property is acquired for public use. Any agency which proposes to acquire private property for a public purpose shall give notice of such proposed acquisition at least 45 days before beginning negotiations for such acquisition. The notice shall be directed to each owner of property over or across which any right or interest is to be acquired and shall be deemed properly given if delivered personally or mailed by registered or certified mail addressed to the property owner and to the address shown on the tax records in the office of the county treasurer. Neb. Rev. Stat. § 25-2503 (Reissue 1995). In addition, § 25-2504 provides:

> After giving notice pursuant to section 25-2503, the agency shall hold a public hearing on the proposed project and acquisition at least thirty days before beginning negotiations for such acquisition. . . .
>
> At the hearing, the agency shall explain the nature of and necessity for the project for which it seeks to acquire property, the reasons for selecting the particular location or route, the right of each owner of property to be represented by an attorney and to negotiate and accept or reject the offer of damages which will be sustained by the proposed acquisition, and the right to require that such damages be determined pursuant to the procedures for acquisition by eminent domain.

The purpose of the hearing provided for in the uniform procedure for acquiring property for public use is merely to explain the taking and to inform landowners of their procedural rights. See *Seward County Board of Commissioners v. City of Seward, supra.*

In denying the injunction and granting the writ of assistance, the district court determined that notice of the airport project and the intended acquisition of land owned by the Dugans had been satisfied by a letter to the Dugans from the former airport authority dated March 17, 1994. The court further found that a legal notice published in "The Greeley Citizen," stating the time, date, and place of the special meeting to be held on April 18, was sufficient to comply with § 25-2504. The court concluded that the new airport authority had the benefit of the actions taken by the former airport authority.

An action for an injunction sounds in equity. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). Therefore, we will independently consider the findings of the district court.

[7] Sections 3-503 and 3-504(4) provide that the airport authority may acquire real property in the name of the city in which it was established. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Philpot v. Aguglia, ante* p. 573, 611 N.W.2d 93 (2000). In *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 267-68, 242 N.W.2d 849, 851 (1976), the eminent domain proceedings were instituted in an action entitled "City of Seward, Nebraska, for and on behalf of the Seward Airport Authority, condemners, v. Edward W. Brinkmeyer, Jr. . . . condemnees." We conclude that the action in this case should have been commenced by the village of Greeley for and on behalf of the new airport authority.

Next, we address whether there was proper and sufficient notice regarding the condemnation. The notices given by the former airport authority do not apply to the notices required to be given by the new airport authority. The Court of Appeals

determined that the former airport authority ceased its existence after May 10, 1994. See *Dugan v. Greeley Airport Auth.*, 96 NCA No. 42, case No. A-95-352 (not designated for permanent publication). Therefore, after the decision of the Court of Appeals was filed on October 29, 1996, no activity could be attributed to the former airport authority.

The parties agree that the new airport authority was created by resolution of the village board of trustees on December 3, 1996. Although the record does not establish whether the new airport authority was properly created, assuming without deciding that this airport authority was properly created, we proceed to address whether it complied with the notice requirements of chapter 25, article 25.

No legal action can be maintained by a corporation after it has been dissolved and no longer exists as a corporate entity. See *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 322 N.W.2d 373 (1982). The new airport authority was required to comply with the notice requirements set forth in chapter 25, article 25. The notices given by the former airport authority were not valid as to the actions of the new airport authority. Therefore, the district court erred in determining that the notice requirements had been satisfied.

The district court should have granted the Dugans' request for an injunction.

> When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act . . . .

Neb. Rev. Stat. § 25-1063 (Reissue 1995). We conclude that the underlying action should have been brought in the name of the village of Greeley for or on behalf of the new airport authority and

that the new airport authority, if duly created, has not complied with the notice requirements set forth in §§ 25-2503 and 25-2504.

For the reasons set forth herein, we conclude that the actions by the new airport authority constitute an unlawful taking of the Dugans' property. We therefore reverse the judgment of the district court which granted a writ of assistance and denied the temporary injunction. Since the action has not been brought in the name of the village of Greeley as required by law and proper notice has not been given as required by chapter 25, article 25, of the Nebraska Revised Statutes, such condemnation proceedings are fatally defective. We therefore remand the cause with directions that the district court enter an order reversing the order of condemnation entered by the county court and directing the county court to dismiss the proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

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JOHN MORRIS, APPELLEE AND CROSS-APPELLANT, V.
ROCHESTER MIDLAND CORPORATION,
APPELLANT AND CROSS-APPELLEE.

612 N.W.2d 921

Filed June 30, 2000. No. S-99-337.

1. **Directed Verdict: Appeal and Error.** With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. **Jury Instructions: Appeal and Error.** On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.
3. ___: ___. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
4. **Employer and Employee: Wages: Penalties and Forfeitures.** Under Neb. Rev. Stat. § 48-1232 (Reissue 1998), it is discretionary with the court whether to order the employer to pay to the common school fund an amount equal to the judgment.
5. ___: ___: ___. Neb. Rev. Stat. § 48-1232 (Reissue 1998) should not be invoked where there is a reasonable dispute as to the fact that wages are owed or as to the amount of the wages.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

D.C. Bradford, of Bradford, Coenen & Welsh, for appellant.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellee.

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

CONNOLLY, J.

John Morris brought suit under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1998), against his former employer, Rochester Midland Corporation (Rochester), to recover commissions allegedly due for contracts on file at the time of his termination of employment. The district court overruled Rochester's motion for directed verdict, and the jury returned a verdict for Morris. We affirm.

## BACKGROUND

Morris worked as an industrial chemical salesperson for Rochester in its water energy division. He earned a commission of 40 percent of the gross profit from his sales. Morris solicited contracts with schools, hospitals, large food processing and manufacturing companies, and other entities in need of water treatment. His duties entailed calling on prospective customers, testing water samples, and determining their chemical needs.

Morris had two methods of selling chemicals. An ordinary sale involved the sale of chemicals by the drum or by the package, for which Morris would be paid a commission when the chemicals were shipped. Alternatively, a "team contract" required Morris to determine the customers' needs for a 1-, 3-, or 5-year period. In the case of a team contract, Morris would determine the appropriate amount of chemicals for the contract period. Rochester and the customer would then commit to a long-term contract for a set price. The customer would be billed on a monthly, quarterly, or semiannual basis. Chemicals would be delivered to the customer as needed, rather than on a corresponding monthly, quarterly, or semiannual basis. If a customer needed more chemicals during the life of the contract than Morris had projected, the extra chemicals would be provided

without further charge. Under a team contract, Morris received his commission when the customer paid, rather than at the time of shipment.

At the time of Morris' termination of employment, he had 11 accounts on which he had not been paid commission. Of those 11 accounts, 9 were team contracts, which committed Rochester to future delivery of chemicals for the respective contract periods. At trial, Morris argued that he was entitled to full commission on all 11 accounts. Rochester argued that Morris was only entitled to commission on chemicals that had been shipped at the time of his termination of employment. The jury found in favor of Morris and awarded him damages in the amount of $142,797.

## ASSIGNMENTS OF ERROR

Rochester assigns as error the district court's failure to direct a verdict on the issue of Morris' right to commissions on future orders and inclusion of the term "and contracts" in jury instruction No. 7.

Morris assigns, on cross-appeal, the district court's error in failing to assess either an amount equal to the judgment or two times the amount of the judgment pursuant to § 48-1232.

## STANDARD OF REVIEW

[1] With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Ratigan v. K.D.L., Inc.*, *ante* p. 283, 609 N.W.2d 376 (2000).

## ANALYSIS

### MOTION FOR DIRECTED VERDICT

Morris brought suit against Rochester under the Nebraska Wage Payment and Collection Act, which provides in part that "[a]n employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court." § 48-1231. Under § 48-1229(4), "[w]ages shall include

commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed." Because Morris worked for Rochester as a straight commission salesperson, the main issue at trial was whether he had "orders on file" at the time of his termination of employment.

Whether or not there were orders on file at the time of Morris' termination of employment was a question of fact. In light of the conflicting evidence that the parties introduced at trial, the district court properly submitted the issue to the jury. In particular, Morris introduced evidence that an agreement between Rochester and the Omaha Public Schools (OPS) was for a period of 5 years. On direct, Morris testified that the contract with OPS was for 5 years. In addition, exhibit 8, an internal Rochester document, refers to the agreement with OPS as a "5 Year Water Energy Contract." Exhibit 9, an internal Rochester newsletter, mentions Morris' achievement on "the contract with a major school district for their Water Energy needs, getting a five-year agreement worth over $700,000." In addition, Morris read into evidence the deposition testimony of Ronald A. Cappello, Rochester's regional manager, in which Cappello referred to the OPS agreement as a 5-year contract. Morris also read into evidence the deposition testimony of Michael Gerrard Carlin, Rochester's regional distributor manager, in which Carlin admitted that Rochester considered the OPS agreement to be a 5-year contract.

In contrast, Rochester introduced evidence to show that the agreement with OPS was for 1 year with a renewal option, rather than for 5 years. Exhibit 7, the invitation to Rochester to bid for OPS' business, states that the "[c]ontract shall be for a period of one year at a fixed price with four, one-year renewals on the agreement of both parties."

The invitation to bid, however, did not constitute a written contract between Rochester and OPS. Rather, the invitation to bid was issued by OPS to all water treatment companies that wished to bid on OPS' water treatment specifications. The record does not contain a written response to OPS' invitation to bid. Morris testified, however, that OPS' invitation to bid and the bid that he turned in had some subtle differences. On cross-

examination, Morris explained that OPS' invitation to bid was used as a guideline, but it was not followed exactly.

In light of the foregoing evidence introduced by the parties, it is clear that reasonable minds could draw different conclusions as to whether there were "orders on file" at the time of Morris' termination of employment. See § 48-1229(4). We determine, therefore, that the district court did not err in overruling Rochester's motion for directed verdict. The issue of whether there were orders on file was a factual issue for the jury to decide. Rochester was not entitled to have the issue decided as a matter of law, and we conclude that the district court did not err in denying its motion for a directed verdict.

### Jury Instructions

Jury instruction No. 7 informed the jury in part that to recover, Morris had to prove by a greater weight of the evidence "[t]hat as of the date of the termination of this employment, there was due and owing to [Morris] from [Rochester] commissions on orders delivered and contracts and orders on file with [Rochester], no part of which has been paid." Rochester argues that in light of the statutory definition of "wages," the district court erred by including the language "and contracts" in jury instruction No. 7. See § 48-1229(4).

[2,3] On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Id.*

Even if inclusion of the term "and contracts" in instruction No. 7 had prejudicially harmed Rochester, an issue which we do not decide, instruction No. 10 contained language that was substantially similar to the contested language in instruction No. 7. Instruction No. 10 provided:

> A person who is employed as a sales representative and whose compensation is based on a commission on sales procured from customers is entitled to be paid commissions on all orders delivered and *all orders or contracts on*

> *file* with the employer at the time of termination of his employment, less any orders returned or cancelled at the time suit is filed.

(Emphasis supplied.)

However, Rochester neither assigned nor argued any error as to instruction No. 10. Therefore, any error by the district court in including the term "and contracts" in instruction No. 7 was harmless; the jury received substantially the same instruction in No. 10, which Rochester did not appeal.

### MORRIS' CROSS-APPEAL

On cross-appeal, Morris contends that the district court erred in failing to assess either an amount equal to the judgment or two times the amount of the judgment pursuant to § 48-1232. Section 48-1232 provides:

> If an employee establishes a claim and secures judgment on such claim under section 48-1231: (1) An amount equal to the judgment may be recovered from the employer; or (2) if the nonpayment of wages is found to be willful, an amount equal to two times the amount of unpaid wages shall be recovered from the employer. Any amount recovered pursuant to subdivision (1) or (2) of this section shall be placed in a fund to be distributed to the common schools of this state.

[4,5] We have previously held that under § 48-1232, it is discretionary with the court whether to order the employer to pay to the common school fund an amount equal to the judgment. *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988). Section 48-1232 should not be invoked where there is a reasonable dispute as to the fact that wages are owed or as to the amount of the wages. *Id.*

The district court correctly declined Morris' request to have Rochester pay an amount equal to or double the amount of the judgment. There were factual issues as to whether Morris had procured contracts and, if he had, whether those contracts constituted orders on file.

### CONCLUSION

The parties introduced conflicting evidence on issues of fact. Therefore, the district court did not err by overruling

Rochester's motion for summary judgment. If the district court erred by giving instruction No. 7, the error was harmless and not prejudicial. Finally, the district court did not abuse its discretion by denying Morris' request for requiring Rochester to pay under § 48-1232. Therefore, we affirm.

AFFIRMED.

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RANDALL E. LANGEMEIER, APPELLEE, V. URWILER OIL & FERTILIZER, INC., AND CARDINAL MART INC., APPELLANTS.

613 N.W.2d 435

Filed June 30, 2000. No. S-99-482.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
2. **Parties: Jurisdiction: Waiver.** The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
3. **Contracts: Real Estate: Specific Performance: Parties.** In an action seeking specific performance of a real estate purchase agreement, persons claiming title to the property which is the subject of the purchase agreement are indispensable parties.
4. **Parties.** When the determination of a controversy cannot be had without the presence of other parties, the trial court must order them to be brought in.

Appeal from the District Court for Cedar County: MAURICE REDMOND, Judge. Vacated and dismissed.

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

Vince Kirby for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Urwiler Oil & Fertilizer, Inc. (Urwiler Oil), and Cardinal Mart Inc. (collectively referred to as "defendants") appeal the order of the district court for Cedar County granting Randall E.

Langemeier, as seller, specific performance of a real estate purchase agreement and compelling defendants, as buyers, to comply with the terms of such purchase agreement. For the reasons set forth below, we vacate the decision of the district court and dismiss the appeal.

## STATEMENT OF FACTS

On June 27, 1995, Langemeier and Urwiler Oil entered into a purchase agreement for the following described real property:

> That part of Outlot One (1) of Second Addition to the City of Randolph, Cedar County, Nebraska, described as follows: Beginning at the Northwest corner of Block 2, Second Addition; Thence North 134 feet to the point of beginning; Thence East at right angles 162 feet; Thence South at right angles 18 feet; Thence East at right angles 150 feet; Thence North at right angles 230 feet to the South line of Federal Highway No. 20; Thence Southwesterly along the South line of Federal Highway No. 20; Thence to a point where the East line of Cedar Street in the City of Randolph, as extended North, intersects the South line of Federal Highway No. 20; Thence South along the East line of Cedar Street to the point of beginning, all in the City of Randolph, Cedar County, Nebraska.

Langemeier operated a convenience store on the foregoing described property, sometimes referred to as the "Mini Mart." The purchase agreement included all fixtures on the property together with all personal property "on premises on date of acceptance of [the purchase] agreement—list to be attached." The purchase agreement which appears in the record does not have attached to it a list identifying the personal property. The sale price was $125,000, with a $1,000 downpayment, leaving a purchase price balance of $124,000. The sale was conditioned on Langemeier's having marketable title, in fee simple, and Langemeier's conveyance of title to Urwiler Oil by warranty deed "free and clear of all liens, encumbrances or special taxes levied or assessed."

Pursuant to the purchase agreement, Langemeier agreed to furnish to Urwiler Oil, within 15 days from the date of acceptance of the purchase agreement, either a complete, certified

abstract of title or title insurance. Urwiler Oil agreed to deliver, 15 days thereafter, a copy of an attorney's opinion showing any defects in the title. Urwiler Oil further agreed under the purchase agreement to close the sale within 30 days of the delivery of the title abstract or title insurance, unless defects were found, or, in the event defects were found, within 10 days of the curing of such defects.

On June 19, 1995, a title insurance commitment was prepared on the subject property. The commitment listed several matters with regard to the title, summarized as follows:

(1) Langemeier and Vickie Langemeier were divorced on May 24, 1984, and Langemeier claimed to have been awarded the convenience store and the property on which it was situated in the divorce decree. The title insurance company required a quitclaim deed from Vickie Langemeier because the real property awarded to Langemeier in the Langemeiers' divorce decree was identified by only a general description and not by a legal description.

(2) On February 7, 1989, Rodney Zwygart had sued Langemeier, claiming to be Langemeier's business partner with an undivided one-half interest in the partnership's assets. In the lawsuit, Zwygart sought a division of partnership assets, which assets allegedly included the convenience store. The title insurance company refused to issue title insurance against the litigation, which litigation it considered an exception to title insurance because the litigation had not reached a judgment.

Counsel for Urwiler Oil received a copy of the title insurance commitment on or about June 20, 1995. No written attorney's opinion was sent to Langemeier by Urwiler Oil identifying title defects in the property that was the subject of the purchase agreement, although representatives of defendants testified that they had numerous conversations with Langemeier and his attorney about resolving the matters raised in the title insurance commitment, including the pending litigation case, Zwygart v. Langemeier, Cedar County District Court, docket No. 29, page 45, which matters they believed created clouds on the title.

On August 4, 1995, Zwygart filed a notice of lis pendens. The notice set forth that Zwygart claimed an interest in the real estate described in the notice, which interest was the subject of

the pending lawsuit between Zwygart and Langemeier. The notice contained a faulty legal description of the property which was the subject of the purchase agreement.

Cardinal Mart was incorporated as a Nebraska corporation on or about August 15, 1995. Of Cardinal Mart's three shareholders, two are also shareholders in Urwiler Oil. Cardinal Mart took possession of the real estate described in the purchase agreement on August 15 and began operating the convenience store. As of August 15, Langemeier ceased to operate or do business as the Mini Mart.

A closing on the purchase agreement was scheduled for August 18, 1995, but Langemeier did not appear at the closing because he understood it was cancelled due to the existing clouds on the title. Representatives of defendants, however, did appear at the scheduled closing. No closing took place on the purchase agreement on August 18 or subsequent thereto. In August and September, nominal payments were made by Cardinal Mart to Langemeier, which payments Cardinal Mart's representatives described as rent payments. Witnesses testified at trial that the parties continued to discuss the sale and the title matters during August, September, and October.

On October 17, 1995, defendants' counsel notified Langemeier by letter that defendants were rescinding their offer to purchase the property described in the purchase agreement. On November 22, counsel for defendants notified Langemeier that on November 22, defendants had terminated their day-to-day tenancy of the convenience store and had removed or assigned to Cardinal Mart all inventory.

On November 9, 1995, Langemeier filed his petition for specific performance of the purchase agreement against defendants. On December 1, 1998, and continuing on December 2, a bench trial was held on Langemeier's amended petition filed on March 11, 1996, together with Urwiler Oil's second amended answer to the petition, filed June 22, and Cardinal Mart's fourth amended answer to the petition, filed August 27, 1998.

Langemeier admitted at trial on December 1, 1998, that he no longer owned the property described in the purchase agreement, which is the subject of the instant action, and that the property was owned by his mother, Joann Langemeier. Langemeier testi-

fied, however, that he could carry out the terms of the purchase agreement and transfer title to the property the same day or the very next day. The record is unclear when Joann Langemeier acquired title to the property. Joann Langemeier was not a party to the case.

With respect to the divorce decree, Langemeier testified that on August 15, 1995, an order nunc pro tunc had been entered by the district court in the divorce action, which order identified the real property awarded to Langemeier under the divorce decree using legal descriptions, including the property on which the convenience store was located. The record suggests that the nunc pro tunc order may have been issued without notice to Vickie Langemeier.

With respect to the Zwygart litigation, Langemeier testified that the litigation was resolved in December 1995. The record in the instant appeal does not contain evidence other than Langemeier's testimony that the Zwygart lawsuit has been concluded.

Other witnesses testified that subsequent to the filing of the petition for specific performance, a federal tax lien and a judgment lien had been placed on the real estate that was the subject of the purchase agreement. The record further indicates that a mortgage on the real estate had been foreclosed and that the property had been sold. Before the sale was approved, however, Langemeier had redeemed the property from the foreclosure sale, evidently with funds supplied by his mother, Joann Langemeier.

On April 2, 1999, the district court made its docket entry, granting Langemeier specific performance as requested in his petition and ordering the parties to perform the purchase agreement as written. Defendants appeal.

## ASSIGNMENTS OF ERROR

On appeal, defendants have assigned two errors. Defendants claim the district court erred (1) in ordering specific performance of the purchase agreement and (2) in overruling defendants' motion to dismiss made at the conclusion of Langemeier's case. Because we resolve this appeal on the basis of the first assignment of error, we do not comment on defendants' second assignment of error.

## STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *Snowdon Farms v. Jones*, 8 Neb. App. 445, 595 N.W.2d 270 (1999).

## ANALYSIS

Langemeier, as seller, filed the instant case seeking to compel defendants' specific performance of the purchase agreement, by which action defendants would be ordered by judicial decree to purchase the property described in the purchase agreement from Langemeier and otherwise to comply with the terms of the purchase agreement. In their first assignment of error, defendants claim that the district court erred in ordering specific performance for numerous reasons, including that the district court was without jurisdiction to grant Langemeier the relief requested in his amended petition due to the absence of a necessary, indispensable party from the litigation. We agree with defendants that the district court erred in granting specific performance in this case in the absence of Joann Langemeier, titleholder of the subject property.

In reviewing the record, we note that Langemeier no longer owns the property which is the subject of the purchase agreement and that his mother, Joann Langemeier, now owns the subject property. Although Langemeier testified that he could still comply with the terms of the purchase agreement, Joann Langemeier, as the current owner of the property which is the subject of this specific performance action, has an interest in the real estate and is a necessary party in order for the district court to consider Langemeier's amended petition for specific performance.

[2] The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). See, also, *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

[3] With regard to necessary parties to a specific performance action, the following has been recognized:

> The fundamental rule that all persons whose rights will be directly affected by a decree in equity must . . . be joined as parties plaintiff or defendant in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy, governs the question of parties in suits for specific performance. All persons interested in the contract or the property involved in the suit, or whose interests therein may be affected by the decree, are necessary parties and should be made parties to the specific performance suit—otherwise, the court ordinarily will not enter a decree of specific performance.

71 Am. Jur. 2d *Specific Performance* § 189 at 242 (1973). See, also, *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982) (in specific performance action, persons claiming title to lands are indispensable parties).

In *James J. Parks Co. v. Lakin*, 206 Neb. 184, 292 N.W.2d 21 (1980), we considered the effect of the absence of necessary parties to a specific performance action in which the plaintiff sought an order directing the defendant to repurchase land. In *James J. Parks Co.*, the plaintiff filed an action seeking specific performance of a repurchase agreement. The plaintiff had purchased 303 acres of citrus grove land from the defendant, and under the repurchase agreement, the plaintiff could, at its election, require the defendant to repurchase the property upon 30 days' notice. During the time period between the execution of the repurchase agreement and the filing of the specific performance action, other parties had acquired interests in portions of the property subject to the repurchase agreement. The district court dismissed the plaintiff's action.

In affirming the district court's dismissal of the plaintiff's petition for specific performance in *James J. Parks Co.*, we stated that "[a] party seeking specific performance must show his right to the relief sought, including proof that he is ready, able, and willing to perform his obligations under the contract." 206 Neb. at 188, 292 N.W.2d at 24. We noted that under the record on appeal, the fact that others had acquired interests in

the property made unclear the extent of the plaintiff's interest in the property that was the subject of the repurchase agreement. We made the following further observations:

> An equitable right may not be properly asserted in an action unless all of the necessary parties have been made parties to the action. . . .
>
> An indispensable party is one who not only has an interest in the subject matter of the controversy, but who has an interest of such a nature that a final determination cannot be made without affecting his rights, or leaving the controversy in such condition that the final determination may be wholly inconsistent with equity and good conscience.

*Id.* at 188-89, 292 N.W.2d 24-25. See, similarly, *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984). We affirmed the district court's dismissal of the plaintiff's petition for specific performance in *James J. Parks Co.*, because we determined that based upon the evidence, there were indispensable parties who were not joined in the action, that these parties were not identified in the record, and that their identities and ownership interests were unknown, making an appellate order of joinder impossible.

[4] In the instant case, it is apparent that Joann Langemeier has an interest in the subject property. Since her identity is known, her absence from the litigation can be solved by entry of an order by the district court ordering her to be added as a party. See Neb. Rev. Stat. § 25-323 (Reissue 1995) (when determination of controversy cannot be had without presence of other parties, court must order them to be brought in). Defendants claim on appeal that there exist other parties with an interest in the subject property whose presence is required for a final determination of the subject matter of the action. We cannot determine from the record on appeal the validity of defendants' contention, and we, therefore, do not comment on it. Based on the foregoing, we vacate the order of the district court granting Langemeier specific performance and dismiss the appeal.

## CONCLUSION

In an action for specific performance of a real estate purchase agreement, it is fundamental that all persons with an interest in

the real estate that is the subject of the purchase agreement, whose rights to the real estate may be affected by the specific performance action, be made parties to the lawsuit. In the absence of an indispensable party, the district court is without jurisdiction to determine the controversy. For the reasons stated above, we vacate the order of the district court granting Langemeier specific performance and dismiss the appeal.

VACATED AND DISMISSED.

GERRARD, J., not participating.

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PAULA GAGNE, APPELLEE AND CROSS-APPELLANT, V. JAMES D. SEVERA, M.D., DOING BUSINESS AS OMAHA PSYCHIATRIC ASSOCIATES, APPELLANT AND CROSS-APPELLEE.

612 N.W.2d 500

Filed June 30, 2000. No. S-99-522.

1. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **Directed Verdict: Evidence: Appeal and Error.** With regard to 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 where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
4. **Breach of Contract: Damages.** One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
5. **Damages: Proof.** Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.
6. ___: ___. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
7. ___: ___. Damages need not be proved with mathematical certainty; however, damages cannot be established by evidence which is speculative and conjectural.
8. **Juries: Damages: Evidence.** It is the duty of the trial court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.

9. **Appeal and Error.** An appellate court is not obligated to engage in analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY and J. MICHAEL COFFEY, Judges. Reversed and remanded with directions to dismiss.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Angela L. Burmeister and Richard N. Berkshire, of Andersen, Berkshire, Lauritsen & Brower, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

GERRARD, J.

## INTRODUCTION

James D. Severa, a physician, doing business as Omaha Psychiatric Associates (OPA), appeals from a judgment, entered pursuant to a jury verdict, awarding Paula Gagne $15,184.42 in damages for breach of contract, and attorney fees in the amount of $12,500. Gagne has filed a cross-appeal. Severa claims that the district court should have granted his motion for a directed verdict. Because we conclude that Gagne failed to adduce sufficient proof of damages to allow the issue to go to the jury, we reverse the judgment of the district court and remand the cause with directions to dismiss Gagne's petition.

## FACTUAL AND PROCEDURAL BACKGROUND

Severa owns and is the sole proprietor of OPA, a firm that provides therapy, psychiatric care, counseling, psychology, and social work services. OPA contracts with psychiatrists, psychologists, and other mental health professionals to supply them with common office facilities, support staff, and billing services in connection with their practices. In return, the mental health professionals associate their practice with OPA and allow OPA to withhold a portion of their fees collected each month.

On February 23, 1989, Severa entered into an "Independent Contractor Agreement" with Gagne, a licensed psychologist, which provided that OPA would bill Gagne's clients; contact

insurance companies; collect the fees Gagne had earned; provide Gagne with office space, stationery, basic telephone service, "necessary clerical staff," an advertisement in the Omaha telephone directory yellow pages, and monthly statements of accounts; and after withholding OPA's share, remit the balance to Gagne on a monthly basis. The agreement also provided, in pertinent part:

> All billings for [Gagne] shall be prepared on [OPA] letterhead, with the designation in said billing as to the name of [Gagne] providing those services. All monies received, pursuant to such billings, shall be held by [OPA]. From the first $5,000 in gross fees collected for [Gagne], [OPA] shall be entitled to 30 percent thereof. Any fees collected above $5,000 during the month [OPA] shall be entitled to 25 percent thereof (with the exception of fees received through Nebraska welfare, which shall always be subject to a 35 percent payment), for the services [OPA] performs on behalf of [Gagne] as set forth in this agreement. Accordingly [OPA] shall deduct from the gross monthly fees received on behalf of [Gagne], the sum of 30 percent (or 35 percent as relevant) of said fees, and shall remit a check monthly for the gross proceeds less [Gagne's] fee to [OPA]. In addition, if [OPA] advance[s] any funds at any time during the month for special materials or items as requested by [Gagne], [OPA] shall be entitled to a further deduction from the gross proceeds in an amount sufficient to fully reimburse [OPA] for its advance made by reason of such special materials or items for [Gagne].

The term of the contract was for 6 months, after which either party could terminate the contract upon 30 days' written notice.

On April 1, 1993, Gagne gave Severa written notice of her intent to terminate her association with OPA as of May 1. Approximately 3 weeks before the end of her association with OPA, on April 8, Gagne requested and received from the business manager at OPA a summary of the outstanding balances on all of her patients' accounts, which revealed an outstanding balance of $16,154.56. At this time, Gagne decided to independently calculate the amounts due her from OPA.

After concluding that OPA owed her $15,354.42, Gagne filed the instant lawsuit in which she sought recovery for breach of contract, for lost profits, and for wages she claimed entitlement to under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 through 48-1232 (Reissue 1988), in addition to costs and attorney fees pursuant to the act. Severa denied the allegations in the petition and asserted that if the act was applicable, he was entitled to costs and reasonable attorney fees thereunder. The case proceeded to trial.

At trial, Gagne testified that the total of the charges she had submitted to OPA for billing was $227,060. Gagne reached this conclusion by reviewing her appointment book and then multiplying the number of sessions therein by the applicable rate at the time of those sessions. Gagne testified that she calculated these figures by referring to her appointment book because she considered the book to be the most accurate listing of which patients were seen at which rates. Gagne then explained that she submitted the entire amount of $227,060 to OPA for collection and that after all proper deductions were made, OPA still owed her $15,354.42.

At the conclusion of Gagne's case in chief, and again at the close of all of the evidence, Severa made a motion for a directed verdict based upon his assertion that Gagne had not provided sufficient evidence to prove her damages, but that she was merely asking the jury to speculate regarding the amount of damages. Severa also argued that Gagne was not an employee, as that term is defined in the Nebraska Wage Payment and Collection Act, and that he was therefore entitled to a directed verdict on the third cause of action. After Gagne's concession that she was no longer pursuing the lost profits issue raised in her second cause of action, the district court sustained Severa's motion for a directed verdict on Gagne's second cause of action at the close of her case in chief, while denying the motion as to the first and third causes of action. At the close of all the evidence, the district court again denied Severa's motion for a directed verdict and submitted the first cause of action to the jury, reserving the Nebraska Wage Payment and Collection Act claim for its own determination.

The jury returned a verdict in favor of Gagne in the amount of $15,184.42. The trial court then determined that Gagne was

an employee of OPA and Severa, as that term is defined by the Nebraska Wage Payment and Collection Act. Then, "[u]pon consideration of the evidence and the law, and upon consideration of the verdict of the jury on [Gagne]'s first cause of action," the trial court entered a judgment in which it determined that Gagne should recover $15,184.42, "plus [Gagne]'s taxable costs, including an attorney fee to be deemed at a subsequent hearing." Severa filed motions for a new trial and for judgment notwithstanding the verdict, which were overruled by the trial court on December 31, 1996, the same date upon which the trial court overruled a motion for prejudgment interest previously filed by Gagne. Severa then appealed to the Nebraska Court of Appeals, which appeal was docketed in that court as case No. A-97-048.

After Severa filed his notice of appeal in case No. A-97-048, the trial court held a hearing on Gagne's motion for costs and attorney fees. The court determined that because of the appeal pending before the Court of Appeals, it did not have jurisdiction to consider her motion. Gagne appealed, which appeal was docketed as case No. A-97-726; that case was subsequently consolidated with case No. A-97-048 by the Court of Appeals.

In an unpublished memorandum opinion, the Court of Appeals analyzed the case as an action for a legal accounting rather than for a breach of contract and concluded that the evidence was insufficient to support the jury verdict in Gagne's favor. See *Gagne v. Severa*, 7 Neb. App. xii (cases Nos. A-97-048 and A-97-726, May 6, 1998). The judgment entered in Gagne's favor was reversed, and the cause was remanded with directions to dismiss Gagne's petition. The Court of Appeals further concluded that their resolution of that issue rendered Gagne's appeal in case No. A-97-726 moot, and Gagne's appeal therein was dismissed.

Gagne petitioned this court for further review, which petition was granted on September 1, 1998. In that same order, the parties were ordered to provide supplemental briefs on the issue whether the appeals should be dismissed for want of jurisdiction pursuant to *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997) (holding that order awarding attorney fees in amount to be determined at later date was not final, appealable

order). Prior to oral arguments and after those briefs were submitted, this court determined that it was without jurisdiction to hear either appeal because of Gagne's unresolved motion for attorney fees in the trial court. On November 18, the judgment of the Court of Appeals was vacated and Gagne's appeal was dismissed.

On remand, the district court conducted a hearing on Gagne's request for attorney fees, after which an order was entered awarding Gagne attorney fees in the amount of $12,500. Severa timely appealed from the order awarding Gagne attorney fees, and Gagne cross-appealed. We moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts of this state.

## ASSIGNMENTS OF ERROR

Severa asserts that the district court erred in (1) failing to sustain his motion for a directed verdict made at the close of all the evidence, (2) failing to sustain his motion for judgment notwithstanding the verdict, (3) submitting the issue of damages to the jury without sufficient evidence to support a verdict, (4) receiving exhibit 17 into evidence, (5) failing to sustain Severa's motion for a new trial, (6) finding that Gagne was an employee under the Nebraska Wage Payment and Collection Act and entering judgment thereunder against Severa, and (7) awarding Gagne $12,500 in attorney fees.

In her cross-appeal, Gagne asserts that the district court erred in failing to sustain her motion for prejudgment interest.

## STANDARD OF REVIEW

[1,2] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Ratigan v. K.D.L., Inc., ante* p. 283, 609 N.W.2d 376 (2000). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.*

[3] With regard to 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 where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Id.*

## ANALYSIS

Severa first contends that the district court erred in not sustaining his motion for a directed verdict at the close of all of the evidence. Severa's assertion is equivalent to an assertion that he was entitled to a judgment as a matter of law. See *id.* Implicit in the district court's overruling of Severa's motion is the determination that sufficient evidence had been adduced to establish that Gagne had incurred damages attributable to Severa's alleged breach of contract and that Severa's assertions to the contrary were without merit.

[4,5] It has long been the law in Nebraska that one injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991). Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). Thus, in order for Gagne to recover, she must prove that Severa breached the independent contractor agreement, as well as damages attributable to Severa's alleged breach.

The contract between Gagne and Severa provided that Gagne was entitled to a certain percentage of the "gross fees collected" by Severa on Gagne's behalf. In order to prove that Severa breached his duty under the contract and that she was entitled to damages, Gagne was obligated to adduce evidence of the amount that Severa failed to properly bill, of the amount Severa failed to properly collect, or of the amount of "gross fees collected" by Severa, but not paid to Gagne. In other words, the total amount billed by OPA on behalf of Gagne is of no consequence in the instant case; the significant figures are those which exhibit the amount of fees *actually collected* by OPA on behalf of Gagne for which she has not been paid her share, less OPA's share under the independent contractor agreement.

Gagne testified that she reconstructed her patient records by referencing her appointment book, which was not offered into evidence. Gagne explained:

> I went back through my appointment book which I considered the most accurate listing of the patients I had seen. I went back and I looked at, you know, when they were seen, what the fee was for that time of my work there, and I did, you know — I multiplied it by, you know, however many people were seen at that rate.

Gagne concluded that the total charges submitted to OPA for billing, as reflected in exhibit 17, were $227,060. Prior to payment to Gagne, however, the contract also provided that, subject to certain exceptions for Nebraska medicaid and collected fees in excess of $5,000 per month, OPA was entitled to 30 percent of the fees paid by third parties.

Gagne admitted that some of the appointments on her calendar were "no shows." Gagne also admitted that her calculations assumed that all of her patients paid 100 percent of the amount billed and that she made no adjustments for patients that did not pay 100 percent, for accounts that are uncollectible, for bad debts or bankruptcies, or for patients who had moved and failed to provide OPA with forwarding addresses. Further, Gagne conceded that contrary to her assumptions, not all patients paid 100 percent of the balance due on their accounts.

Gagne also explained that she calculated her "insurance adjustment" from a fixed rate of $85 per hour, the highest rate at which her time was billed while she was at OPA, and that no adjustments were made for the time which she billed at a rate below $85 per hour. Gagne's summary also included an estimate of the percentage of her clients that used each insurance carrier. Implementing an OPA document entitled "Practice Aging Totals," Gagne reduced her submitted charges by $5,994.38, the amount she calculated certain insurance carriers would not remit. Further, Gagne deducted from her total charges submitted an amount that reflected Severa's 30 percent; no evidence was adduced, however, to suggest whether Gagne correctly calculated this figure at only 30 percent or whether other percentages may have been appropriate pursuant to the language in the contract.

Gagne compiled all of the foregoing information into a summary, which was introduced over Severa's objection, as exhibit 17. Exhibit 17 reveals that after Gagne subtracted from her total charges the amount she estimated for an insurance adjustment ($5,994.38), 30 percent for OPA's fee ($66,319.68), and the amount that she claims to have already received from OPA ($139,391.52), the resulting "Amount Owed" was $15,354.42.

The foregoing reveals that Gagne's figures were based, in large part, upon assumptions that were subsequently proved to be inaccurate or incomplete. Gagne's own testimony shows that her calculations were based upon the amount of money she submitted to OPA for billing on her behalf, not the amount of money which was actually collected on her accounts. It is undisputed that the contract between Gagne and Severa entitled Gagne to a percentage of fees actually collected by OPA on her behalf; assuming without deciding that Gagne has proved that Severa breached the independent contractor agreement, we conclude that Gagne has failed to adduce sufficient evidence as to the amount of damages, if any, she suffered as a result of Severa's breach of the contract.

Gagne's evidence notwithstanding, the issue of damages may still have been properly submitted to the jury if evidence adduced by Severa provides a factual basis upon which Gagne's damages may have been calculated with a reasonable degree of certainty. Severa's evidence must therefore be analyzed in order to determine whether the issue was properly submitted to the jury.

Severa introduced numerous exhibits at trial to explain Gagne's accounts, which were introduced primarily via the testimony of Severa's office manager. The office manager testified that she had reviewed all of the records in OPA's possession regarding Gagne's accounts from 1989 to May 1993 and had prepared a spreadsheet which provided a complete overview of the 264 patients that Gagne saw while at OPA. The office manager confirmed the information in the spreadsheet by cross-referencing the information in OPA's records with Gagne's appointment books.

The spreadsheet reveals that $198,513.18 of Gagne's total charges of $222,450 were actually collected. Exhibit 17, com-

piled by Gagne, reflects that Gagne has already received $139,391.52. Thus, the evidence adduced at trial, viewed in a light most favorable to Gagne, suggests the following summary of her account:

| | |
|---|---|
| Amount received from third parties | $198,513.18 |
| plus transfers | 342.52 |
| | $198,855.70 |
| less refunds for overpayment | 2,412.27 |
| Net amount received | $196,443.43 |
| less OPA's 30-percent fee | 58,933.03 |
| Amount due Gagne | $137,510.40 |
| less payments to Gagne | 139,391.52 |
| Amount owed by OPA to Gagne | ($ 1,881.12) |

Therefore, the evidence, viewed in a light most favorable to Gagne, reveals that OPA does not owe Gagne any money which she has not already received.

[6,7] Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997). As previously explained, Gagne has failed to adduce evidence which establishes that OPA has collected any money on Gagne's behalf to which she is entitled after application of the proven credits and payments. The evidence adduced at trial does not establish a reasonably certain factual basis for computation of any loss sustained by Gagne and any such loss calculated by the jury is mere speculation and conjecture. See *id.* Damages need not be proved with mathematical certainty; however, damages cannot be established by evidence which is speculative and conjectural. See, *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000); *Union Ins. Co. v. Land and Sky, Inc., supra.*

[8] It is the duty of the trial court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. See *Snyder v. Contemporary Obstetrics & Gyn., supra.* Gagne failed to prove what amount was not properly billed by Severa; what amount was billed, but not properly collected by Severa; or what amount was billed and collected, but

not properly paid to Gagne. As such, the evidence in the instant case left the jury to speculate about what Gagne's actual damages were. As a matter of law, such speculative and conjectural evidence is inadequate to merit submitting the matter to the jury, and the district court should have granted Severa's motion for a directed verdict on this issue.

[9] Having so concluded, we need not consider Severa's other assignments of error. An appellate court is not obligated to engage in analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert, ante* p. 160, 608 N.W.2d 588 (2000). Further, our conclusion renders Gagne's cross-appeal moot, and the issues raised therein are also unnecessary to the resolution of this appeal. Consequently, Gagne's cross-appeal must be dismissed.

## CONCLUSION

The district court erred in submitting the issue of damages to the jury, and Severa's motion for a directed verdict at the close of all the evidence should have been sustained. Consequently, the judgment of the district court is reversed, and this cause is remanded with directions to dismiss Gagne's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STEPHAN and MILLER-LERMAN, JJ., not participating.

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STATE OF NEBRASKA, APPELLANT, V. CLARENCE VICTOR, APPELLEE.

612 N.W.2d 513

Filed June 30, 2000. No. S-99-816.

1. **Constitutional Law: Appeal and Error.** A constitutional question not properly raised in the trial court will not generally be considered on appeal.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

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

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

MCCORMACK, J.

## FACTUAL AND PROCEDURAL BACKGROUND

Clarence Victor was convicted of first degree murder and sentenced to death in 1988. This court affirmed Victor's conviction and sentence in *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990). This court also affirmed the subsequent judgment of the district court denying Victor postconviction relief in *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993). The facts of Victor's crime are more fully set forth in those opinions, but are not relevant to the current appeal.

In 1998, the Legislature amended Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 1998), which now provides, in relevant part:

> (2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.
>
> (3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.
>
> (4) Within one hundred twenty days after July 15, 1998, a convicted person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion in the district court which imposed such sentence requesting a ruling that the penalty of death be precluded under subsection (2) of this section and that the sentence be vacated. The court shall cause notice of each such request to be served on the county attorney, grant a prompt hearing on the request, and determine the issues and make findings of fact with respect to the request. If the court finds by a preponderance of the evidence that the convicted person is a person with mental retardation, the sentence of death shall be vacated and a sentence of life imprisonment imposed.

Victor filed a motion in the district court pursuant to the amended § 28-105.01. The district court determined that based upon the evidence presented, Victor was mentally retarded, as defined by § 28-105.01. The district court vacated Victor's death sentence and imposed a sentence of life imprisonment.

## ASSIGNMENT OF ERROR

The State's sole argument is that § 28-105.01(4) is unconstitutional in that it grants the judiciary the power to commute an already final sentence, in violation of the separation of powers clause of the Nebraska Constitution.

## ANALYSIS

Victor argues that the State waived its constitutional argument by failing to raise it in the district court. A review of the record supports Victor's claim that the argument was not raised below. The State is attempting to raise the claim jurisdictionally, arguing that if § 28-105.01(4) is unconstitutional, then the judgment is void and can be attacked at any time.

[1] The record shows that the State did not raise its sole assignment of error in the trial court. This court has consistently and repeatedly held that a constitutional question not properly raised in the trial court will not generally be considered on appeal. See, e.g., *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995); *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992). See, also, *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992).

## CONCLUSION

The sole assigned error by the State in the instant case was waived by the State due to its failure to present the constitutional claim to the trial court. As the State has no other assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. CHARLES W. GRAY, APPELLANT.

612 N.W. 2d 507

Filed June 30, 2000. No. S-99-896.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A criminal defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution.
3. **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. **Postconviction: Effectiveness of Counsel.** Nebraska does not recognize a constituional claim based upon ineffective assistance of postconviction counsel.
5. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
6. **Sentences: Probation and Parole.** When a flat sentence of life imprisonment is imposed and no minimum sentence is stated, by operation of law, the minimum sentence for parole eligibility purposes is the minimum imposed by law under the statute.
7. **Postconviction.** The district court need not conduct an evidentiary hearing on a motion for postconviction relief where the motion alleges only conclusions of fact or law or where the files and records affirmatively show that the criminal defendant is not entitled to any relief.

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

Paul J. Vaughan, of Johnson & Vaughan, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Charles W. Gray appeals the order of the district court for Washington County which denied Gray's motion for postconviction relief without an evidentiary hearing. For the reasons recited below, we affirm.

## STATEMENT OF FACTS

On July 5, 1990, the State filed an information against Gray charging him with first degree murder and use of a firearm to commit a felony in connection with the May 13, 1990, death of Tatum McIntosh. On February 4, 1991, Gray entered a plea of guilty to an amended information charging him with one count of second degree murder. On March 8, 1991, he received a flat life sentence of imprisonment.

Gray filed a "petition" for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1995), dated October 4, 1994. Because the amended information upon which Gray was charged omitted malice as an element of second degree murder, under the line of cases subsequently overruled by *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), the district court granted Gray postconviction relief, vacating his conviction and sentence on September 21, 1995.

The State filed an amended information on October 23, 1995, again charging Gray with first degree murder and use of a firearm to commit a felony. After plea negotiations, on October 30, 1996, the State filed an amended information charging Gray with one count of second degree murder. On October 31, Gray entered a plea of no contest, and the district court found Gray guilty of the charge of second degree murder. A presentence investigation was ordered.

The presentence report dated December 5, 1996, states on the first page that the range of sentences applicable to Gray's second conviction on October 31, 1996, for the second degree murder committed on May 13, 1990, was 10 years' to life imprisonment. On January 16, 1997, the district court imposed upon Gray on this subsequent second degree murder conviction a flat life sentence. Gray was not given credit on this sentence for the time he had served in the penitentiary under his prior conviction.

Gray's trial counsel appealed this second conviction, arguing that Gray's sentence was excessive. The sentence was summarily affirmed by this court in *State v. Gray*, 252 Neb. xix (case No. S-97-118, July 23, 1997).

Gray filed the instant postconviction action on March 20, 1998. In its response to Gray's motion, the State filed the affidavit of Ron Riethmuller, the records administrator for the

Nebraska Department of Correctional Services (DCS), in which he states, inter alia, that Gray was "re-sentenced" on January 16, 1997, to a term of life imprisonment and that Gray's "earliest parole eligibility date on his sentence of January 16, 1997 is January 15, 2002." Riethmuller's affidavit, prepared during Gray's incarceration on his second conviction, is dated February 24, 1999. The district court denied Gray's amended motion for postconviction relief without an evidentiary hearing. Gray appeals.

## ASSIGNMENTS OF ERROR

On appeal, Gray has assigned four errors, which combine to form three assignments of error. Gray claims, restated, that the district court erred (1) in failing to find that Gray was denied effective assistance of counsel in his first postconviction action because his first postconviction attorney failed to inform Gray that he would not receive credit for time served pursuant to the first conviction if Gray was successful in having his first conviction set aside and thereafter convicted and resentenced to life imprisonment; (2) in failing to find that Gray was denied effective assistance of trial counsel at his second sentencing, because his trial counsel at the sentencing for his second conviction failed to object to the district court's purported ex post facto application of sentencing laws, such that Gray was erroneously sentenced under the 1995 amended sentencing statute rather than the sentencing statutes in effect in 1990 when he committed the crime; and (3) in denying Gray an evidentiary hearing on his motion for postconviction relief.

## STANDARDS OF REVIEW

[1,2] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). A criminal defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Ryan, supra*; *State v. Smith, supra*.

[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. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000).

## ANALYSIS

As more fully explained below, because the files and records in this case affirmatively show that Gray was not entitled to postconviction relief, we conclude that the district court did not err in denying Gray an evidentiary hearing, and we affirm the district court's order denying Gray's motion for postconviction relief.

*Ineffectiveness of Postconviction Counsel.*

[4] Gray claims that his first postconviction counsel was ineffective. Specifically, Gray argues that in connection with his first postconviction proceeding, his postconviction attorney failed to advise him that under established law, he would not receive credit for time served pursuant to the first conviction if Gray was successful in his postconviction action and was again convicted and sentenced to life in prison in a subsequent criminal proceeding. See, e.g., *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997) (holding that it is a proper sentence to deny credit for time served to criminal defendant who received life sentence on second conviction after first conviction was set aside); *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995), *cert. denied* 516 U.S. 905, 116 S. Ct. 271, 133 L. Ed. 2d 193 (same). Because Nebraska does not recognize a constitutional claim based upon ineffectiveness of postconviction counsel, Gray's assignment of error is without merit.

In *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), *cert. denied, Abdullah v. Nebraska*, 510 U.S. 829, 114 S. Ct. 97, 126 L. Ed. 2d 64, we considered and rejected a criminal defendant's claim of ineffective assistance of counsel in a postconviction case. In *Stewart*, we stated:

> The federal constitution has been interpreted to provide that a defendant in a criminal case where imprisonment is imposed has the right to assistance of counsel. *Strickland*

> *v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . The U.S. Supreme Court has also held that the assistance of counsel provision in the U.S. Constitution applies to direct appeals only. See *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). . . . As the *Finley* court stated, postconviction relief is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. . . . States have no obligation to provide a postconviction relief procedure, and when they do, the fundamental fairness mandated by the Due Process Clause of the U.S. Constitution does not require that the State supply a lawyer as well. . . .
>
> In *Coleman v. Thompson*, [501] U.S. [722], 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the U.S. Supreme Court held that because there is no constitutional right to an attorney in state postconviction proceedings, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." [501 U.S. at 752]. The Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal constitution. We, therefore, hold that a prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding.

242 Neb. at 719, 496 N.W.2d at 529.

Pursuant to *Stewart*, Gray cannot claim ineffective assistance of postconviction counsel. This assignment of error is without merit.

*Ineffectiveness of Trial Counsel at Second Sentencing.*

Gray argues that he is entitled to postconviction relief based upon trial counsel's ineffectiveness at Gray's second sentencing. Specifically, Gray argues that trial counsel was ineffective due to counsel's failure to object to the trial court's imposition of a sentence which was purportedly an ex post facto application of the 1995 amended sentencing statute to his 1990 crime. The record shows that Gray was not subject to an ex post facto application of sentencing laws, his trial counsel was not ineffective, and there is no merit to this assignment of error.

[5] We have recently observed that "[a] law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts." *State v. Urbano*, 256 Neb. 194, 207, 589 N.W.2d 144, 154 (1999). This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id.*

In 1990, when the crime was committed, Neb. Rev. Stat. § 28-105 (Reissue 1989) provided, inter alia, that the range of potential penalties for a defendant convicted of a Class IB felony, such as second degree murder, was not less than 10 years' imprisonment to a maximum sentence of life imprisonment. In 1995, § 28-105 was amended such that the minimum sentence for second degree murder was raised from 10 years' imprisonment to 20 years' imprisonment, with a maximum sentence of life imprisonment. See § 28-105 (Reissue 1995). Gray contends that following his second conviction for second degree murder, the district court utilized the 1995 amended statute when imposing a flat life sentence upon him on January 16, 1997, and that this sentence was an ex post facto application of the 1995 amendment to his 1990 crime. The record shows otherwise.

Gray correctly notes that under the amended sentencing statute relating to second degree murder, the increased minimum sentence of 20 years' imprisonment as opposed to 10 years' imprisonment affects the time when a prisoner will be eligible for parole. See Neb. Rev. Stat. § 83-1,110 (Reissue 1999). At his second sentencing, Gray received a determinate sentence of "life imprisonment," the same sentence as he had originally received in 1991. We note that in 1990, when Gray committed the second degree murder for which he was sentenced, Nebraska law did not permit the imposition of an indeterminate sentence for second degree murder. See *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[6] When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence for parole eligibility purposes is the mini-

mum imposed by law under the statute. *Urbano, supra*; *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972). Therefore, by operation of law, the minimum sentence for parole eligibility purposes applicable to the life sentence imposed on January 16, 1997, is the minimum provided by law, or 20 years' imprisonment, unless the imposition of such minimum sentence would violate the prohibition against ex post facto laws. See *Urbano, supra.*

Because the 1995 amendment raised the minimum sentence for parole eligibility purposes on a flat life sentence for a second degree murder conviction from 10 years' imprisonment to 20 years' imprisonment, the 1995 amendment would disadvantage Gray. Thus, in this case, the prohibition against ex post facto laws requires that Gray's 1997 sentence cannot be imposed pursuant to the 1995 amendment. Gray's sentence must, therefore, be imposed pursuant to the sentencing structure in place at the time of the commission of the crime in 1990, rather than pursuant to the amended sentencing structure in place in 1997.

A review of Gray's presentence report, prepared following his second conviction and prior to his sentencing, indicates on the first page that the sentencing range to which Gray was subject was 10 years' to life imprisonment. Ten years was the statutory minimum in 1990 when Gray committed the crime. The trial court sentenced Gray to a flat life sentence, which was effectively a sentence in which the minimum sentence for parole eligibility purposes was the minimum provided by law, subject to ex post facto principles. See *Thompson, supra* (holding that eligibility for parole of defendant who received flat life sentence for second degree murder was same as though statutory minimum had been expressed as minimum of indeterminate sentence). Consistent therewith, the affidavit of Riethmuller shows that DCS has treated Gray's sentence as 10 years' to life imprisonment. The affidavit indicates that according to DCS, Gray will be eligible for parole at the earliest on January 15, 2002, which date is 5 years after the January 16, 1997, sentencing and one-half of the 10 years' imprisonment minimum. See § 83-1,110. Riethmuller's affidavit demonstrates that the district court imposed a sentence upon Gray based upon the sentencing statute in effect at the time Gray committed the crime. Because Gray

was not subject to an ex post facto application of the law, no objection by trial counsel was required, and the files and records show there was no ineffectiveness of trial counsel in relation to the imposition of the second sentence in 1997. This assignment of error is without merit.

*Denial of Evidentiary Hearing.*

Gray claims the district court erred in refusing to hold an evidentiary hearing on his motion for postconviction relief. This assignment of error is without merit.

The Nebraska Postconviction Act provides:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.
>
> 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 [and] grant a prompt hearing thereon . . . .

§ 29-3001.

[7] We have recently observed that "[a]n evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution." *State v. Silvers*, 255 Neb. 702, 710, 587 N.W.2d 325, 332 (1998). See, also, *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998). However, the district court need not conduct an evidentiary hearing on a motion for postconviction relief where the motion alleges only conclusions of fact or law or where the files and records affirmatively show that the criminal defendant is not entitled to any relief. *State v. Silvers, supra*; *State v. Dandridge, supra*. Such files and records may include the presentence report. *State v. Silvers, supra*.

As we have outlined above, the files and records affirmatively show that Gray is entitled to no relief, and therefore, the district court did not err in refusing to hold an evidentiary hearing on Gray's motion for postconviction relief.

## CONCLUSION

For the reasons outlined above, we conclude that Gray's motion for postconviction relief is without merit and that the district court did not err in denying Gray an evidentiary hearing. We affirm the district court's order denying Gray's motion for postconviction relief.

AFFIRMED.

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# TAMARA GESTRING, PERSONAL REPRESENTATIVE OF THE ESTATE OF LARRY E. GESTRING, DECEASED, APPELLANT, V. THE MARY LANNING MEMORIAL HOSPITAL ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

613 N.W. 2d 440

Filed July 7, 2000. No. S-98-1234.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Juries: Parties.** The general rule is that where there are multiple parties on the same side of a civil lawsuit, each side of the lawsuit is entitled to a total of three peremptory challenges unless the multiple parties' interests are adverse to each other.
4. ___: ___. If the interests of multiple parties on the same side of a civil lawsuit are adverse to each other, the trial court may properly grant each party peremptory strikes of its own.
5. **Trial: Juries.** A trial court should consider all relevant circumstances to determine whether the defendants actually are involved in a good faith controversy on an issue of fact to be decided by the jury, and it is incumbent upon the defendants to assist the trial court in making such a determination.
6. **Juries: Parties.** Factors to be considered when determining whether multiple parties on the same side of a civil lawsuit are entitled to separate peremptory challenges include, but are not limited to, (1) whether separate acts of misconduct were alleged against the separate defendants, (2) whether comparative negligence principles applied to the case, (3) the type of relationship among the defendants, (4) whether

cross-claims or third-party complaints had been filed and the positions taken therein, (5) information disclosed on pretrial discovery, and (6) representations made by the parties.

7. ___: ___. Additional peremptory challenges should be granted to multiple parties on the same side of a civil lawsuit only after the trial court has considered all of the circumstances of the case and determined that the interests of those multiple parties are adverse to each other.
8. **Juries: Parties: Presumptions: Appeal and Error.** When additional peremptory challenges are granted to a party, absent a showing that her or his interests are adverse to other parties on the same side of a civil lawsuit, prejudice will be presumed, and a judgment must be reversed on appeal for unwarranted allowance of supernumerary challenges.
9. **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.
10. **Federal Acts: Health Care Providers: Damages: Equity.** The Emergency Medical Treatment and Active Labor Act provides that any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement delineated therein may obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.
11. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
12. **Actions: Pleadings.** Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action.
13. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief.
14. **Federal Acts: Health Care Providers: Liability.** A hospital's liability under the Emergency Medical Treatment and Active Labor Act is not grounded upon tort concepts, as a plaintiff's claim under the act does not rest on any proof that a hospital was negligent; such a claim is predicated on the hospital's violation of a federal statute, making the hospital strictly liable for any personal harm that directly results from that violation.
15. **Directed Verdict.** A proper result will not be reversed merely because it was reached for the wrong reason.
16. ___. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
17. **Federal Acts: Health Care Providers.** A hospital can violate 42 U.S.C. § 1395dd (1994) through the operation of its emergency room by failing to stabilize a patient's emergency medical condition before transferring or releasing the patient.
18. **Federal Acts: Health Care Providers: Words and Phrases.** With respect to an emergency medical condition described in 42 U.S.C. § 1395dd(e)(1)(A) (1994), "sta-

bilized" means that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility.

19. **Health Care Providers: Words and Phrases.** The definition of "to stabilize" asks whether the medical treatment and transfer were reasonable under the circumstances; this is a factual inquiry.
20. **Federal Acts: Health Care Providers: Physician and Patient.** If an individual at a hospital has an emergency medical condition which has not been stabilized, the hospital may not transfer the patient unless (1) the patient requests the transfer in writing; (2) a physician has signed a certification that based upon the reasonable risks and benefits to the patient and the information available at the time, the medical benefits reasonably expected from the provision of appropriate medical treatment at another facility outweigh the increased risks to the individual's medical condition from effecting the transfer; or (3) in the absence of a physician, a "qualified person" signs such a certification, which is subsequently countersigned by a physician. 42 U.S.C. § 1395dd(c)(1)(A) (1994).
21. **Federal Acts: Health Care Providers.** In addition to the obligation of certifying the medical need for transferring patients protected by the Emergency Medical Treatment and Active Labor Act, hospitals also have an obligation to appropriately transfer such patients, which requires that transfer be effected through qualified personnel and transportation equipment as required, including the use of necessary and medically appropriate life support measures during the transfer. 42 U.S.C. § 1395dd(c)(2)(D) (1994).

Appeal from the District Court for Adams County: JOHN P. ICENOGLE, Judge. Reversed and remanded for a new trial.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellant.

Robert W. Wagoner for appellee Mary Lanning Memorial Hospital Association.

William M. Lamson, Jr., and William R. Settles, of Lamson, Dugan & Murray, for appellees Hastings Internal Medicine Associates, P.C., Surgery: Adult, Pediatric, Vascular, P.C., Richard D. French, M.D., and Gary W. Barth, M.D.

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

GERRARD, J.

Tamara Gestring, as personal representative of the estate of her late husband, Larry E. Gestring (Gestring), brought this action against the Mary Lanning Memorial Hospital Association (Mary Lanning); Hastings Internal Medicine Associates, P.C.;

Surgery: Adult, Pediatric, Vascular, P.C.; Richard D. French, M.D.; and Gary W. Barth, M.D. (collectively defendants), alleging wrongful death from medical malpractice and negligence under state law and a violation of the federal Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (1994). This appeal presents the question whether it is appropriate for a trial court to grant additional peremptory challenges to codefendants in a civil case when the codefendants may be defending different theories, but the interests of those defendants are not adverse. For the reasons stated herein, we conclude that the personal representative's motion for a new trial should have been sustained; thus, we reverse the judgment of the district court and remand this matter for a new trial.

## FACTUAL BACKGROUND

This case arises from a set of circumstances which began on September 10, 1994, and culminated with the death of Gestring on September 12. On September 10, Gestring became ill and was experiencing sharp pains in his abdomen. Gestring went to the emergency room at Webster County Community Hospital in Red Cloud, Nebraska, where he was examined by Estella Chan, M.D. Gestring explained that he had been ill for 3 days prior to September 10. Chan saw Gestring in the emergency room and admitted him into the hospital at approximately 11:15 a.m.

Chan's examination revealed that Gestring was weak and dehydrated, with a slightly distended and significantly tender abdomen. Gestring had been producing an abnormally small amount of urine and was catheterized because of his inability to void. Gestring was placed on intravenous hydration, and a nasogastric tube was inserted due to his continuing complaints of nausea. Demerol was administered for pain, and Gestring was given intravenous antibiotics. Chan then explained that Gestring's condition was severe and recommended that Gestring be transferred to Hastings, where he could be examined by Barth. The Gestrings consented to the transfer, and Gestring was discharged from the Webster County hospital at approximately 5:15 p.m. on September 10, 1994.

Upon his arrival at Mary Lanning in Hastings, Gestring was examined by Mark Brosnihan, M.D., and Barth. Barth initially

diagnosed Gestring's condition as an "acute abdomen," or abdominal pain, and quite possibly a perforated ulcer or ruptured viscus. Uncertain of Gestring's actual condition, Barth decided to conduct an exploratory laparotomy.

During the exploratory laparotomy, Barth examined many of Gestring's internal organs in an effort to determine the cause of Gestring's condition. Barth became concerned when he palpated a phlegmonous (a very inflamed, reddened, irritated) area of the colon near the upper left quadrant of the large bowel, in the area of the splenic flexure. Barth concluded that the mass was not malignant and that the mass was an acute diverticulitic condition of the splenic flexure. Barth's notes from the operation added that the mass might also be an inflammatory bowel disease.

Barth testified that he did not remove the mass because he could not get "a good plane," which would have allowed him to dissect the mass with scissors or by hand. After discussing all options with his assistants, Barth concluded that Gestring suffered from a moderately severe case of diverticulitis. Because Gestring was very ill, and quite possibly toxic, Barth decided that resection of the colon was not essential and could lead to complications. Gestring's abdominal cavity was irrigated with saline solution, after which Barth closed the incision and treated Gestring nonoperatively. Gestring was taken to the recovery room and then placed in Mary Lanning's intensive care unit (ICU).

Barth testified that he ordered Gestring to be placed in ICU because Gestring's medical chart indicated that he may have been undergoing some renal impairment when he arrived at Mary Lanning. While in ICU, Gestring's urine output did not increase. Barth then consulted French, an internist, who recommended that Gestring be given doses of Lasix and Mannitol intravenously in an attempt to improve Gestring's urine output and overall condition. Gestring's urine output did not significantly improve during the evening hours of September 11, 1994.

As the evening progressed, Gestring's condition continued to decline. Concerned that Gestring might possibly need dialysis treatment, Barth contacted Scott Liggett, M.D., a practicing nephrologist in Lincoln, Nebraska. After a telephonic consulta-

tion with Liggett, Barth decided to transfer Gestring to a hospital in Lincoln then known as Bryan Memorial Hospital, where Gestring could receive hemodialysis should such treatment become necessary. Barth and French then consulted Gestring's family and discharged Gestring from Mary Lanning via ground ambulance at approximately 11 p.m.

Before Gestring could be discharged, Mary Lanning, as the discharging hospital, was required by federal law to complete certain paperwork regarding Gestring's status upon discharge. On that paperwork, Barth certified that Gestring suffered from an emergency medical condition which had been stabilized prior to transfer. Upon his arrival at Bryan Memorial Hospital, Gestring experienced cardiac and respiratory arrest at the door to the emergency room. Attempts to resuscitate Gestring failed, and he was pronounced dead at 1:24 a.m. on September 12, 1994.

An "abdomen only" autopsy was conducted on September 12, 1994. Gordon Hrnicek, M.D., testified at trial that the autopsy results led him to the conclusion that Gestring died from a pulmonary embolism. On cross-examination, however, Hrnicek admitted that the pulmonary embolism, assuming Gestring suffered from such a condition, was secondary to the medical condition for which he was initially hospitalized. There was conflicting expert testimony at trial regarding the ultimate cause of Gestring's death; most experts relying upon the limited scope of the autopsy to explain why their conclusions differed from those of other experts.

The personal representative filed a petition in the district court for Adams County, seeking damages for the wrongful death of and personal injury to Gestring. The petition alleged, inter alia, that the defendants fell below the standard of care for treatment of Gestring in such a manner as to cause him needless physical suffering and mental distress as well as physical deterioration which led directly to his death. The petition also asserted that Mary Lanning was strictly liable insofar as it failed to require strict compliance with the patient transfer provisions of 42 U.S.C. § 1395dd, causing Gestring unnecessary physical suffering and mental distress prior to his death and substantially contributing to his death. In addition to the cause of action for wrongful death, the personal representative sought recovery in a

second cause of action for the physical pain and discomfort suffered by Gestring immediately prior to his death. A third and separate cause of action was pled for funeral and burial expenses. The defendants answered by denying the personal representative's allegations.

Prior to trial, the district court decided that Barth, French, and their respective employers were defending similar interests and granted the attorney representing all such defendants a total of three peremptory challenges of the jury panel. The court reasoned that there was a separate and distinct theory of recovery against Mary Lanning and granted counsel for Mary Lanning three separate peremptory challenges. The personal representative objected to the district court's allocation of peremptory challenges, arguing that the defendants represented similar interests and that they should receive only three challenges amongst them or, in the alternative, that the personal representative should receive six challenges so as to receive an amount equal to that of the defendants. The objection was overruled, and the case proceeded to trial.

Mary Lanning made a motion for a directed verdict at the close of the personal representative's case in chief, which was partially sustained by the district court; the court sustained Mary Lanning's motion as to the cause of action for wrongful death and dismissed Mary Lanning as a defendant as to that cause of action. All other issues were submitted to the jury, which returned a verdict in favor of all of the defendants. On July 20, 1998, the district court entered judgment upon the jury verdict. The personal representative's timely motion for a new trial was overruled on November 4, and this appeal ensued. We moved the matter to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.

## ASSIGNMENTS OF ERROR

The personal representative asserts that the district court erred in (1) granting six peremptory challenges to the defendants while granting only three to the plaintiff, (2) partially sustaining Mary Lanning's motion for a directed verdict and dismissing Mary Lanning as a defendant in the wrongful death action, and (3) failing to adequately instruct the jury on provi-

sions and definitions contained within EMTALA, which the personal representative claims were essential for the jury to obtain a proper understanding of her claims thereunder.

## STANDARD OF REVIEW

[1,2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Snyder v. EMCASCO Ins. Co., ante* p. 621, 611 N.W.2d 409 (2000); *Heald v. Heald, ante* p. 604, 611 N.W.2d 598 (2000). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Heald v. Heald, supra.*

## ANALYSIS

### PEREMPTORY CHALLENGES

The personal representative first asserts that the district court erred in granting the defendants six peremptory challenges while granting her only three and that such error entitles her to a new trial. For the reasons that follow, we conclude that the personal representative was prejudiced by the district court's allocation of peremptory challenges and that she is therefore entitled to a new trial.

The number of peremptory challenges allowable in civil actions where there are more than two parties involved is ordinarily controlled by statutes, court rules, or on rare occasions, a municipal charter. Most statutes of this nature provide that "each side" or "each party" is to be given the same number of peremptory strikes and that where one side contains multiple parties whose interests are adverse, each party may then be granted individual sets of peremptory challenges. See Annot., 32 A.L.R.3d 747 (1970). Nebraska, however, is without a statute that governs the distribution of peremptory challenges, and in this state, the issue is governed by " 'unwritten rules of court.' " See *Petsch & McDonald v. Hines*, 110 Neb. 1, 9, 192 N.W. 963, 966 (1923). The absence of a controlling statute notwithstanding, a rule similar to that found in other jurisdictions which have interpreted such statutes can be gleaned from prior decisions of this court.

Our closest confrontation of the issue occurred in *Petsch & McDonald v. Hines, supra.* In *Petsch & McDonald v. Hines*, 110 Neb. at 8, 192 N.W. at 966, one codefendant argued on appeal that the trial court erred in refusing "to permit appellant and its codefendant each the full number of three peremptory challenges to the jury." This court began its discussion by noting that peremptory challenges in civil actions did not exist at common law and that the right thereto is dependent on statutes or rules of court. The *Petsch & McDonald* court then noted that all mention of peremptory challenges had been omitted when the latest version of the civil code had been enacted by the Legislature. "However, the right of peremptory challenge appears to have been still recognized by the courts," 110 Neb. at 9, 192 N.W. at 966, and " '[i]n the absence of any statutory authority for such challenges there is no doubt of the power of a court to provide by rule for a reasonable number on each side,' " *id.*

We further explained in *Petsch & McDonald v. Hines*, 110 Neb. at 10, 192 N.W. at 966, that when an action is brought against two or more defendants, " 'they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant' " and that when several defendants set up a common defense, they are not entitled to additional peremptory challenges. We, however, qualified our holding in *Petsch & McDonald* by stating that " 'the rule is otherwise where they set up separate and distinct defenses presenting different issues, or where the parties on one side, although having a common cause against the other, have conflicting rights among themselves which the verdict of the jury will affect.' " 110 Neb. at 10, 192 N.W. at 966.

The issue was revisited by this court in *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N.W. 44 (1934). *Masonic Bldg. Corporation* once again involved defendants who claimed the right to separate sets of peremptory challenges. The trial court therein determined that the answers of the various defendants did not raise adverse claims *as between themselves* and therefore limited the defendants to three challenges to be exercised collectively. This court affirmed upon a finding that the defendants raised similar defenses.

The instant case once again presents the question whether codefendants in a civil case should be granted separate sets of peremptory strikes or, in the alternative, whether a plaintiff should receive additional challenges when the court grants multiple defendants additional peremptory strikes. This issue is properly analyzed by answering two interrelated questions: (1) was it error for the trial court to grant additional peremptory challenges to each defendant, and (2) if it was error, must the personal representative show that she was prejudiced by such error before she is entitled to a new trial?

[3,4] *Petsch & McDonald v. Hines*, 110 Neb. 1, 192 N.W. 963 (1923), and *Masonic Bldg. Corporation v. Carlsen, supra*, stand for the proposition that where there are multiple parties on the same side of a civil lawsuit, each *side* of the lawsuit is entitled to a total of three peremptory challenges unless the multiple parties' interests are adverse to *each other*. If the parties' interests are adverse to each other, the trial court may properly grant each party three peremptory strikes of its own. Because the interests of Mary Lanning are not adverse to the interests of the other defendants, we conclude that the district court erred when it granted Mary Lanning additional peremptory challenges.

[5] The Wyoming Supreme Court confronted a similar issue in *Wardell v. McMillan*, 844 P.2d 1052 (Wyo. 1992), and the court's analysis is instructive. Interpreting a statute granting each *side* of a lawsuit three peremptory challenges, *Wardell* establishes a general framework under which such claims are to be analyzed. The *Wardell* court explained that " '[i]n determining whether multiple defendants constitute one side, consideration must be given the nature of the claim against them and whether the defendants' interests are or may be antagonistic,' " 844 P.2d at 1060, and that "[m]ulti-party defendants' interests are antagonistic when a good-faith controversy exists, vis-a-vis each other, over an issue of fact which the jury will decide," *id.* at 1061. The *Wardell* court continued:

> When such a controversy exists, the defendants constitute separate "sides" . . . and are entitled to have additional peremptory challenges. This result is justified by the rationale that certain of the extra challenges will be used to

> select a jury for the case against the other defendant, rather than against the plaintiff. . . .
>
> When, on the other hand, no good-faith controversy exists between multi-party defendants and they are yet awarded extra peremptory challenges, the single-party plaintiff is placed in a distinct tactical disadvantage. The multi-party defendants, having no motive to exercise their additional challenges against a co-defendant, are able to pool their challenges against the plaintiff. . . . To allow nonantagonistic, multi-party defendants a two-, three- or four-to-one advantage in the exercise of peremptory challenges affords them undue influence over the composition of the jury and implicates the single-party plaintiff's right to a fair trial.

844 P.2d at 1061. Thus, a trial court should consider all relevant circumstances to determine whether the defendants actually are involved in a good faith controversy on an issue of fact to be decided by the jury, and it is incumbent upon the defendants to assist the trial court in making such a determination. See *id.*

[6] *Wardell* provides an "illustrative, but not exhaustive," list of factors to be considered when making such a determination: (1) whether separate acts of misconduct were alleged against the separate defendants, (2) whether comparative negligence principles applied to the case, (3) the type of relationship among the defendants, (4) whether cross-claims or third-party complaints had been filed and the positions taken therein, (5) information disclosed on pretrial discovery, and (6) representations made by the parties. 844 P.2d at 1061. Other jurisdictions have adopted similar approaches. See, e.g., *Gallegos v. Southwest Com. Health Services*, 117 N.M. 481, 872 P.2d 899 (N.M. App. 1994); *St. Luke Church v. Smith*, 318 Md. 337, 568 A.2d 35 (1990); *Staiger v. Gaarder*, 258 N.W.2d 641 (N.D. 1977); *Massoni v. State Highway Commission*, 214 Kan. 844, 522 P.2d 973 (1974), *overruled in part on other grounds, Lollis v. Superior Sales Co.*, 224 Kan. 251, 580 P.2d 423 (1978). We determine that the trial courts of this state should likewise consider the above-listed circumstances when determining whether additional peremptory challenges should be allowed to multiple parties on the same side of a civil lawsuit.

The district court granted three additional peremptory challenges to Mary Lanning because there were different theories of recovery against Mary Lanning and because Mary Lanning was not acting "in collusion" with the other defendants. Further, the district court relied, at least in part, upon the fact that Mary Lanning had hired its own attorney. Notably absent from the trial court's determinations, however, is a finding that the *interests* of the multiple defendants were adverse.

Mary Lanning did file an answer separate from that filed by the other defendants. As in *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N.W. 44 (1934), however, neither Mary Lanning's nor the other defendants' answers assert that Gestring's death was the fault of the other. To the contrary, the defendants generally denied the allegations in the personal representative's petition and affirmatively alleged only that they each had met the applicable standard of care. Thus, despite the fact that Mary Lanning may be forced to defend an additional theory of recovery on the EMTALA claim, the granting of three additional peremptory challenges created a situation in which the defendants had "no motive to exercise their additional challenges against a co-defendant, [but were] able to pool their challenges against the plaintiff." *Wardell v. McMillan*, 844 P.2d 1052, 1061 (Wyo. 1992).

[7] We hold that additional peremptory challenges should be granted to multiple parties on the same side of a civil lawsuit only after the trial court has considered all of the circumstances of the case and determined that the interests of those multiple parties are adverse to each other. Allowing the defendants in the instant case a six-to-three advantage in the exercise of peremptory challenges afforded them a substantial edge in determining the composition of the jury and potentially deprived the personal representative of substantial rights and a just result in a matter submitted for disposition. The district court made no determination that Mary Lanning's interests were adverse to those of the other defendants, and the record does not support such a determination. We therefore conclude that the district court should have sustained the personal representative's motion for a new trial, the denial of which constitutes an abuse of discretion.

The defendants argue that even if the district court erred in granting additional peremptory challenges, the personal representative has not shown how she was prejudiced by the district court's decision and that she is therefore not entitled to a new trial. This contention is without merit.

[8] In a similar case involving the grant of additional peremptory challenges to multiple defendants, the Supreme Court of Kentucky explained:

> The requirement of a showing of actual prejudice effectively nullifies the requirements of the rule on allocation of peremptory challenges. To show actual prejudice, the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge performed in accordance with the prescribed rule of the game. . . .
>
> . . . As long as [peremptory challenges are] part of the trial process . . . we believe that their proper allocation between litigants is a substantial right which so pervades the process that its erroneous application requires reversal as a matter of law if the issue is properly preserved by the adversely affected litigant.

*Kentucky Farm Bur. Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky. 1979). We agree with the court's rationale, and we hold that when additional peremptory challenges are granted to a party, absent a showing that her or his interests are adverse to other parties on the same side of a civil lawsuit, prejudice will be presumed, and a judgment must be reversed on appeal for unwarranted allowance of supernumerary challenges. See *Thompson v. Presbyterian Hosp., Inc.*, 652 P.2d 260 (Okla. 1982).

In the case at bar, the personal representative objected to the defendants' obtaining twice as many peremptory challenges as she was granted, so the issue has been properly preserved for appeal. Because an absence of balance in the jury selection process is a cognizable form of prejudice which will be presumed if properly preserved for appeal, we conclude that the district court abused its discretion in denying the personal representative's motion for a new trial, which should have been granted.

[9] Although our disposition requires that this case be remanded for a new trial and we need not reach all of the errors assigned, there is another aspect of this case which is likely to recur upon remand. 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. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). We therefore proceed to consider the personal representative's assignment of error regarding the district court's grant of a directed verdict in favor of Mary Lanning with reference to the personal representative's EMTALA claim, since the issue is likely to recur upon remand.

### Directed Verdict on EMTALA Claim

The personal representative asserts in her second assignment of error that the district court erred in partially sustaining Mary Lanning's motion for a directed verdict. The district court granted Mary Lanning's motion for a directed verdict with regard to the wrongful death cause of action, reasoning that EMTALA precluded an action against Mary Lanning for wrongful death and provided only for causes of action seeking redress for personal injuries suffered by a patient prior to his or her death. For the following reasons, we conclude that the district court erroneously granted the directed verdict in Mary Lanning's favor.

In partially sustaining Mary Lanning's motion for a directed verdict, the district court reasoned:

> The [EMTALA] statutes however provide the following, that any individual who suffers personal harm as a direct result of a participating hospital's violation of requirements of this section may in a civil action against the participating hospital obtain those damages available for permanent injury under the law of the state in which the hospital is located and such equitable relief as is appropriate. That language makes the hospital responsible for permanent injuries caused to Mr. Gestring because of the violations if there are violations of the EMTALA statute. That language specifically does not include any obligation or recovery to any other party through a wrongful death

> action or any other type of action against the hospital for an EMTALA violation, therefore the hospital is only responsible for the injuries caused to the decedent which essentially will be when we get through this from the time that transfer is started until the time of the death of the decedent.
>
> They're not responsible for any wrongful death recovery to which other persons might be entitled as a result of that death.

The district court further reasoned that there was no evidence on which to conclude that the negligence of Mary Lanning contributed to Gestring's death and concluded that Mary Lanning should not remain as a defendant in the wrongful death cause of action.

[10] EMTALA provides that "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may . . . obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate." 42 U.S.C. § 1395dd(d)(2)(A). In Nebraska, when a person dies as a result of the negligent or wrongful act of another and the conduct is such that if death had not occurred, the deceased would have had a cause of action to recover damages, then the person or entity whose conduct brought about the death is liable to the surviving next-of-kin, regardless of the death. See Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 1995). Thus, "the law of the State in which [Mary Lanning] is located" provides an avenue through which the personal representative of Gestring's estate may seek redress for personal harm she has suffered by being the wife deprived of the society, comfort, and companionship of Gestring as a direct consequence of an EMTALA violation inflicted upon Gestring. See, e.g., *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. 1995); *Lane v. Calhoun-Liberty County Hosp. Ass'n Inc.*, 846 F. Supp. 1543 (N.D. Fla. 1994); *Griffith v. Mt. Carmel Medical Center*, 842 F. Supp. 1359 (D. Kan. 1994). The mere fact that the personal representative has rested her wrongful death cause of action, at least in part, upon an alleged EMTALA violation does not justify a directed verdict as to the entire cause of action.

[11-13] A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999). Thus, two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action. *Id.* Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief. *Id.* The crucial inquiry in regard to the district court's grant of the directed verdict is whether the personal representative's EMTALA claim constitutes a separate cause of action or merely a theory of recovery under which she can recover for the wrongful death of Gestring.

[14] The U.S. Court of Appeals for the Eighth Circuit has stated that " 'EMTALA is not a federal malpractice statute and it does not set a national emergency health care standard; claims of misdiagnosis or inadequate treatment are left to the state malpractice arena.' " *Summers v. Baptist Medical Center Arkadelphia*, 91 F.3d 1132, 1137 (8th Cir. 1996). Accord *Brooks v. Maryland General Hosp., Inc.*, 996 F.2d 708 (4th Cir. 1993). Thus, a hospital's liability under EMTALA is not grounded upon tort concepts. An EMTALA plaintiff's claim does not rest on any proof that a hospital was negligent; it is predicated on the hospital's violation of a federal statute, making the hospital strictly liable for any personal harm that directly results from that violation. *Griffith v. Mt. Carmel Medical Center, supra.* Therefore, state malpractice law and general principles of negligence provide one theory of recovery against a hospital where the alleged substandard treatment results in wrongful death, and EMTALA provides a separate and distinct theory of recovery, either of which may be invoked by a plaintiff in a cause of action for wrongful death.

The personal representative's petition contains a prayer in which she seeks recovery against Mary Lanning on a negligence

theory, in addition to her claim based upon Mary Lanning's alleged EMTALA violations. As the trial progressed, the personal representative's counsel withdrew the issue of Mary Lanning's negligence from the case, conceding that there was no evidence upon which the jury could conclude that Mary Lanning was negligent. Such a concession does not, however, result in the automatic dismissal of the wrongful death claim against Mary Lanning based upon alleged violations of EMTALA. EMTALA provides a separate *theory of recovery* under which a plaintiff may seek relief in a wrongful death *cause of action.* While the district court may have properly disposed of the personal representative's negligence theory of recovery against Mary Lanning, it should not have sustained the motion for a directed verdict in regard to the entire "wrongful death action."

[15,16] This court has long adhered to the principle that a proper result will not be reversed merely because it was reached for the wrong reason. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999). We have also stated that a trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Consequently, the directed verdict on the EMTALA claim may still have been appropriate if the evidence at trial was such that reasonable minds could draw but one conclusion in regard to the EMTALA claim against Mary Lanning. The following analysis of the EMTALA requirements demonstrates that such is not the case:

[17,18] Upon discovery of an emergency medical condition, EMTALA usually requires hospitals to treat the discovered condition. Under certain circumstances, however, EMTALA allows hospitals to transfer patients instead of treating them. See 42 U.S.C. § 1395dd(b)(1)(B). If a hospital elects to transfer the patient under 42 U.S.C. § 1395dd(b)(1)(B), that "hospital can [still] violate § 1395dd through the operation of its emergency room by failing to stabilize a patient's emergency medical condition before transferring or releasing the patient." *Delaney v. Cade*, 986 F.2d 387, 391-92 (10th Cir. 1993). With respect to an emergency medical condition described in 42 U.S.C. § 1395dd(e)(1)(A), the term "stabilized" means that "no mate-

rial deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(A). Because there is no dispute that Gestring suffered from an "emergency medical condition" or that Mary Lanning decided to transfer Gestring rather than provide treatment, the critical inquiry is whether Gestring's condition was stabilized at the time of transfer.

[19] "'[T]he definition of "to stabilize" asks whether the medical treatment and [transfer were] reasonable under the circumstances. This is obviously a factual inquiry . . . .'" *Delaney v. Cade*, 986 F.2d at 392. "To determine whether the defendants stabilized [Gestring's] medical condition before transfer, all the expert testimony submitted to the district court . . . must be considered." See *id.* Thus, if the testimony at trial denotes a genuine dispute concerning whether material deterioration was likely to occur during transfer, a jury should consider whether Gestring was "stabilized" as defined in EMTALA. See *id.*

At trial, Steven Tilles, M.D., testified that Gestring was not stable at the time he was transferred from Mary Lanning. Tilles testified that while Gestring may have been stabilized for transfer earlier on the day he was transferred, his condition had not been stabilized at the time the decision was made to transfer him to Lincoln. Bruce Hutson, M.D., stated that "there was 100 per cent chance . . . that [Gestring] was going to deteriorate during transit." Simply put, the jury could have accepted Tilles' and Hutson's testimony and found that because Gestring was not stabilized at the time of transfer, Mary Lanning was in violation of EMTALA and that such a violation was a cause of Gestring's death. The evidence places into question whether at the time of Gestring's transport, "no material deterioration of [his] condition [was] likely, within reasonable medical probability." See 42 U.S.C. § 1395dd(e)(3)(B).

[20] Gestring's stabilization notwithstanding, a hospital may legally transfer someone who has an emergency medical condition which has not been stabilized if one of several conditions has been satisfied. If an individual at a hospital has an emergency medical condition which has not been stabilized, the hospital may not transfer the patient unless (1) the patient requests the transfer in writing or (2) a physician has signed a certifica-

tion that based upon the reasonable risks and benefits to the patient and the information available at the time, the medical benefits reasonably expected from the provision of appropriate medical treatment at another facility outweigh the increased risks to the individual's medical condition from effecting the transfer. EMTALA also allows such a transfer if, in the absence of a physician, a "qualified person" signs such a certification, which is subsequently countersigned by a physician. See 42 U.S.C. § 1395dd(c)(1)(A).

[21] In addition to the obligation of certifying the medical need for transferring patients protected by EMTALA, hospitals also have an obligation to appropriately transfer such patients. See 42 U.S.C. § 1395dd(c)(2). The statutory definition of appropriate transfer requires, inter alia, that "transfer [be] effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer." 42 U.S.C. § 1395dd(c)(2)(D). See, also, *Burditt v. U.S. Dept. of Health and Human Services*, 934 F.2d 1362 (5th Cir. 1991). This statutory requirement has been interpreted as requiring "personnel and transportation equipment that a reasonable physician would consider appropriate to safely transport the patient in question." 934 F.2d at 1372.

At trial, the personal representative argued that Mary Lanning inappropriately transferred Gestring because he was not stabilized at the time of transfer; the personal representative further contended that had Barth properly certified that Gestring's condition was not stabilized at the time of transfer, the proper personnel and life support measures would have accompanied Gestring to Lincoln. Hutson testified that the box checked by Barth on the certificate of transfer form was not indicative of Gestring's condition at the time of transfer. Tilles testified that had Barth properly certified Gestring's condition as unstable, the awareness of the ambulance crew would have been heightened, and Gestring might possibly have survived the trip to Lincoln. Because the evidence is in dispute as to whether Gestring's transfer complied with EMTALA, the question whether Mary Lanning appropriately transferred Gestring was a question to be resolved by the jury. See *id.*

In summary, there was sufficient evidence upon which a finder of fact could have based the conclusion that Mary Lanning was in violation of EMTALA and, further, that the violation was a cause of Gestring's death. Due to the highly technical nature of the definitions contained within EMTALA, the district court should properly instruct the jury thereon prior to submitting any EMTALA issues for decision. We conclude that the district court improperly sustained Mary Lanning's motion for a directed verdict on the wrongful death action.

## CONCLUSION

For the foregoing reasons, we conclude that the personal representative's motion for a new trial should have been sustained; thus, we reverse the judgment of the district court and remand this matter for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
HERMAN BUCKMAN, APPELLANT.

613 N.W. 2d 463

Filed July 7, 2000. Nos. S-99-948, S-99-1009.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution.
3. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
4. **Postconviction: Constitutional Law.** When a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
6. **Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.

7. **Postconviction: Effectiveness of Counsel: Pleas.** In a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
8. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
9. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement is satisfied if a 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.
10. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffective assistance of counsel analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
11. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to a defendant and which were or could have been litigated on direct appeal.
12. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
13. **Convictions: Effectiveness of Counsel: Plea Bargains.** A defendant convicted of a crime cannot assert a claim of ineffective assistance of counsel based upon the fact that the defendant did not accept a plea bargain to a lesser charge and was ultimately convicted of a greater charge.
14. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
15. ___: ___: ___. Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.
16. **Miranda Rights.** *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
17. **Search and Seizure: Arrests.** A search made without a warrant is valid if made incidental to a lawful arrest.
18. **Evidence.** Pursuant to Neb. Rev. Stat. § 29-3301 (Reissue 1995), the term "identifying physical characteristics" includes saliva samples.
19. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
20. **Rules of Evidence: Expert Witnesses.** In this state, where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a sci-

entific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.

21. ___: ___. This state adheres to the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), under which the proponent of scientific evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.

22. **Trial: Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeals from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Herman Buckman appeals from an order of the Lancaster County District Court which dismissed his motions for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). We have consolidated cases Nos. S-99-948 and S-99-1009 for purposes of briefing and oral argument.

## SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

## FACTS

### CASE NO. S-99-1009

Buckman was charged with burglary (count I) and with conspiracy to possess a controlled substance (count II). Buckman was also alleged to be a habitual criminal in both counts. On February 27, 1989, the trial court accepted Buckman's plea of

no contest on count II. As part of a plea bargain, count I and a separate charge of possession of a firearm by a felon were dismissed. On March 2, Buckman was sentenced on count II, as enhanced by the habitual criminal statute, to 20 to 60 years' imprisonment to be served concurrently with the sentence imposed on count II in case No. S-99-948. No direct appeal was filed with respect to Buckman's conviction for conspiracy to possess a controlled substance.

CASE NO. S-99-948

With respect to case No. S-99-948, Buckman was charged with and subsequently found guilty by a jury of the first degree murder of Denise Stawkowski (count I) and use of a weapon to commit a felony (count II). He was later determined to be a habitual criminal. On March 2, 1989, he was sentenced on count I to life imprisonment, with credit for 377 days served plus any and all good time earned during that period, and on count II, as enhanced by the habitual criminal statute, to 20 to 60 years' imprisonment to be served consecutively to the sentence imposed on count I.

A detailed description of the facts regarding case No. S-99-948 is set forth in our opinion concerning Buckman's direct appeal. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). We reiterate only those facts necessary for resolution of this postconviction action. The record shows that at the time of her death on February 19, 1988, the victim was a 25-year-old wife and mother of four children. She was a drug dealer and a drug user who sold drugs to several people.

The victim's husband testified that the victim began selling small quantities of methamphetamine to Buckman and Goldie Fisher in December 1987. The victim kept a record of her drug transactions in a blue trifold ledger, along with the drugs, money, and razor blades for dividing the drugs. In January 1988, Buckman and Fisher began to purchase cocaine from the victim. Buckman and Fisher paid for the drugs with cash or offered merchandise in exchange for the drugs.

Shortly before the murder, Buckman became dissatisfied with either the quantity or quality of the drugs he was buying from the victim. On at least one occasion, Buckman threatened to

steal any drugs the victim might have had. The morning before the day of the murder, Buckman and Fisher traded a VCR for the balance due on an "eight-ball" of drugs received earlier in the week from the victim. Later that day, they were trying to sell leather jackets and baby clothes to get money to pay Fisher's babysitter. A few hours before the murder, they tried to sell or trade a ".38 Special" gun to the victim's husband for drugs. The same caliber gun was used to kill the victim.

It was established that when the victim was with Fisher at approximately 1 a.m. on February 19, 1988, the victim's purse contained roughly $2,000 and three eight-balls of cocaine. None of these items were found with the victim's body when it was discovered at approximately 3:20 the same morning. On February 19, after the murder, Buckman and Fisher spent large amounts of cash in Lincoln, but when they were arrested, the baby clothes and leather coats were still in Buckman's car. At that time, Buckman had $656 in cash in his possession.

Karen Niemann testified that she picked up Fisher, who was alone on a road near the location of the murder, at approximately 1:30 a.m. This was within the timeframe for the victim's death as set by the pathologist. Other evidence placed Fisher with Buckman immediately before and after the murder.

Certain evidence placed Buckman at the scene of the murder. There were bloodstains on his clothing and on the steering wheel cover and floormats in his car. A Kool cigarette butt was found in the victim's car, and a package of Kool cigarettes and brown slippers were found near the murder scene. A cellmate of Buckman's testified that Buckman bragged that he had killed the victim in the presence of Fisher and that he had used the money he stole from the victim to pay debts.

Buckman was represented on direct appeal by the same attorneys he had at trial. On appeal, we held that (1) the evidence supported the convictions, (2) the jury was not required to be unanimous as to the theory which brought it to its guilty verdict on the first degree murder charge, and (3) the admission of evidence regarding Buckman's use of illegal controlled substances and the receipt of stolen property was not an abuse of discretion. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). We also concluded that Buckman's appeal did not preserve the

issue of whether the trial court erred in overruling his motion in limine and his objection at trial to Niemann's testimony, and we refused to consider his claim that the trial court erred in not requiring the State to elect between premeditated murder and felony murder. *Id.*

### Motions for Postconviction Relief

On April 1, 1998, Buckman filed a motion for postconviction relief with respect to his convictions for first degree murder and use of a weapon, which he subsequently amended. On July 28, Buckman filed a motion for postconviction relief with respect to his conviction for conspiracy to possess a controlled substance, which was also subsequently amended.

On January 27, 1999, the State requested that the district court deny an evidentiary hearing and overrule Buckman's motions to vacate and/or set aside the judgments and/or convictions. On May 28, the district court denied an evidentiary hearing in both cases and dismissed the motions for postconviction relief. Buckman appeals from this order.

## ASSIGNMENTS OF ERROR

Buckman asserts that (1) the district court erred in failing to grant an evidentiary hearing; (2) the district court erred in dismissing the amended motions for postconviction relief; and (3) he was denied the right to a fair trial and the conflict-free assistance of counsel at trial and on direct appeal, in violation of the 5th, 6th, and 14th Amendments to the U.S. Constitution.

## ANALYSIS

### Case No. S-99-1009

Buckman argues his counsel was ineffective because counsel told him that a plea of no contest to the charge of conspiracy to possess a controlled substance would result in no additional prison time, since his sentence would run concurrently with the sentences imposed for first degree murder and use of a weapon to commit a felony. He also claims he was told that because he would win on appeal, the plea would not matter. Buckman further alleges that counsel told him that he did not need a trial on the conspiracy charge because his appeal regarding the murder and use of a weapon to commit a felony would inevitably be

successful and would vindicate him on all charges, including the conspiracy charge. He further asserts that counsel was ineffective in not challenging the admissibility of the evidence against him and in not informing him regarding the evidentiary challenges that could have been made and those that would be forfeited in the event of a plea of no contest.

[2-4] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

[5-7] A plea of no contest is equivalent to a plea of guilty. *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991). Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.*

[8-10] Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Lyle, supra.* When a conviction is based upon a guilty plea, the prejudice requirement is satisfied if a 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. *State v. Silvers, supra.* The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reason-

able and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*

Buckman's first two claims of ineffective assistance of counsel allege that his plea was not made voluntarily and intelligently. We have previously set forth the standard by which to determine if a plea was freely, intelligently, voluntarily, and understandingly made. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In *Irish*, we stated that in order to support a finding that a plea of guilty or no contest has been entered into freely, intelligently, voluntarily, and understandingly,

> 1. The court must
>
> a. 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; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.
>
> We conclude that the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested.

223 Neb. at 820, 394 N.W.2d at 883.

Buckman relies upon *State v. Jefferson*, 5 Neb. App. 646, 562 N.W.2d 77 (1997). In *Jefferson*, the defendant alleged he was promised that the county attorney would ask the court to drop another charge and give Jefferson 45 days' jail time. Instead, the judge sentenced the defendant to a term of 4 to 5 years' imprisonment. In concluding that the files and records did not conclusively establish that the defendant's plea was knowingly and voluntarily made, the Court of Appeals stated:

> [I]n postconviction proceedings where the defendant alleges that his or her plea was induced by some promise, the court must hold an evidentiary hearing on the issue

> unless the record conclusively shows that the plea was not induced by any promises, except those included in the plea bargain. Usually the record will not conclusively show that no such promise was made unless the judge addresses the defendant personally on the subject—a good reason for the trial court to specifically discuss the matter with the defendant.

*Id.* at 652, 562 N.W.2d at 81.

In *Jefferson*, the judge did not ask the defendant if any promises had been made to him, and there was no other evidence in the record to establish that no such promises had been made. *Jefferson* is distinguished from the case at bar because Buckman was specifically asked whether anyone had made him any promises other than those contained in his plea bargain, and he said no. From our review of the record, we conclude that Buckman was informed of his rights as required by *Irish* and that he freely, intelligently, voluntarily, and understandingly entered his plea of no contest. Thus, the record affirmatively shows that Buckman is entitled to no relief, and the district court did not err by not granting an evidentiary hearing with respect to these first two claims of ineffective assistance of counsel.

Buckman's third claim of ineffective assistance of counsel relates to an assertion that counsel failed to inform him of evidentiary challenges that would be forfeited by pleading no contest. The record shows that Buckman was specifically asked by the trial court whether he understood that by pleading no contest he would be waiving and giving up his right to raise any defenses to the charge, whether those defenses be procedural, constitutional, or statutory. Buckman replied that he understood. Accordingly, we find no error in the district court's refusal to grant an evidentiary hearing on the issue of ineffective assistance of counsel and that the record affirmatively shows Buckman is entitled to no relief.

## CASE NO. S-99-948

Buckman asserts numerous challenges to his convictions for first degree murder and use of a weapon to commit a felony. These challenges include the use of a statement made to law enforcement about the brand of cigarettes Buckman smoked,

physical evidence seized by the police, evidence seized from Buckman's car, a cigarette package seized from his bedroom, testimony regarding serological testing, and challenges to jury instructions.

[11] Buckman failed to raise these issues on direct appeal even though they were known to him and could have been addressed using the record available on direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to a defendant and which were or could have been litigated on direct appeal. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

However, Buckman raises the same issues in the context of ineffective assistance of counsel at trial. Since Buckman was represented by the same attorneys on direct appeal as he was at trial, this is his first opportunity to allege ineffectiveness of trial counsel. Therefore, Buckman's claims regarding ineffective assistance of trial counsel are not procedurally barred. See *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

Buckman first alleges that he was offered two separate and distinct plea bargains: (1) plead to one count of being an accessory to murder and testify against his girl friend, Fisher, or (2) plead to one count of second degree murder and be sentenced to an indeterminate term of 10 years' to life imprisonment without testifying against Fisher. Buckman claims that his counsel advised him that the prosecution's case was so weak that he would be found not guilty at trial and that, therefore, he rejected both of the alleged plea bargains. Buckman asserts that counsel was ineffective in that had he been properly advised as to the strength of the prosecution's case, he would have accepted one of the plea bargains. The district court determined that Buckman did not allege sufficient facts which, if proved, would constitute an infringement of his constitutional rights.

[12,13] Buckman complains that counsel was ineffective because counsel did not correctly predict the outcome of the trial. We conclude that Buckman cannot raise this issue under the guise of ineffective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Williams, ante* p. 234, 609 N.W.2d 313 (2000). The fact

that Buckman's counsel did not successfully predict the outcome of the trial does not permit Buckman, after conviction, to argue that he would have accepted a plea to a lesser offense. A defendant convicted of a crime cannot assert a claim of ineffective assistance of counsel based upon the fact that the defendant did not accept a plea bargain to a lesser charge and was ultimately convicted of a greater charge. Accordingly, Buckman is precluded from raising this issue.

Buckman's second challenge arises from a statement made after he was arrested and taken to the Lancaster County sheriff's office. There, Buckman asked police officers for a cigarette. When he was offered a Camel Light cigarette, Buckman declined, stating that he smoked Kool King cigarettes. Kool King cigarette butts were found in the victim's car, where her body was found, and a package of Kool King cigarettes was found near the crime scene. Buckman's statement to law enforcement that he smoked Kool King cigarettes was received at trial to prove that Buckman was the source of the cigarette butts and the cigarette package found at the crime scene. Buckman argues that his counsel was ineffective for failing to object to this statement because the statement was the product of an illegal arrest and was taken in violation of his *Miranda* rights.

[14,15] Buckman claims that his arrest was illegal because the police did not have a warrant for his arrest, nor did they have probable cause to arrest him without a warrant. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

We conclude that the trial court correctly determined that the police had probable cause to arrest Buckman. Prior to Buckman's arrest, the police had found the victim's body in her car with gunshot wounds to her head. At that time, the police were aware that Buckman and Fisher wanted to buy drugs from the victim and were looking for her a few hours before she was

killed. Buckman and Fisher were seen in the parking lot of a liquor store where the victim had been on the night of the murder. Buckman was seen talking to the victim several hours before the murder, and she had left to meet Buckman a few hours before her body was found. In addition, Fisher was picked up near the crime scene a few hours before the victim's body was found.

Buckman's counsel was not ineffective by not objecting at trial to Buckman's statement that he smoked Kool King cigarettes. The record affirmatively shows that Buckman is entitled to no relief on this issue.

[16] Buckman next argues that the statement was taken in violation of his *Miranda* rights. The U.S. Supreme Court has stated:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). We have excluded from the definition of interrogation a course of inquiry related and responsive to a volunteered remark. See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

We conclude that the statement was normally attendant to Buckman's arrest and custody. When Buckman asked for a cigarette, he was offered a Camel Light. His response that he smoked Kool King cigarettes was a volunteered statement. Accordingly, the record affirmatively shows that Buckman is entitled to no relief on this issue.

Buckman's next claim is that his trial counsel was ineffective for not suppressing various items of physical evidence. At the police station, Buckman smoked two Kool King cigarettes which were saved by police. Serological testing was later performed on them, and at trial, the cigarette butts were offered as

evidence that Buckman was responsible for the cigarette butts found at the murder scene.

Buckman claims that his counsel was ineffective for failing to object to this evidence because the cigarette butts were the product of an illegal arrest and because law enforcement did not have a warrant or his consent to seize these items. We have already concluded that Buckman was not illegally arrested, since police had probable cause to arrest him without a warrant, and a warrant was not required to "seize" the cigarette butts which Buckman discarded.

In *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989), police seized a cigarette butt that the defendant had smoked at the police station. We stated: "Defendant's argument concerning the seizure of items he discarded as trash at the Ewing police department is without merit. The defendant abandoned these items and sufficiently exposed them to the officer and the public to defeat his claim to fourth amendment protection." *Id.* at 334, 440 N.W.2d at 253.

Accordingly, Buckman's counsel was not deficient for failing to object to the receipt of this evidence. The record affirmatively shows that Buckman is entitled to no relief on this issue.

Buckman next asserts that his counsel was ineffective for failing to suppress the following evidence: cash, a jacket, a sweater, a cap, a saliva sample, and subsequent testing of these items. After Buckman was arrested, police seized $656 in cash and the jacket, sweater, jeans, and cap Buckman had been wearing. Police took a saliva sample from Buckman, which was forensically tested, and his clothing was also tested. All of these items and the results of the forensic testing were received at trial to prove that Buckman was at the scene of the crime and that blood found on his clothing could not be excluded as being that of the victim's. Buckman claims that his trial counsel was ineffective for not suppressing this evidence because it was the product of an illegal arrest and was seized without a warrant and without his consent.

[17] A search made without a warrant is valid if made incidental to a lawful arrest. *Id.* In *Wickline*, after the defendant was lawfully arrested, the arresting officer searched the defendant's belongings. During this search, the officer recovered a screw-

driver, which was later admitted at trial as evidence that it was the type of instrument used to commit the crime. We concluded that this type of seizure was legal. Similarly, in the case at bar, all of the items at issue were seized incidental to a lawful arrest.

[18] A warrant or order was not required in order to take the saliva sample because Buckman was in lawful custody at the time it was taken. Neb. Rev. Stat. § 29-3304 (Reissue 1995) provides as follows:

> No order shall be required or necessary where the individual has been lawfully arrested, nor under any circumstances where peace officers may otherwise lawfully require or request the individual to provide evidence of identifying physical characteristics, and no order shall be required in the course of trials or other judicial proceedings.

Pursuant to Neb. Rev. Stat. § 29-3301 (Reissue 1995), the term "identifying physical characteristics" includes saliva samples. Thus, Buckman is entitled to no relief on this issue.

Buckman next asserts that his counsel should have moved to suppress certain evidence seized from his car. Police officers seized Buckman's car on February 19, 1988, without a warrant. On the morning of February 20, police searched the car pursuant to a search warrant. Another search of the car was conducted on February 24 pursuant to a search warrant issued the day before. During this second search, police officers seized, among other things, a black leather jacket, two floormats, and the steering wheel cover.

These items were tested by a forensic serologist. They were received at trial along with testimony from the serologist that small bloodstains were found on each item. Buckman claims that his trial counsel was ineffective for failing to suppress this evidence, since police illegally seized his car on February 19, 1988, and since his car was illegally searched on February 24 because the search warrant allegedly lacked probable cause.

The trial court concluded that officers had probable cause to believe that a crime had been committed and that Buckman was involved. Buckman and Fisher were seen in Buckman's car talking to the victim prior to the murder. Police officers were aware that Buckman often kept a gun in his car. Police saw Buckman

in his car shortly after the victim's body was found and shortly before he was arrested. We conclude that there was probable cause to believe that Buckman's car contained evidence relevant to the crime. The warrant for the first search of the car was properly issued.

As to the search warrant for the second search of the car on February 24, 1988, this search warrant must be supported by an affidavit establishing probable cause. See *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). The affidavit for the second search warrant incorporated the February 19 affidavit, which stated that Buckman and Fisher were seen in Buckman's car talking to the victim prior to the murder, that police officers were aware Buckman often kept a gun in his car, and that the victim died of gunshot wounds to the head. The February 23 affidavit contained additional information regarding stolen items in the car, some of which were linked to the victim's murder, including a VCR, leather coats, children's clothing, and tools. From this affidavit, the trial court correctly concluded that probable cause existed for issuance of the search warrant. Therefore, Buckman's counsel was not deficient for failing to object to the introduction of this evidence. Buckman is entitled to no relief on this issue.

Buckman claims his counsel failed to suppress admission of a cigarette package seized from his residence on February 21, 1988. Police had searched Buckman's residence pursuant to a search warrant which authorized the seizure of a coat; a purse; a folder, including records of drug transactions; a gun; clothing worn by Buckman and Fisher; and car keys. During the search, police found a Kool cigarette package in a trash container in the basement of the residence. The package had been opened from the bottom, rather than the top, as was the Kool King cigarette package found at the crime scene. Buckman claims this cigarette package was illegally seized and that his counsel was ineffective for not moving to suppress it.

[19] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of

access to the seized object itself. *U.S. v. Hatten*, 68 F.3d 257 (8th Cir. 1995).

All three of these elements are met under the circumstances described above. The police had a legal right to be in the place where the object was seized pursuant to the search warrant they had. The object's incriminating nature would have been immediately apparent to the officers due to the fact that this specific type of cigarette package had been found at the crime scene and had been opened in the same unusual manner. Finally, the police had a lawful right of access to the cigarette package because all the items for which they were searching pursuant to the warrant could have been found in the trash can where they found the cigarette package.

Accordingly, Buckman's counsel was not ineffective for failing to move to suppress this evidence. The record affirmatively establishes that Buckman is entitled to no relief on this issue.

Buckman's next claim of ineffective assistance of counsel relates to the testimony of two expert witnesses. Moses Schanfield, Ph.D., testified regarding the results of forensic serological tests he conducted on a Kool King cigarette butt found in the victim's car and known samples of Buckman's blood and saliva. Schanfield stated that only 0.7 percent of the white population and only 4.8 percent of the black population could have been the donor of the saliva found on the cigarette butt. He then concluded that Buckman fell within the 4.8 percent of the black population that could have smoked the cigarette. Reena Roy, Ph.D., testified about the results of forensic testing she conducted on, among other things, the jacket, sweater, and jeans Buckman was wearing at the time of his arrest and the steering wheel cover and floormats from Buckman's car.

[20,21] Buckman claims that his counsel was ineffective for failing to move for a hearing in accordance with *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), concerning this testimony and for failing to object to the evidence as being inadmissible under Neb. Rev. Stat. §§ 27-403 and 27-702 (Reissue 1995). Essentially, he claims that the evidence was more prejudicial than probative because the database was limited to only two racial classifications.

> In this state, where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. Stated otherwise, this state adheres "to the *Frye* standard, under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists."

*Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 829, 566 N.W.2d 110, 113 (1997).

Both of these expert witnesses testified that the testing methods they used were of the kind that were generally accepted in the scientific community. Buckman's counsel did challenge the fact that only two racial classifications were used by the experts. Counsel explored the limiting effect of using only two classifications. However, the testimony was admitted despite counsel's attempts to challenge it. The record shows that the statistical frequency tables relied on by both experts were generally accepted and relied upon by experts in the scientific community. The fact that the challenge was not successful does not render counsel's performance deficient. Accordingly, we cannot say that counsel's performance as to this issue was deficient.

Buckman next alleges that his counsel was ineffective for advising him not to testify at trial. He claims that his counsel told him that the prosecution's case was "so weak" that he did not need to testify in order to be found not guilty. He asserts that had he testified, he would have been found not guilty.

When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Williams, ante* p. 234, 609 N.W.2d 313 (2000). The district court concluded that Buckman failed to show that his counsel was deficient or that he was prejudiced with regard to not testifying at trial. The district court found that Buckman's allegation was a legal conclusion—that had he testified, he would not have been convicted. At Buckman's trial,

when the State rested, a dialog was had among the trial court, Buckman, and counsel. Buckman was advised of the benefits and detriments of testifying and not testifying. The record shows that he made the choice not to testify after having discussed the matter with his counsel. Buckman's claim has no merit.

Buckman's final challenge under his ineffective assistance of counsel argument relates to the jury instructions. Buckman first asserts that the jury instructions required the jury to find him not guilty of first degree murder before they could consider the lesser-included offenses of second degree murder and manslaughter. We addressed the "acquittal first" instruction in *State v. Jones*, 245 Neb. 821, 828-29, 515 N.W.2d 654, 658 (1994), where we stated:

> The problem with [the acquittal first] instruction . . . is not that it requires the jury to acquit the defendant on the greater charge before considering the lesser charge. An acquittal first instruction provides "for a more logical and orderly process for the guidance of the jury in its deliberations." *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984). There are many jurisdictions that approve the propriety of instructions requiring acquittal of the most serious offense charged before consideration of lesser offenses.

Accordingly, the instruction was proper. Therefore, the district court did not err in denying Buckman postconviction relief on this issue.

Buckman next asserts that he received ineffective assistance of counsel because the jury instruction on the lesser-included offense of second degree murder failed to include the necessary element of malice, thereby reducing the prosecution's burden of proof. Our decision in *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), that malice was an element of second degree murder was overruled in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). At the time of Buckman's trial, malice was not included as an element of second degree murder. Accordingly, failure to instruct on it was not error. Buckman's motion for postconviction relief assigned other errors with regard to the instructions, but such errors were not assigned and argued on appeal. Therefore, we will not consider such errors on appeal as they relate to his argument that counsel was ineffective.

Finally, Buckman alleges that one of his attorneys had represented both him and an individual who was an endorsed witness listed on the informations for both cases now here on appeal. He claims that the motion for postconviction relief in that individual's case raises significant questions about whether the dual loyalties of counsel were detrimental to his cases.

[22] It appears that this is the first time Buckman has made any mention of this claim. It does not appear anywhere in the record, in his amended motion for postconviction relief, or in the district court's order. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999). Accordingly, we need not consider this issue.

## CONCLUSION

For all of the foregoing reasons, we affirm the denial of postconviction relief in cases Nos. S-99-948 and S-99-1009.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V.
BRANDON R. JOHNSON, APPELLEE.

613 N.W.2d 459

Filed July 7, 2000. No. S-99-991.

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 from the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ___: ___. Jurisdictional questions can be raised by the Nebraska Supreme Court sua sponte.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
5. **Criminal Law: Judgments: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) grants the State the right to seek Supreme Court review of adverse criminal rulings and specifies the special procedure by which to obtain such review.
6. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.

7. **Jurisdiction: Appeal and Error.** An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.
8. **Criminal Law: Final Orders: Jurisdiction: Appeal and Error.** A failure to strictly comply with the jurisdictional prerequisites of Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) prevents the State from obtaining any review of a trial court's final order in a criminal case.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Exception dismissed.

James S. Jansen, Douglas County Attorney, Donald W. Kleine, and Jennie Dugan-Hinrichs for appellant.

Jeff T. Courtney, of Pfeffer & Courtney, for appellee.

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

GERRARD, J.

## INTRODUCTION

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), the State attempts to take exception to a decision of the district court for Douglas County, which sustained the motion for absolute discharge of Brandon R. Johnson regarding a two-count criminal information filed against him. For the reasons stated herein, we dismiss the State's exception for want of jurisdiction.

## BACKGROUND

On March 18, 1998, while in custody of the Nebraska Department of Correctional Services, Johnson was involved in an altercation with a number of correctional officers. The altercation arose from an incident in which a correctional officer attempted to place handcuffs on Paul M. Gilpatrick, another inmate. When Gilpatrick attempted to break loose from the correctional officer, the officer executed a wristlock takedown and took Gilpatrick to the ground in an attempt to regain control of the situation. While holding Gilpatrick down, the correctional officer was allegedly assaulted by Johnson.

On March 20, 1998, a criminal complaint was filed in the county court for Douglas County in which Johnson was charged with first degree assault on an officer, a Class II felony, and third

degree assault on an officer, a Class IV felony. A preliminary hearing was held on April 8 to determine whether Johnson should be bound over to district court to stand trial. On that same day and as part of the same proceeding, a preliminary hearing was also held in regard to a complaint filed against Gilpatrick, in which he was charged with assault on an officer in the third degree, a Class IV felony, and aiding and abetting an assault on an officer in the first degree. The county court found probable cause to bind both Johnson and Gilpatrick over for trial in the district court.

On April 8, 1998, an information was filed in the district court for Douglas County in which Johnson was charged with the same two offenses charged in the criminal complaint of March 20. Johnson entered a plea of not guilty, subject to a plea in abatement in which he asserted that the assault charges should be dismissed as a matter of law because there was insufficient evidence adduced at the preliminary hearing to support a finding of probable cause that he had committed the offenses alleged in the information. Gilpatrick also filed a plea in abatement on the same day as Johnson, in which he asserted that the assault charges against him should likewise be dismissed. Gilpatrick's attorney and Johnson's attorney subsequently agreed that one bill of exceptions from the preliminary hearing would be submitted to the district court in regard to consideration of both pleas in abatement. This bill of exceptions was then obtained by Gilpatrick's attorney and submitted to the district court on May 21. The cover of the bill of exceptions stated that it was a statement of the proceedings in the Douglas County Court in the cases of State v. Paul M. Gilpatrick, case No. CR98-7636, and State v. Brandon R. Johnson, case No. CR98-7626.

On May 13, 1999, without ever having received a ruling on his plea in abatement, Johnson filed a motion to discharge him of the offenses charged in the April 8, 1998, information on the grounds that his statutory and constitutional rights to a speedy trial had been violated by the State's failure to bring him to trial within 6 months of filing the information. Thereafter, a different district judge was assigned to the case; the judge conducted a hearing on the matter and on June 28, 1999, sustained Johnson's motion for discharge based on speedy trial grounds.

The State filed the instant application for leave to take exception to the decision of the district court pursuant to § 29-2315.01.

## ASSIGNMENTS OF ERROR

The State contends that the district court erred in (1) granting Johnson's motion to discharge because delay due to a court's disposition of a plea in abatement is statutorily excluded from the State's time limit to bring a defendant to trial and (2) granting Johnson's motion to discharge because the State is not responsible for delays caused by Johnson's own action or inaction.

## STANDARD OF REVIEW

[1] 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 from the lower court's decision. *Hron v. Donlan, ante* p. 259, 609 N.W.2d 379 (2000).

## ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dustin H. et al., ante* p. 166, 608 N.W.2d 580 (2000). Jurisdictional questions can be raised by the Nebraska Supreme Court sua sponte. *State ex rel. NSBA v. Krepela, ante* p. 395, 610 N.W.2d 1 (2000).

[4,5] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991). Section 29-2315.01 thus grants the State the right to seek Supreme Court review of adverse criminal rulings such as those involved in this case, and specifies the special procedure by which to obtain such review. *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). "Under [§ 29-2315.01], the general appeal statute does not come into play until there has been compliance with the special requirements of § 29-2315.01." *State v. Baird*, 238 Neb. at 726, 472 N.W.2d at 205. Because this appeal is the result of the State's seeking leave to take exception to the district court's order pursuant to § 29-2315.01, our pre-

liminary inquiry is whether the mandatory requirements of § 29-2315.01 have been met, thereby conferring jurisdiction upon this court to decide the merits of the issues raised in the State's exception.

Section 29-2315.01 provides:

> The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. *Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the county attorney as to the part of the record he or she proposes to present to the appellate court.* Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, and upon presentation, if the trial court finds it is in conformity with the truth, *the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the county attorney proposes to present to the appellate court is adequate for a proper consideration of the matter.* The county attorney shall then present *such application* to the appellate court within thirty days from the date of the final order. If the application is granted, the county attorney shall . . . proceed to obtain a review of the case as provided in section 25-1912.

(Emphasis supplied.)

[6] Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Wieczorek, supra.* Section 29-2315.01 clearly provides that in order to obtain review of a district court's final decision in a criminal case, the State *shall* present that application and a copy of the ruling complained of to the trial judge, who "*shall* sign the same" and indicate thereon his or her opinion as to whether that portion of the record proposed to be submitted by the county attorney to the appellate court is adequate for resolution of the issues raised in the application. Thereafter, the county attorney *shall* then present *such application* to the appellate court and proceed with the appeal.

The record in the instant case does not contain such an application. To the contrary, the record contains only a copy of the county attorney's initial application for leave to docket error proceedings, which was apparently submitted to the district court. The record does not, however, contain an application which bears the signature of the trial judge or the trial judge's opinion as to whether that part of the record sought to be submitted by the county attorney is adequate for review of the trial court's decision to which the State takes exception. Moreover, even though the application for leave to appeal *makes reference* to the court's order of June 28, 1999, "*a copy* of the ruling or decision complained of" is not attached thereto, as mandated by § 29-2315.01. In short, the application in the instant case does not comply with the mandatory provisions of § 29-2315.01.

[7,8] An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). This court has consistently maintained that the failure to strictly comply with the jurisdictional prerequisites in § 29-2315.01 prevents the State from obtaining any review of a trial court's final order in a criminal case. See, e.g., *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991); *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). Because the right of the State to appeal from a final order in a criminal case is limited by the express provisions of § 29-2315.01, the State's failure to comply with § 29-2315.01 in the instant case prevents this court from having jurisdiction to consider the merits of the State's exception.

## CONCLUSION

Because the record does not contain a proper application for leave to docket the State's exception as required by § 29-2315.01, we are without jurisdiction to decide the merits of the case, and the State's exception to the district court's decision must be and is dismissed.

EXCEPTION DISMISSED.

# STATE OF NEBRASKA, APPELLEE, V. JOHNNY MIKE HERNANDEZ, ALSO KNOWN AS JUAN HERNANDEZ, APPELLANT.

613 N.W.2d 455

Filed July 7, 2000. No. S-99-1102.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question 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.
2. **Sexual Assault: Prior Convictions: Jurisdiction: States.** Under Neb. Rev. Stat. § 28-319(3) (Reissue 1995), a prior conviction from another jurisdiction shall be utilized to enhance the penalty for a subsequent sexual assault offense so long as the prior conviction was pursuant to a state or federal law with essentially the same elements as § 28-319.
3. ___: ___: ___: ___. The critical inquiry under Neb. Rev. Stat. § 28-319(3) (Reissue 1995) is not whether a sexual assault statute from a sister state or federal jurisdiction incorporates exactly the same elements as § 28-319. Rather, the relevant inquiry is whether the offense for which a defendant was previously convicted and sentenced includes essentially the same elements as an offense punishable under § 28-319.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Harry A. Moore, Madison County Public Defender, for appellant.

Don Stenberg, Attorney General, and Donald J.B. Miller for appellee.

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

GERRARD, J.

## INTRODUCTION

Johnny Mike Hernandez, also known as Juan Hernandez, was convicted pursuant to a jury verdict of sexual assault in the first degree, in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1995). In its sentencing of Hernandez, the district court for Madison County found that the current conviction for first degree sexual assault was a second offense and enhanced his sentence pursuant to § 28-319(3). Hernandez appeals the enhancement of his sentence. The question presented is whether the military offense of sodomy for which Hernandez was previously convicted and sentenced includes essentially the same ele-

ments as first degree sexual assault (§ 28-319) for purposes of sentence enhancement under § 28-319(3). We conclude that the elements of the military offense of sodomy with a child under the age of 16 includes essentially the same elements of the offense for which Hernandez stands convicted in the instant case and, therefore, affirm the judgment of the district court.

## FACTUAL AND PROCEDURAL BACKGROUND

D.W. was 7 years old in July 1998 when he told his mother that a family friend, "Uncle Johnny," had put his mouth on D.W.'s penis, had grabbed D.W.'s penis, and had also rubbed his own penis on D.W.'s bottom. D.W.'s mother reported the matter to the Norfolk police for investigation.

On November 9, 1998, an information was filed charging Hernandez with first degree sexual assault on D.W. He pled not guilty. The State amended the information on May 5, 1999, alleging that Hernandez had once before been found guilty pursuant to § 28-319 or any other state or federal law with essentially the same elements as first degree sexual assault, as specified in § 28-319. Hernandez similarly pled not guilty to the amended information. A trial ensued, and the jury returned a guilty verdict on May 14. The district court accepted the verdict and adjudged Hernandez guilty of first degree sexual assault on the same day.

At Hernandez' sentencing hearing, the court received exhibits 9 and 11, which contain certified copies of the charge sheets, the general court-martial order, and the decision of the Army Court of Military Review, all relating to the 1987 court-martial convictions of Hernandez. The evidence reveals that Hernandez was charged with and found guilty of two counts of sodomy with a child under the age of 16, in violation of article 125 of the Uniform Code of Military Justice (UCMJ), and one count of committing an indecent act with the body of a child under the age of 16, with intent to gratify Hernandez' sexual desires, in violation of article 134 of the UCMJ. These acts occurred on May 27, 1987, while Hernandez was in the Army, stationed in Meunchweiler, Germany.

The district court took judicial notice of Title 10 of the United States Code, § 925, which defines the offense of sodomy under

article 125 of the UCMJ. The State offered and the court received photocopies of this same section as embodied in the United States Code Annotated.

The district court also received into evidence at the sentencing hearing a transcript of portions of the testimony adduced at trial in the instant case. The partial trial transcript included the testimony of M.B., who recounted in detail his sexual assault by Hernandez while M.B. was a child living on a military base in Germany. M.B. testified that Hernandez anally sodomized him. M.B. also read his statement given to the military police after the assault. Hernandez' counselor while he was incarcerated in the U.S. Disciplinary Barracks testified that Hernandez admitted responsibility for the 1987 sexual assault on M.B.

The district court found that the current conviction for first degree sexual assault was a second offense because Hernandez had a previous general court-martial conviction involving substantially the same crime with substantially the same elements. In accordance with § 28-319(3), Hernandez was sentenced to 25 to 50 years' imprisonment, with credit for time served. He was also deemed ineligible for parole pursuant to § 28-319(3). Hernandez timely appealed, and we moved this appeal to our docket pursuant to our authority to regulate the caseloads of the Nebraska appellate courts.

## ASSIGNMENT OF ERROR

Hernandez alleges, restated, that the district court erred in ruling that his prior conviction under the UCMJ could be used to enhance the penalty for his conviction of first degree sexual assault.

## STANDARD OF REVIEW

[1] Interpretation of a statute presents a question 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. *State v. Bottolfson, ante* p. 470, 610 N.W.2d 378 (2000).

## ANALYSIS

Hernandez did not dispute at sentencing, nor does he dispute on appeal, that he was convicted of a violation of article 125 of

the UCMJ in 1987. Hernandez, however, argues that article 125 does not contain essentially the same elements as § 28-319 because the military offense of sodomy proscribes some conduct or additional behavior that would not be criminally proscribed under § 28-319. As explained more fully below, Hernandez misperceives the critical inquiry that courts are required to make under the sentencing enhancement provisions of § 28-319(3).

[2] Section 28-319 provides, in pertinent part:

> (1) Any person who subjects another person to sexual penetration (a) without consent of the victim, or (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.
>
> . . . .
>
> [Note: Neb. Rev. Stat. § 28-318(6) (Reissue 1995) defines sexual penetration as "sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen."]
>
> (3) Any person who *is* found guilty of sexual assault in the first degree for a second time *when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section* shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

(Emphasis supplied.) In 1993, the Legislature added the italicized language to § 28-319(3) for the express purpose of clarifying that a prior conviction from another jurisdiction could be utilized to enhance the penalty for a subsequent sexual assault offense so long as the prior conviction was pursuant to a state or federal law with essentially the same elements as § 28-319. See Judiciary Committee Statement, L.B. 430, 93d Leg., 1st Sess. 1591-92 (Feb. 3, 1993).

[3] Thus, the critical inquiry is not whether a sexual assault statute from a sister state or federal jurisdiction incorporates exactly the same elements as § 28-319. Rather, the relevant inquiry is whether the offense for which a defendant was previously convicted and sentenced includes *essentially the same elements* as an offense punishable under § 28-319.

Therefore, we must examine the language of article 125 of the UCMJ to ascertain whether it contains essentially the same elements as § 28-319, such that Hernandez' court-martial conviction under article 125 could be used to enhance his sentence pursuant to § 28-319(3). We note that the United States Code contains the UCMJ, and thus, Hernandez' conviction was a conviction under federal law. Article 125 provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C. § 925 (1994). The offense of sodomy is further clarified in the Manual for Courts-Martial, United States (MCM), which has the force and effect of law. See *Noyd v. Bond*, 395 U.S. 683, 692, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969) (noting that MCM has force and effect of law unless it is " 'contrary to or inconsistent with' " the Uniform Code Congress has enacted). See, also, 53A Am. Jur. 2d *Military and Civil Defense* § 297 (1996 & Cum. Supp. 2000). The MCM repeats the text of article 125, then lists the following as elements of the offense of sodomy:

> (a) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
>
> [Note: add either or both of the following *elements*, if applicable]
>
> (b) That the act was done with a child under the age of 16
>
> (c) That the act was done by force and without the consent of the other person.

(Emphasis supplied.) Manual for Courts-Martial, United States, ¶ 51, art. 125 (1984). Exhibits 9 and 11 reveal that subsection

(b) applied to Hernandez' 1987 court-martial conviction, as he was charged and convicted of sodomy with a child under the age of 16.

A comparison of § 28-319 and article 125, as applied in Hernandez' court-martial conviction, reveals that both contain essentially the same elements. Both require penetration, and § 28-319, pursuant to § 28-318(6), defines penetration such that an act of sodomy is included within its purview. Section 28-319 prohibits sexual penetration when the victim does not consent or could not consent because of mental or physical incapabilities or age. Similarly, article 125, as clarified in the MCM, prohibits sexual penetration when the victim does not consent or could not consent because of age. As noted previously, this consent element was applied in Hernandez' court-martial conviction, as he was charged and convicted of sodomy with a child under the age of 16.

Therefore, the particular sodomy offense for which Hernandez was previously convicted and sentenced under article 125, as further clarified in the MCM, includes essentially the same elements of the offense for which Hernandez stands convicted under § 28-319. This is precisely the type of circumstance that the Legislature considered when it amended § 28-319(3) to clarify that a prior conviction from another jurisdiction could be utilized to enhance the penalty for a subsequent sexual assault offense so long as the conviction was pursuant to a state or federal law with essentially the same elements as § 28-319. We conclude that the district court appropriately used Hernandez' court-martial conviction under article 125 to enhance his penalty for first degree sexual assault, pursuant to § 28-319(3).

## CONCLUSION

For the foregoing reasons, we conclude that the district court properly utilized Hernandez' prior sodomy conviction to enhance his penalty for first degree sexual assault. Therefore, we affirm the judgment of the district court.

AFFIRMED.

# ALFRED V. BARTLETT ET AL., APPELLANTS AND CROSS-APPELLEES, V. DAWES COUNTY BOARD OF EQUALIZATION, APPELLEE AND CROSS-APPELLANT, AND TAX EQUALIZATION AND REVIEW COMMISSION OF NEBRASKA, APPELLEE.

613 N.W.2d 810

Filed July 7, 2000. Nos. S-99-1211 through S-99-1216.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ___: ___. In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Judgments: Collateral Attack.** When a judgment is attacked in a way other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
5. **Administrative Law: Collateral Attack.** The rule regarding collateral attack on a judgment applies not only to courts of general jurisdiction, but also to administrative boards and tribunals acting in a quasi-judicial capacity.
6. **Taxation: Valuation.** A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization.
7. **Taxation: Valuation: Property: Agriculture.** Agricultural land constitutes a separate and distinct class of property for purposes of property taxation.
8. **Constitutional Law: Taxation: Valuation: Agriculture.** Neb. Const. art. VIII requires uniform and proportionate assessment within the class of agricultural land.
9. **Taxation: Property: Agriculture.** Subclasses of agricultural property must be based on soil classification for purposes of taxation.
10. **Taxation: Valuation.** When ordering an adjustment for purposes of equalization, the Tax Equalization and Review Commission is authorized to adjust only by class or subclass.
11. **Taxation: Presumptions: Evidence: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) creates 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 the presumption disappears when there is competent evidence adduced on appeal to the contrary.
12. **Constitutional Law: Taxation: Valuation.** A county board of equalization has the duty to correct and equalize individual discrepancies and inequalities in assessments within the county. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county.

Appeals from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, and Patrick M. Connealy, of Crites, Shaffer, Watson, Connealy & Harford, for appellants.

Dennis D. King, of Smith and King, P.C., for appellee Dawes County Board of Equalization.

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

HENDRY, C.J.

## INTRODUCTION

Alfred V. Bartlett, Dale W. Anderson, Pamela B. Anderson, Ormund Whitsel, Eleanor Whitsel, Robert Marshall, and Donald Littrel (hereinafter taxpayers), property owners in Dawes County, brought property valuation protests to the Dawes County Board of Equalization. The board denied the protests, and taxpayers appealed to the Tax Equalization and Review Commission (TERC). TERC found that the procedure utilized by the board in addressing the protests was arbitrary and unreasonable, but affirmed the board's denial of the protests. Taxpayers now appeal, and the board cross-appeals. We granted taxpayers' petition to bypass, see Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

## BACKGROUND

In April 1998, due to problems with the assessment of property in Dawes County, the Dawes County assessor divided the county into four agricultural "market areas" for property tax purposes. The boundaries for each market area were based upon where "assessment to sales ratios" for various land sales fell on the county map. The land sales used in determining the market areas came from a "qualified sales report" compiled by the Property Tax Administrator pursuant to Neb. Rev. Stat. § 77-1360.01 (Cum. Supp. 1998). A chart depicted the assessment-to-sales ratios for the various sales which were grouped in ranges, with each range being labeled with a letter ("Ratios: 40% under = X, 41% - 55% = O, 56% - 70% = Z, 70% - 85% =

C, 85% up = H"). The letter representing the assessment-to-sales ratio for each sale was plotted on the map where the sale had occurred. The county was then divided into the "market areas" by drawing lines around the various sales locations, along township or half-township lines. There is no zoning in Dawes County.

Each year, the Property Tax Administrator prepares reports informing TERC of the quality of assessments in each county in Nebraska. See Neb. Rev. Stat. § 77-5027 (Cum. Supp. 1998). Assessments in Dawes County were not acceptable even after the creation of the market areas and the adjustments made by the assessor. The acceptable range of assessment for agricultural land is from 74 to 80 percent of the actual value. Neb. Rev. Stat. § 77-5023 (Cum. Supp. 1998). Assessments in Dawes County were at only 70 percent. Pursuant to Neb. Rev. Stat. § 77-5026 (Cum. Supp. 1998), if TERC determines that equitable assessment of property in the state cannot be made without adjusting the value of a class or subclass of property in a county which it deems overvalued or undervalued, TERC may hold a hearing during which legal representatives of the county may show cause as to why the adjustment should not be made. Pursuant to this statute, TERC held a show cause hearing on May 13, 1998, at which the Dawes County assessor appeared, in order to discuss how to remedy the situation.

The record of the hearing indicates that several alternatives were considered by TERC and the assessor to bring the agricultural class of land into the acceptable statistical range. TERC members noted that none of the market areas as delineated by the assessor fell within the acceptable range. However, the assessor believed that the adjustments should be done by location of the land instead of by land use. Thus, another alternative was developed, basing the adjustments in valuations on the market areas established by the assessor. At the conclusion of the hearing, TERC ordered adjustments to the assessments of agricultural land based on the market areas established by the assessor.

TERC issued a written order adjusting values on May 14, 1998. The order stated the following with respect to the adjustments to agricultural land:

That the value of the agricultural subclasses of property in the County be adjusted to the midpoint of the acceptable range (i.e., 77%), which requires that the subclasses be adjusted as follows:

a. That there shall be no adjustment to the median indicated level of value for agricultural land in Agricultural Area 1.

b. That the median indicated level of value for agricultural land in Agricultural Area 2 shall be increased by 62%.

c. That the median indicated level of value for agricultural land in Agricultural Area 3 shall be decreased by 18%.

d. That the median indicated level of value for agricultural land in Agricultural Area 4 shall be increased by 92%.

The Dawes County assessor complied with TERC's order and implemented the adjustments by market areas.

Taxpayers are farmers and ranchers who own agricultural land divided by the lines between agricultural market area one (Area 1) and market area four (Area 4). The adjustments by market area implemented by the assessor in compliance with TERC's May 14, 1998, order caused the valuation of taxpayers' properties in Area 4 to increase to nearly double the amount at which it was previously valued, while adjoining property located in Area 1 did not increase. Taxpayers filed property valuation protests with the board to protest the valuation of their property in Area 4.

In August 1998, the board filed its own petition with TERC pursuant to Neb. Rev. Stat. § 77-1504.01 (Cum. Supp. 1998), which allows a county board to petition TERC to consider an adjustment to a class or subclass of property. The petition requested that TERC revise the sales roster for agricultural land and either issue a stay of or reverse its order of May 14, 1998.

When taxpayers' protests were presented to the board, the board made the following notation on taxpayers' protest forms, "The Board of Equalization has chosen to keep agricultural land assessments at their present level, as ordered by T.E.R.C., pending the outcome of the Board's petition." However, TERC dismissed the board's petition in an order dated August 7, 1998.

Taxpayers then filed appeals from the board's denial of their protests with TERC, and the cases were consolidated for hear-

ing. At the hearing, Dixie Eaton, Dawes County assessor in 1998, testified that she divided Dawes County into four market areas by plotting the sales in the county based on the assessment-to-sales ratios and by looking at soil maps. She testified that the market areas were drawn on township lines or half-township lines, even though soil type divisions do not follow township lines. Eaton testified that there are eight subclasses of grassland in Dawes County. These subclasses are known as 1G, 1G-1, 2G, 2G-1, 3G, 3G-1, 4G, and 4G-1. These subclasses are based on soil type. The market areas established by the assessor are not consistent with the soil classifications depicted on the soil map of Dawes County.

Taxpayers Marshall, Bartlett, Littrel, and Dale Anderson each testified that there was no difference between the land they own in Area 4 as opposed to the land they own in Area 1. Taxpayers also adduced evidence that the land sales in Area 4 included in the qualified sales report were not sales of agricultural land. Taxpayers testified as to the fair market values of their land, which ranged from $100 to $129 per acre. Taxpayers also produced evidence of the fair market value of their land through their expert witness, Bruce Sheopner, who opined that taxpayers' land was worth $114 to $130 per acre. Sheopner further testified that the land sales in Area 4 contained in the qualified sales report were not sales of agricultural property.

Connie Sandoz, who took office as the Dawes County assessor in 1999, testified that there is no difference in the soil type, type of grass, or carrying capacity of taxpayers' land located in Area 4 as opposed to land located in Area 1. However, Sandoz testified that subclass 4G grassland in Area 4 was assessed at $150 per acre, while subclass 4G grassland in Area 1 was assessed at $75 per acre. Sandoz also testified that land classified as subclass "2D" in Area 4 was assessed at $480 per acre, compared to $250 per acre in Area 1. Sandoz agreed that adjoining lands for every subclass of land along the boundary of Area 1 and Area 4 had "vastly different values." When asked for her justification of this difference in value, Sandoz stated, "There has to be a line somewhere . . . ."

In its findings and order dated September 22, 1999, TERC found that the board represented to the taxpayers that "no action

would be taken" upon their protests pending the outcome of the board's petition to TERC to adjust values. TERC determined that the board "failed to consider the merits" of taxpayers' protests and that such action was unreasonable and arbitrary. TERC determined that by not addressing the taxpayers' protests, the board "ignored the statutory duty to equalize assessments." TERC determined that the process utilized by the board in maintaining the assessments at their current levels pending the outcome of the board's petition was arbitrary and unreasonable.

TERC further determined that taxpayers had failed to show the actual or fair market value of their property, that establishment of market areas is a professionally accepted mass appraisal technique, and that the taxpayers' challenge to the sales included in the qualified sales report constituted a collateral attack on a decision of the Property Tax Administrator. TERC further found that the issues raised by taxpayers regarding the increased valuation constituted a collateral attack on TERC's prior orders of May 14 and August 7, 1998. TERC then affirmed the board's denial of the protests.

## ASSIGNMENTS OF ERROR

Taxpayers claim, rephrased and summarized, that TERC erred in (1) determining that taxpayers' challenge constituted a collateral attack on TERC's orders of May 14 and August 7, 1998, (2) failing to find that adjustments to agricultural land based solely on location rather than the class or subclass of property were unlawful and resulted in the failure to assess agricultural land uniformly and proportionately, (3) affirming the board's decision after finding that the board failed to consider the merits of taxpayers' protests and finding such failure to be unreasonable and arbitrary, (4) finding that taxpayers adduced no evidence to establish the board's determination of values was unreasonable, (5) finding that taxpayers' challenge to the qualified sales report constituted a collateral attack on the decision of the Property Tax Administrator, (6) denying taxpayers due process by reviewing the results of its own prior order, and (7) failing to reduce the valuation of taxpayers' properties to the lowest value of the same class and subclass of similar property located in the county.

The board, in its cross-appeal, claims TERC erred in determining that the board's method of addressing taxpayers' protests was arbitrary and unreasonable.

## STANDARD OF REVIEW

[1-3] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record. Neb. Rev. Stat. § 77-5019(5) (Supp. 1999); *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000); *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Pittman, supra*; *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). However, in instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000).

## ANALYSIS

### COLLATERAL ATTACK

Taxpayers claim TERC erred in its determination that taxpayers' challenge to the adjustments by market area constituted a collateral attack on TERC's prior orders.

[4,5] When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *County of Adams v. Nebraska State Bd. of Equal.*, 252 Neb. 847, 566 N.W.2d 392 (1997). The rule regarding collateral attack on a judgment applies not only to courts of general jurisdiction, but also to administrative boards and tribunals acting in a quasi-judicial capacity. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980). See, also, *County of Adams, supra*. The board argues that an order of an administrative agency is not subject to collateral attack in the absence of fraud or bad faith and that there was no fraud or bad faith in this case. The board's

argument assumes that taxpayers' challenge constitutes a collateral attack.

[6] We have consistently held that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982). An appeal may then be taken from the order of the county board of equalization fixing the assessed value of the property. *Id.* This remedy is full, adequate, and exclusive. *Id.* Such a claim cannot be made, in the first instance, by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. *Id.*

TERC's order of May 14, 1998, ordered the adjustments by market areas, and TERC's order of August 7, 1998, denied the board's petition to TERC to reconsider the adjustments. Taxpayers were then given notice of the adjustments, and they filed their protests. This was taxpayers' first and only opportunity to challenge any of these issues. The protest procedure and appeal therefrom is taxpayers' sole method of challenging the 1998 property valuations. Taxpayers do not have the opportunity to challenge the increase in the valuation of their property outside of the protest procedure. Thus, taxpayers' challenge does not constitute a collateral attack on TERC's prior orders. TERC erred in determining that taxpayers' challenge to the 1998 adjustments was a collateral attack.

### ADJUSTMENTS TO VALUATION BY "MARKET AREA"

Taxpayers also claim that TERC erred in failing to find that TERC's adjustments to agricultural land by market area rather than by class or subclass of property was unlawful and void.

Section 77-5026 provides:

> Pursuant to section 77-5023, if the commission finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the commission shall issue

> a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing at least five days following the mailing of the notice. The notice shall be mailed to the county clerk, county assessor, and chairperson of the county board. At the hearing the legal representatives of the county may appear and show cause why the value of a class or subclass of the property of the county should not be adjusted. At the hearing, the commission may receive testimony from any interested person.

The May 13, 1998, show cause hearing was held pursuant to this section. TERC's order of May 14 purported to be ordering adjustments to subclasses of agricultural land. These "subclasses" were, in actuality, the market areas delineated by the assessor.

[7,8] Agricultural land constitutes a separate and distinct class of property for purposes of property taxation. Neb. Rev. Stat. § 77-1361(1) (Cum. Supp. 1998). Neb. Const. art. VIII requires uniform and proportionate assessment within the class of agricultural land. Agricultural land is then divided into "categories" such as irrigated cropland, dry cropland, and grassland. Neb. Rev. Stat. § 77-1363 (Cum. Supp. 1998). These categories are further divided into subclasses based on soil classification. *Id.*

Section 77-5027 provides in part, "[TERC] shall, pursuant to section 77-5026, raise or lower the valuation of any *class or subclass* of property in a county when it is necessary to achieve equalization." (Emphasis supplied.) TERC's order of May 14, 1998, in which it ordered adjustments to agricultural land assessments (Area 1, no adjustment; area two, 62-percent increase; area three, 18-percent decrease; and Area 4, 92-percent increase), was not an adjustment to the value of a subclass of property as authorized by §§ 77-5026 and 77-5027. TERC has the authority to increase or decrease "by a percentage the value of a class or subclass of property." In this case, TERC ordered increases and decreases by various percentages based on where the land was located within the "market areas."

[9] Although TERC's order claims to be adjusting subclasses of agricultural land, a "market area" is not a subclass of agricultural land recognized by our statutes. Subclasses of agricultural

property must be based on soil classification for purposes of taxation. § 77-1363. Although the assessor claims to have used soil maps in establishing the market areas, the market areas bear little resemblance to the soil map of Dawes County. Eaton admitted that township lines do not follow soil classifications. The market area map itself shows only the assessment-to-sales ratios for the various sales plotted on the map, with the market area boundaries drawn around them. The evidence in this case indicates that the market areas established by the assessor were not, in fact, based on soil classification, but, instead, were based on assessment-to-sales ratios. Subclasses of agricultural land must be based on soil classification, not upon where the land is located. The market areas do not constitute subclasses of agricultural land as defined by our statutes. Thus, TERC was without authority to order adjustments to agricultural land by market area, and such adjustments were in violation of the statutory scheme set out by the Legislature.

The board argues that TERC correctly found on appeal that the establishment of market areas is a professionally recognized method of mass appraisal under Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998), which provides:

> Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, taking into account factors such as location, zoning, and current functional use, (2) income approach, and (3) cost approach.

Assuming without deciding that market area analysis is a professionally accepted mass appraisal method for establishing actual value, the problem in this case is that the "market areas" were used by TERC as a basis for ordering adjustments for purposes of equalization under § 77-5026.

[10] When ordering an adjustment for purposes of equalization, TERC is authorized to adjust only by class or subclass. § 77-5027. The market areas involved in this case do not constitute a class or subclass of agricultural land; therefore, TERC's determination that market area analysis is a professionally

accepted method of mass appraisal for purposes of ascertaining actual value does not justify TERC's 1998 adjustments.

TERC was without authority to order adjustments to agricultural land based on the market areas because the market areas involved in this case do not constitute subclasses of property recognized by our statutes. We therefore determine that the adjustments to agricultural land valuations implemented by the assessor pursuant to TERC's May 14, 1998, order must be reversed.

### Action of County Board

Taxpayers further claim that TERC erred in affirming the board's denial of taxpayers' protests after determining that the board's failure to address the merits of the protests was arbitrary and unreasonable. The board cross-appeals on this issue, claiming TERC erred in determining that the board's action was arbitrary and unreasonable.

Neb. Rev. Stat. § 77-1510 (Cum. Supp. 1998) provides in part, "Appeals may be taken from any action of the county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act." Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides in part:

> The Tax Equalization and Review Commission shall hear appeals and cross appeals taken under section 77-1510 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 commission 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.

[11] We have held that § 77-1511 creates 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. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000).

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Id.*

[12] A county board of equalization has the duty to correct and equalize individual discrepancies and inequalities in assessments within the county. *AT&T Information Sys. v. State Bd. of Equal.*, 237 Neb. 591, 467 N.W.2d 55 (1991); Neb. Rev. Stat. §§ 77-1501, 77-1502, and 77-1504 (Cum. Supp. 1998 & Supp. 1999). In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. *AT&T Information Sys., supra.* See, also, § 77-1501. This basic duty of county boards of equalization remains unchanged by enactment of the Tax Equalization and Review Commission Act. See §§ 77-1501, 77-1502, and 77-1504 (Reissue 1996, Cum. Supp. 1998 & Supp. 1999).

A county board of equalization may address equalization issues each year between June 1 and July 25. § 77-1504. County boards of equalization must also rule on protests within this time period. § 77-1502. A county board of equalization may file its own petition with TERC, on or before July 26, requesting an adjustment to a class or subclass of property. See § 77-1504.01 (Supp. 1999).

TERC determined that the board ignored its duty to equalize assessments based on language the board placed on taxpayers' protest forms, stating, "The Board of Equalization has chosen to keep agricultural land assessments at their present level, as ordered by T.E.R.C., pending the outcome of the Board's petition." TERC noted that by not addressing the issues raised in the protests, in the event that the board's own petition to TERC was denied, the board would have lost the opportunity to equalize assessments within the limited timeframe under which it is authorized to equalize assessments. TERC found the board's method of handling the protests to be arbitrary and unreasonable.

The board's own language placed on the protest forms is sufficient to rebut the presumption that the board faithfully performed its official duties in making an assessment and acted

upon sufficient competent evidence to justify its action. The board's notation on the protest forms indicates that the board essentially took no action on taxpayers' protests and simply decided to await the outcome of its own petition to TERC. The board's petition was subsequently dismissed by TERC. As TERC determined in its order, this resulted in the board's losing the ability to equalize assessments within the allotted time-frame. The board had a duty to address the equalization issue, which it failed to do. TERC was correct in determining that this action by the board was arbitrary and unreasonable, and the board's cross-appeal is without merit.

We therefore determine that TERC must remand these consolidated protests to the board for a determination on the merits, taking into consideration our determination that TERC's May 14, 1998, order in which it adjusted agricultural land values by market areas was unauthorized. Accordingly, we need not address the remaining assignments of error.

## CONCLUSION

For the foregoing reasons, we reverse TERC's decision of September 22, 1999, affirming the board's denial of taxpayers' protests, and remand this cause to TERC with orders to remand the consolidated protests to the board for further proceedings regarding the 1998 tax year, consistent with this opinion and in conformity with Neb. Const. art. VIII, requiring uniform and proportionate assessment within the class of agricultural land.

The board's cross-appeal is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
DONNIE GRAHAM, APPELLANT.

614 N.W.2d 266

Filed July 7, 2000. No. S-99-1235.

1. **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.

2. **Motions to Suppress: Appeal and Error.** In making a determination whether a trial court's ruling on a motion to suppress is to be upheld, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes that the trial court is the finder of fact and takes into consideration that it observed the witnesses.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Motions to Suppress: Courts: Records.** District courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress.
5. **Criminal Law: Constitutional Law.** Where entry by an undercover agent is effected solely by the invitation of the defendant, albeit under a misconception as to the agent's identity and purpose, there is no Fourth Amendment activity so long as the agent does not exceed the scope of the invitation.
6. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.
7. **Criminal Law: Entrapment: Intent.** Under the "origin of intent" test, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
8. **Entrapment: Evidence: Proof.** Because entrapment is in the nature of an affirmative defense, the burden of going forward with evidence of the element of governmental inducement is on the defendant.
9. ___: ___: ___. In assessing whether the defendant has satisfied his or her burden of going forward with evidence of governmental inducement, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. This determination is made as a matter of law, and the defendant's evidence of inducement must be more than a scintilla.
10. **Criminal Law: Entrapment: Police Officers and Sheriffs: Controlled Substances.** The lone fact that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Affirmed.

Kelly J. Werts, of Fankhauser, Nelsen & Werts, P.C., for appellant.

Don Stenberg, Attorney General, and Marie Colleen Clarke for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Donnie Graham appeals his convictions of two counts of distributing marijuana in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). Graham asserts that the district court for Pawnee County erred in denying his motion to suppress and in failing to find that he had been entrapped. We affirm.

## STATEMENT OF FACTS

Investigator Philip Dittbrenner was assigned to the Southeast Area Drug Enforcement Task Force, which covers a six-county area in southeast Nebraska, including Pawnee County. In May 1998, Dittbrenner was working with a confidential informant who agreed to introduce Dittbrenner to persons who might be selling illegal drugs. The informant received a fee of $50 to $100 each time he provided adequate information that led to persons who were selling drugs. Pursuant to such agreement, the informant identified Graham as a person he had known for some time who had dealt in cocaine, methamphetamine, and marijuana sales.

On May 6, 1998, Dittbrenner and the informant went to Graham's home in Pawnee City so that the informant could introduce Dittbrenner to Graham and Dittbrenner could attempt to purchase drugs from Graham. Dittbrenner and the informant arrived at Graham's home in the early afternoon without notice or invitation. The informant introduced Dittbrenner to Graham as "Bill" and falsely told Graham that he worked for "Bill" in a construction business. Neither the informant nor Dittbrenner revealed Dittbrenner's true identity as an investigator. Graham invited Dittbrenner and the informant into his home.

Dittbrenner and the informant remained in Graham's home for approximately 45 minutes to an hour, talking with Graham. During that time, the three individuals drank beer, Graham offered Dittbrenner marijuana to smoke, and Dittbrenner simulated smoking the marijuana. Toward the end of the visit, Dittbrenner asked Graham whether he had any marijuana to sell. Graham replied that at the time, all he had was a small baggie of marijuana that he would sell to Dittbrenner for $10. Dittbrenner

purchased the baggie and inquired whether he could get more marijuana. Graham told Dittbrenner he would attempt to find some more marijuana, but no specific plan was made at that time.

The next day, May 7, 1998, the informant called Graham to inquire as to an additional purchase of marijuana. Graham advised the informant and Dittbrenner that he could get them a quarter ounce of marijuana, but that they would need to travel to get it. Dittbrenner and the informant went to Graham's house, then proceeded with Graham to the home of Lynn deKoning in rural Pawnee County. On the way, Dittbrenner gave Graham $50, which was the agreed-upon price for the quarter ounce of marijuana. When they arrived at the deKoning residence, Dittbrenner and the informant waited in the car. Graham went to the house and brought out an individual he introduced to Dittbrenner and the informant as "Lynn." Graham and Lynn went into the residence, and a short time later, Graham returned to the car and handed Dittbrenner a baggie which, Dittbrenner estimated, contained approximately a quarter ounce of marijuana.

The baggies given by Graham to Dittbrenner were sent to the Nebraska State Patrol Criminalistics Laboratory for analysis. Testing revealed that both baggies contained marijuana.

Graham was arrested, and a preliminary hearing was held in the county court for Pawnee County on December 3, 1998. The county court found that the State had submitted sufficient evidence to establish probable cause that the two charged offenses of distributing marijuana had been committed and that reasonable grounds existed to believe Graham had committed those offenses. Graham was bound over to district court for trial on the charges.

On June 16, 1999, Graham filed a motion to suppress as evidence

> any and all observations made and items of evidence seized from [Graham's] residence by law enforcement officers during the presence of law enforcement officers at said residence on or about May 7, 1998 [sic] and also suppressing as evidence any and all observations made regarding [Graham] and items of evidence seized from a pur-

> ported drug purchase and sale on or about May 8, 1998 [sic].

Graham asserted that Dittbrenner's entry into his home on May 6, 1998, using a confidential informant and a false identity to obtain Graham's consent to enter violated his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the U.S. Constitution and by Neb. Const. art. I, § 7.

Graham waived jury trial, and on July 28, 1999, the matter came on for hearing on the motion to suppress and for bench trial. For purposes of the motion and trial, the parties stipulated that the testimony of Dittbrenner at the preliminary hearing would be admitted and received into evidence, and Graham waived further cross-examination of Dittbrenner. Graham waived foundation for the admission of the Nebraska State Patrol Criminalistics Laboratory reports, provided that such reports would not be admitted into evidence if the court sustained his motion to suppress. At the bench trial, Graham argued a defense of entrapment, asserting that the record did not show any predisposition on his part to commit the crimes charged. The State argued in response that there was no entrapment, as Graham had not resisted Dittbrenner's request to purchase marijuana.

On August 11, 1999, the district court entered a ruling denying Graham's motion to suppress and, with respect to the substance of the charges, found Graham guilty of both counts of distributing marijuana in violation of § 28-416(1)(a). On October 14, the district court sentenced Graham to imprisonment for not less than 36 months and not more than 60 months on each count to run concurrently. Graham appealed the denial of the motion to suppress and his convictions.

## ASSIGNMENTS OF ERROR

Graham asserts that the district court erred in (1) denying his motion to suppress and (2) failing to find that he had been entrapped.

## STANDARD OF REVIEW

[1,2] 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. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In making a determination whether a trial court's ruling on a motion to suppress is to be upheld, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes that the trial court is the finder of fact and takes into consideration that it observed the witnesses. *Id.*

[3] Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

## ANALYSIS

*Motion to Suppress.*

Graham asserts that the district court erred in denying his motion to suppress evidence obtained as the result of Dittbrenner's entry into his home on May 6, 1998. Graham argues that such governmental entry into his home which was gained by use of false pretenses on the part of the State's agent violated his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the U.S. Constitution and by Neb. Const. art. I, § 7. Because we conclude that the Fourth Amendment and Neb. Const. art. I, § 7, are not implicated by the undisputed facts, we affirm the district court's denial of Graham's motion to suppress.

[4] We note that in its ruling on Graham's motion to suppress, the district court did not articulate its specific findings but simply stated that "[t]he court finds that the defendant's Motion to Suppress should be overruled." We have directed that "district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress." *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996). We noted in *Osborn* that the degree of specificity required would vary from case to case. In the instant case, the district court's articulation of the specific basis of its denial of Graham's motion to suppress would have been helpful to our review on appeal. However, the only evidence offered and received for the

district court's consideration of Graham's motion to suppress was Dittbrenner's testimony from the preliminary hearing. Because there is no conflict in the evidence relevant to the motion, we are able to review the district court's ultimate determination of the motion to suppress from the record in this case. Accordingly, we proceed to consideration of the merits of the motion to suppress.

The uncontroverted evidence establishes that based on the informant's identification of Graham as a person who dealt in illegal drugs, Dittbrenner arranged to meet Graham. Dittbrenner used a false identity to gain Graham's consent to enter his house. After Dittbrenner and the informant had been inside Graham's house for some time, Graham voluntarily offered them some marijuana to smoke. When Dittbrenner later asked to purchase some marijuana from Graham, Graham readily offered to sell what he had and agreed to try to locate more. The following day, Graham again readily responded to Dittbrenner's request by accepting Dittbrenner's $50 and taking Dittbrenner to a location where Graham obtained marijuana, which he then sold to Dittbrenner.

[5] Under the facts of this case, there was neither a search nor a seizure as those concepts are understood under the Fourth Amendment and Neb. Const. art. I, § 7. In cases "where entry by an undercover agent is effected solely by the invitation of the defendant, albeit under a misconception as to the agent's identity and purpose, there is no Fourth Amendment . . . activity so long as the agent does not exceed the scope of the invitation." *People v Catania*, 427 Mich. 447, 454, 398 N.W.2d 343, 346 (1986). See, also, *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966). In the instant case, Graham voluntarily allowed Dittbrenner and the informant into his home without any coercion on their part, compare *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (Fourth Amendment is implicated where consent is gained via coercion), and once inside, Dittbrenner's conduct did not exceed the scope for which he had gained admittance.

The facts show that once inside Graham's house, Dittbrenner observed nothing other than that which Graham contemplated. While recognizing that the home is accorded the full range of Fourth Amendment protections, the U.S. Supreme Court has

stated that when the home is converted into a commercial center "for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Lewis v. United States*, 385 U.S. at 211. In the instant case, Graham initiated the transaction of unlawful drug activity in his home by offering Dittbrenner and the informant marijuana to smoke. Upon Dittbrenner's inquiry, Graham readily agreed to sell the marijuana he had on hand and to attempt to locate additional marijuana for Dittbrenner to purchase.

Under the facts of the instant case, we conclude there was no Fourth Amendment activity by Dittbrenner, and therefore, no violation of Graham's right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the U.S. Constitution and by Neb. Const. art. I, § 7. We therefore conclude that the district court did not err in denying Graham's motion to suppress, and we reject Graham's first assignment of error.

*Entrapment.*

As his second assignment of error, Graham argues generally that the district court erred in not finding that the evidence established his entrapment defense. In particular, Graham argues that the State offered no evidence to show that he had a predisposition to sell marijuana. Because we conclude, as more fully outlined below, that Graham did not carry his burden of going forward with evidence of inducement, this assignment of error is without merit.

[6] Under Nebraska law, entrapment is " 'the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.' " *State v. Connely*, 243 Neb. 319, 330, 499 N.W.2d 65, 73 (1993), quoting *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). In *Sherman v. United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958), the U.S. Supreme Court stated: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

[7] It has been observed that there are two tests for analyzing the existence of entrapment: " 'the origin of intent' " test and the

"objective" test. Note, *Entrapment*, 73 Harv. L. Rev. 1333, 1335 (1960). Nebraska has adopted the "origin of intent" test to determine whether a defendant was entrapped. Under this test, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Connely, supra*; *State v. Stahl, supra.*

[8] Entrapment is a defense consisting of conjunctive elements—governmental inducement to commit a crime and a lack of criminal predisposition in the defendant. *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). Because entrapment is in the nature of an affirmative defense, the burden of going forward with evidence of the element of governmental inducement is on the defendant. *State v. Connely, supra*; *State v. Stahl, supra.*

[9] In assessing whether the defendant has satisfied his or her burden of going forward with evidence of governmental inducement, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *State v. Swenson, supra.* This determination is made as a matter of law, and the defendant's evidence of inducement must be more than a scintilla. *Id.* To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction. *Id.* For the reasons recited below, we conclude that Graham's evidence of the element of inducement was not more than a scintilla of evidence, and thus, he did not satisfy his burden of going forward. Accordingly, we need not and do not analyze the sufficiency of the evidence of the second element of entrapment, predisposition. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court not obligated to engage in analysis not needed to adjudicate case and controversy before it).

In the present case, Graham argues that Dittbrenner and the informant contacted him on their own initiative to gain admittance to his home, that he did not offer to sell marijuana to Dittbrenner prior to Dittbrenner's request, and that in response to Dittbrenner's request, Graham said that he had only the bag-

gie from which the three had been smoking. Graham claims this evidence was sufficient as to inducement. In response to Graham's argument, the State asserts, inter alia, that Graham did not meet his initial burden to show governmental inducement. We agree with the State.

[10] The thrust of Graham's argument with respect to inducement is that because Dittbrenner initiated the marijuana sale, Graham has, therefore, met his burden of establishing that the State induced the crimes. Contrary to Graham's assertion, in *State v. Swenson*, we specifically stated that "[t]he lone fact that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana." 217 Neb. at 825, 352 N.W.2d at 153. See, also, *State v. Lampone*, 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980) (observing that "where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment").

Our holding in *State v. Swenson*, that the lone fact of an offer to purchase is not an inducement resulting in the availability of the entrapment defense, is consistent with other authorities considering the element of inducement. See, generally, *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958) (in case in which entrapment was established, it was observed that undercover agent's merely affording opportunity to commit offense does not constitute entrapment). See, also, *State v. Nelsen*, 89 S.D. 1, 228 N.W.2d 143 (1975); *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969); *People v Margaret Jones*, 48 Mich. App. 334, 210 N.W.2d 396 (1973). In connection with entrapment in drug prosecutions, other authorities have identified four principal "inducements": appeals to friendship, sympathy, offers of excessive amounts of money, and appeals to the seller's "addiction." See, generally, *State v. Nelsen, supra*. None of these inducements is present in the instant case. To establish that a defendant was induced to violate the law, the cases further indicate that an inducement must be undue or prolonged, consisting of persistent pressure or insistent persuasion. *Id.* See, also, *United States v. Glaeser*, 550 F.2d 483

(9th Cir. 1977). The evidence fails to show that any such pressures were brought to bear on Graham. In sum, Graham's evidence relating to inducement was limited to the fact that Dittbrenner offered to purchase marijuana, which evidence was not more than a scintilla of evidence of inducement and, therefore, was insufficient to carry Graham's burden of going forward with respect to the first element of the entrapment defense. The district court's rejection of the entrapment defense was correct, and this assignment of error is without merit.

## CONCLUSION

We conclude that Dittbrenner's entry into Graham's home did not implicate Graham's rights under the Fourth Amendment and Neb. Const. art. I, § 7, and that the district court, therefore, properly denied his motion to suppress evidence obtained as a result of such entry. We further conclude that Graham did not offer more than a scintilla of evidence of the element of inducement and, therefore, failed to meet his burden of going forward with sufficient evidence to support an entrapment defense. The district court's rulings were correct, and we, therefore, affirm Graham's convictions.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
JOHN DIXON, APPELLANT.

614 N.W. 2d 288

Filed July 14, 2000. No. S-98-888.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.

4. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error.
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. **Homicide: Lesser-Included Offenses.** Attempted second degree murder is a lesser-included offense of attempted first degree murder.
7. **Trial: Juries: Evidence.** Where the evidence and circumstances of a crime are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences, whether requested to do so or not.
8. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
9. ___. 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.
10. **Trial: Evidence: Tape Recordings.** If adequate foundation is elicited at trial, tape recordings of relevant and material conversations may properly be admitted into evidence.
11. **Trial: Juries: Evidence: Tape Recordings.** Previously played portions of tape recordings, like testimony of an actual witness at trial, generally should not be reheard by jurors.
12. ___: ___: ___: ___. When a jury makes a request to rehear certain evidence, a trial court should discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified.
13. **Trial: Juries: Evidence: Tape Recordings: Appeal and Error.** Once a tape recording is properly admitted as testimonial evidence, such evidence should be marked as any other exhibit and included in the record for review in the event of an appeal. After being admitted, however, the exhibit should be played once in open court so that the jury can hear the tape in the same manner that it does other evidence. It is only under circumstances where the jury makes a request to rehear certain testimonial evidence during deliberations that the trial court must proceed to weigh the probative value of the testimony against the danger of undue influence, in open court in the presence of both parties or their counsel, before determining whether portions of the evidence should be reheard by the jury.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Daniel P. Bracht, of Law Offices of Daniel P. Bracht, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

## INTRODUCTION

John Dixon was convicted pursuant to a jury verdict in the district court of attempted first degree murder, use of a deadly weapon to commit a felony, and attempted theft by unlawful taking of property with a value in excess of $1,500. The district court thereafter sentenced Dixon to a combined sentence of not less than 49 nor more than 62 years' imprisonment. Dixon timely appealed. The primary issue in this appeal is whether the evidence adduced at trial was sufficient to entitle Dixon to a jury instruction on attempted second degree murder. Based on our holding in *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), we answer this question in the affirmative, and for the reasons stated herein, we affirm Dixon's conviction for attempted theft by unlawful taking, reverse Dixon's convictions for attempted first degree murder and use of a deadly weapon to commit a felony, and remand this cause for a new trial on those two counts.

## FACTUAL BACKGROUND

The evidence viewed in a light most favorable to the State reveals that on the evening of February 7, 1995, Chad Vasa, Ramon Morales, and Dixon met at an apartment in Omaha, Nebraska. When Vasa first met Morales, Morales was carrying a duffelbag containing a sawed-off shotgun and some shells for the shotgun. Dixon arrived after Morales. Shortly thereafter, Vasa, Morales, and Dixon (hereinafter collectively the trio) decided to leave the apartment and abandon the duffelbag containing the shotgun at the house of a mutual acquaintance; the trio then drove to western Omaha in search of a car to steal.

The initial attempt to steal a car went awry, as Morales and Dixon were chased away from the car by someone appearing to

have a weapon. The trio decided that before they attempted to steal another car, they would retrieve the shotgun and shells. After doing so, they set out toward West Point, Nebraska. The trio stopped in Decatur, Nebraska, where they stole another car, a Chevrolet Celebrity, and then again in Oakland, Nebraska, where Dixon used the shotgun to shoot the windows out of a parked car, before they finally arrived in West Point.

Upon arriving in West Point early on the morning of February 8, 1995, the trio decided to attempt to steal yet another car. They parked the Chevrolet Celebrity in an alley adjacent to the garage and behind the home of Bill and Cheryl Weiler. Vasa testified that he remained in the car while Morales and Dixon got out to steal the Weilers' 1985 Buick Electra Park Avenue automobile, which was parked next to the garage. According to Vasa, Morales let himself into the car while Dixon stood at the corner of the Weilers' garage, holding the shotgun.

Cheryl Weiler awoke when her dog began to bark at approximately 6:15 a.m. She went to the kitchen and attempted to quiet her dog by tapping on the window when she noticed that the interior light of the Park Avenue was on and that someone was behind the steering wheel. Cheryl Weiler also noticed that there was another person standing outside of her car between the car and the garage. She alerted her husband, Bill Weiler, and dialed the 911 emergency dispatch service on the telephone.

Bill Weiler then went to the door and ordered the intruders to get out of the car. There was a brief hesitation and a muffled response before one of the intruders asked, "Now?"; Bill Weiler then shouted, "Yeah, now." At this point, a shot was fired in Bill Weiler's direction, striking him with at least 180 shotgun pellets, causing him severe injuries. The remainder of the shotgun pellets struck the area of the Weilers' home near the doorway from which Bill Weiler had emerged. Before authorities arrived at the Weilers' home, the trio had escaped and were headed back toward Omaha.

Hours after the shooting, Vasa was arrested near Tekamah, Nebraska, for possessing a stolen vehicle. After his arrest, Vasa met with police several times and was questioned regarding the February 8, 1995, shooting in West Point. On February 21, Vasa gave a statement to Investigators Ron Hilliges and Doug Johnson

of the Nebraska State Patrol, in which Vasa indicated that he and Dixon were involved in the shooting. Vasa asserted that he was not the shooter and voluntarily took two polygraph examinations in an attempt to exonerate himself, failing both of them.

Hilliges and Johnson informed Vasa of the polygraph results and told Vasa that they did not believe his story. Still maintaining his innocence, Vasa offered to make a tape-recorded telephone call to Dixon, during which Vasa believed Dixon would admit to the shooting. Johnson and Hilliges explained that Vasa was to ask questions in a manner that would not allow Dixon to merely give "yes" or "no" answers and then allowed Vasa to place the call. During the ensuing telephone conversation, Vasa asked Dixon, "Wasn't you just supposed to scare him though, man?" Dixon replied, "Yeah." Later in the conversation, Vasa asked Dixon, "How come you shot him?" Dixon responded, "I don't know, dude. . . . I just felt like blasting on him." Dixon concluded their discussion by stating, "That's the point of having a gun." Hilliges and Johnson were present when the conversation between Vasa and Dixon was recorded.

Johnson and Hilliges later discovered that portions of the tape-recorded conversation were indiscernible because the voices sounded "like chipmunks." The investigators then approached Brian Kreikemeier, an experienced sound technician, to "clean up" the recording and make the conversation more intelligible. Kreikemeier "cleaned up" the recording by slowing the tape speed down, adjusting the frequency of the recorded sounds through an equalizer, and recording the slower version onto another tape. Kreikemeier testified at trial that no changes could have been made to the original tape because it was received by him in such a condition that it could not be recorded over.

Dixon was ultimately brought to trial on charges of attempted first degree murder, use of a deadly weapon in the commission of a felony, and attempted theft by unlawful taking. At trial, the State sought to introduce both the partially unintelligible tape recording (exhibit 4) and the "cleaned-up" version (exhibit 3), and both were admitted into evidence over Dixon's objections. Exhibit 3 was played in court and was then explained and corroborated by Vasa's testimony. Vasa, Johnson, and Hilliges all

testified that exhibit 3 was an accurate depiction of the conversation between Dixon and Vasa. Dixon's attorney then attempted to cross-examine Vasa about the failed polygraph examinations, but the State objected, and the objection was sustained.

Dixon also objected to the introduction of three photographs the State sought to admit into evidence. Two of these photographs (exhibits 22 and 23) depict Bill Weiler's injuries, and the third photograph (exhibit 44) illustrates the field of vision of Debra Harstick, a neighbor of the Weilers who testified at trial. Dixon argued that exhibits 22 and 23 were cumulative and would inflame the jury and that exhibit 44 should not be admitted because it was taken during a season different from that in which Bill Weiler was shot and depicts automobiles not present on the day of the shooting. The photographs were admitted into evidence over Dixon's objection.

At the conclusion of the State's case, Dixon made a motion to dismiss all three counts of the information, which motion was recharacterized by the court as a motion for a directed verdict and then overruled. Prior to the submission of the case to the jury, the district court instructed the jury on attempted murder in the first degree. Dixon did not request a jury instruction on attempted murder in the second degree, and no such instruction was given. After the case was submitted to the jury but before a verdict had been reached, the district court acceded to the jury's request for a tape player, "presumably to listen to Exhibit 3." Thereafter, the jury returned verdicts of guilty on all three counts.

Dixon made a motion for a new trial, which was overruled upon sentencing. After a presentence investigation, the district court sentenced Dixon to not less than 40 nor more than 50 years' imprisonment for the crime of attempted first degree murder, not less than 8 nor more than 10 years' imprisonment for the crime of using a firearm to commit a felony, and not less than 1 nor more than 2 years' imprisonment for the crime of attempted theft by unlawful taking. The district court ordered the sentences to be served consecutively. Dixon timely appealed.

## ASSIGNMENTS OF ERROR

Dixon contends, summarized and restated, that the district court erred in (1) failing to instruct the jury on the lesser-

included offense of attempted second degree murder; (2) admitting various audiotapes, photographs, and testimony into evidence; (3) allowing the jury to take an electronic tape recorder into their deliberations; (4) not allowing Dixon to cross-examine Vasa regarding the results of Vasa's polygraph examinations; (5) giving a jury instruction which improperly minimized the burden of proof on the element of intent; (6) declining to give a jury instruction tendered by Dixon on the inherent problems with verbal communications; (7) conducting an ex parte communication with the jury; (8) overruling Dixon's motions for a directed verdict and for a new trial; (9) finding sufficient evidence to uphold Dixon's convictions; and (10) imposing excessive sentences.

## STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Brown*, 258 Neb. 346, 603 N.W.2d 456 (1999).

## ANALYSIS

### Duty to Instruct Jury on Lesser-Included Offense

Dixon first contends that the district court erred by failing to instruct the jury that it could find him guilty of the lesser-included offense of attempted second degree murder. We must therefore determine whether the district court was correct in instructing the jury on only attempted first degree murder or whether the evidence also warrants an instruction on the lesser-included offense of attempted second degree murder, notwithstanding Dixon's failure to request such an instruction.

[3,4] It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Brown, supra.* Jury instructions must be read as a whole,

and if they fairly present the law so that the jury could not be misled, there is not prejudicial error. *Id.*

[5] This court has delineated a two-step procedure for trial courts to follow when determining whether to instruct the jury on a lesser-included offense. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In *State v. Williams*, 243 Neb. at 965, 503 N.W.2d at 566, we stated:

> [A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense . . . 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.

As charged in the present case, the statutory elements of attempted first degree murder are these: a substantial step in a course of conduct intended to culminate in the commission of a purposeful, malicious, premeditated killing of another person. Neb. Rev. Stat. §§ 28-201 and 28-303 (Reissue 1995). The statutory elements of attempted second degree murder are these: a substantial step in a course of conduct intended to culminate in the commission of an intentional killing of another person. § 28-201 and Neb. Rev. Stat. § 28-304 (Reissue 1995).

[6] Applying the *Williams* test, we held in *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), that attempted second degree murder is a lesser-included offense of attempted first degree murder. Having satisfied the initial inquiry of the *Williams* test, we now address the crucial question in this appeal as to whether the evidence in the instant case produces a rational basis for acquitting Dixon of attempted first degree murder and convicting him of the lesser-included offense of attempted second degree murder.

*State v. Al-Zubaidy, supra*, is instructive. In *State v. Al-Zubaidy*, we determined that the evidence warranted an instruction on the lesser-included offense of attempted second degree murder. The sole evidence upon which we based our conclusion was the defendant's statement that he did not intend to kill the victim upon entering her residence. We determined that the defendant's statement made it possible for the jury to find that

he went to the victim's home with no premeditation to kill, which entitled the defendant to a jury instruction on attempted second degree murder. Because the district court did not give such an instruction, we reversed Al-Zubaidy's conviction and remanded the cause for a new trial.

Similarly, the evidence in the instant case provides a rational basis upon which the jury could have acquitted Dixon of attempted first degree murder and convicted him of attempted second degree murder. Vasa's testimony conveys that the trio retrieved the shotgun for the purposes of protection and intimidation after the first attempt to steal a car had gone awry. The trio did not know they would again be confronted by the owner of a car they were attempting to steal, but considered it prudent to have the shotgun in case they were. Further, Dixon maintained that he was "just supposed to scare" anyone who might discover them. Consistent therewith, after Bill Weiler shouted, Dixon shot just one time from over 70 feet away after a short verbal exchange.

[7] There is no doubt that a jury could reasonably infer from the foregoing evidence that Dixon possessed the requisite premeditation to be convicted of attempted first degree murder. The evidence, however, is also such that a jury could reasonably have drawn contrary inferences and concluded that Dixon did not possess the requisite premeditation for attempted first degree murder. Where the evidence and circumstances of a crime are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences, whether requested to do so or not. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). The failure of the district court in this case to instruct the jury on attempted second degree murder precluded the jury from considering the lesser-included offense of attempted second degree murder, thereby creating the situation in which the jury had to either convict Dixon of attempted first degree murder or acquit him when the evidence at least supported an instruction on the lesser-included offense.

There is ample evidence in the instant case from which the jury could have drawn inferences that would potentially have led to a conviction for either attempted first degree murder or

attempted second degree murder, and the jury should have been allowed to consider the lesser-included offense of attempted second degree murder. See *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). Because the evidence adduced at Dixon's trial warranted a jury instruction on attempted second degree murder, we conclude that the failure of the district court to so instruct constituted prejudicial error. It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not. *Id.* Thus, Dixon's convictions for attempted first degree murder and the related count of use of a deadly weapon to commit a felony must be reversed, and this cause is remanded for a new trial on those two counts.

[8] We do note that Dixon assigned as error that there was insufficient evidence to support his conviction for attempted theft by unlawful taking. Dixon, however, did not support this assigned error with any argument; errors that are assigned but not argued will not be addressed by this court. See *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Moreover, upon reviewing the record, we conclude that there is sufficient evidence beyond a reasonable doubt for a jury to convict Dixon of attempted theft by unlawful taking of property with a value in excess of $1,500.

### Provision of Audiotape Player to Jury

[9] Although the foregoing determinations resolve this appeal, we nonetheless consider one of the other issues that Dixon assigns as error because it is likely to recur as an issue during a retrial. 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. *Gestring v. Mary Lanning Memorial Hosp., ante* p. 905, 613 N.W.2d 440 (2000).

[10] Dixon asserts that the district court erred in admitting exhibits 3 and 4 of his recorded conversation with Vasa on February 21, 1995, because there was inadequate foundation to do so. Dixon also argues that there was insufficient foundation for exhibits 59 and 60, which are redacted copies of exhibits 3 and 4, respectively, that were submitted to the jury. Suffice it to say that if Dixon is retried and adequate foundation is elicited

at that trial, tape recordings of relevant and material conversations may properly be admitted into evidence. See, *State v. Pearson*, 215 Neb. 339, 338 N.W.2d 445 (1983); *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981); *State v. Myers*, 190 Neb. 146, 206 N.W.2d 851 (1973). The tape recordings were critical items of evidence and are likely to be offered when Dixon is retried; we therefore proceed to address the procedure by which such exhibits should be presented to the jury if properly admitted into evidence.

Five minutes after the jury retired to deliberate in the instant case, the jury requested that the trial judge provide it with an audiotape playback machine. The trial judge, in open court outside of the presence of the jury, advised Dixon and counsel for both parties that "I've received a request from the jury for a recorder or player and speaker, which is presumably to listen to Exhibit 3." We digress to note that the record reflects that exhibit 3 (later redacted and submitted to the jury as exhibit 59) was played in open court at trial and that immediately after it was played, Vasa testified again regarding portions of the conversation, including Dixon's statement, "I just felt like blasting on [the victim]." While testifying at trial, Vasa was reading from a transcript of the very same conversation contained in exhibit 3. This procedure was allowed at trial because there were places on the tape recording where the conversational exchange was very quick and the conversation between Dixon and Vasa was difficult to understand when heard only once.

Dixon objected to the jury's request for the audiotape playback machine; his objection was overruled, and the jury was provided a tape player and exhibits 59 and 60 for unsupervised use in the jury room. Dixon contends on appeal that by letting the jury hear and rehear exhibits 59 and 60, the court allowed the jury to place undue emphasis on a small portion of the evidence adduced at trial. The precise question to be answered in this appeal is whether the district court erred in the procedure it utilized before the court in allowing the jury to rehear portions of exhibits 59 and 60 during deliberations.

The general rule is that allowing a jury to rehear only portions of the evidence after they have commenced deliberations is not to be encouraged, but it is a matter within the discretion of the

trial court. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). Although trial courts have been given latitude in deciding whether to allow a jury to reexamine exhibits such as audiotapes, we think that it would be instructive to review the principles that we utilize in reviewing whether such reexamination constitutes an abuse of discretion. The traditional common-law rule is that a trial court has "no discretion to submit depositions and other testimonial materials to the jury room for *unsupervised review*, even if properly admitted into evidence at trial." (Emphasis supplied.) *Chambers v. State*, 726 P.2d 1269, 1275 (Wyo. 1986).

[11] Thus, previously played portions of tape recordings, like testimony of an actual witness at trial, generally should not be reheard by jurors. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). Jurors must rely upon their memory of what they heard the witness say, be it from a live witness or a tape recording. *Id.* The common-law rule is designed to curtail the principal danger involved in allowing the jury to rehear only a part of the evidence; that is, the jury may give undue emphasis to the part of the evidence which is reheard. *State v. Halsey, supra.*

[12] We do not ordinarily stray from the common-law rule, i.e., a trial court should not allow unrestricted review of previously played portions of tape recordings, any more than a court would allow unrestricted rereading of the testimony of an actual witness at trial. *State v. Jacob, supra.* When a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified. *Chambers v. State, supra.*

[13] Accordingly, once a tape recording is properly admitted as testimonial evidence, such evidence should be marked as any other exhibit and included in the record for review in the event of an appeal. After being admitted, however, the exhibit should be played once in open court so that the jury can hear the tape

in the same manner that it does other evidence. See, *State v. Myers*, 190 Neb. 146, 206 N.W.2d 851 (1973); 75B Am. Jur. 2d *Trial* § 1689 (1992 & Cum. Supp. 2000). It is only under circumstances where the jury makes a request to rehear certain evidence during deliberations that the trial court must proceed to weigh the probative value of the evidence against the danger of undue emphasis, in open court in the presence of both parties or their counsel, before determining whether portions of the evidence should be reheard by the jury.

Applying these established principles, we conclude that the district court erred in not conducting an examination into the reasons for the jury's request to rehear portions of exhibit 59 or 60 and in not weighing the probative value of the requested evidence against the danger of undue emphasis before the court granted the jury's request to rehear certain evidence. Moreover, the district court erred in submitting exhibits 59 and 60 to the jury for unsupervised and unrestricted review within the confines of the jury room, under any circumstances. In reaching these conclusions, we do not share the dissent's view that the playing of Dixon's tape-recorded statements and Vasa's subsequent reading from a verbatim transcript of the tape recording at trial were akin to playing at trial a tape recording of an actual crime in progress. See, e.g., *State v. Myers, supra*. We express no opinion as to whether any portion of exhibits 59 or 60 should have been reheard by the jury because the record does not reflect the reasons for the jury's request. This court, however, has observed on many other occasions that such a practice is " 'fraught with some danger to a fair trial, and ought to be indulged in with caution.' " *State v. Halsey*, 232 Neb. 658, 663, 441 N.W.2d 877, 881 (1989) (quoting *Barton v. Shull*, 70 Neb. 324, 97 N.W. 292 (1903)).

For the sake of completeness, we note that the evidence contained in exhibits 59 and 60 does not pertain to the attempted theft by unlawful taking conviction, and our affirmance of that count remains intact. We do not consider any other errors assigned by Dixon in this appeal.

## CONCLUSION

We conclude, in accord with *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), that Dixon was entitled to a jury

instruction on the lesser-included offense of attempted second degree murder and that the failure of the district court to so instruct constituted prejudicial error. Dixon's assignment of error relating to the conviction for attempted theft by unlawful taking of property is without merit. Accordingly, we affirm Dixon's conviction for attempted theft by unlawful taking, reverse Dixon's conviction for attempted first degree murder and the related conviction for use of a deadly weapon to commit a felony, and remand this cause to the district court for a new trial on those two counts.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., concurring in part, and in part dissenting.

I agree with and concur in that portion of the majority opinion which holds that Dixon's convictions for attempted first degree murder and the related count of use of a deadly weapon to commit a felony should be reversed and the cause remanded for a new trial on those counts because the trial court erred in not instructing on the offense of attempted second degree murder. I also concur in the affirmance of Dixon's conviction of attempted theft by unlawful taking of property with a value in excess of $1,500. However, I respectfully dissent from that portion of the majority opinion under the subheading "Provision of Audiotape Player to Jury." I do so for two reasons.

First, I do not regard the issue as properly before us under accepted principles of appellate review. We generally adhere to the rule that an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *In re Interest of Battiato, ante* p. 829, 613 N.W.2d 12 (2000); *Springer v. Bohling, ante* p. 71, 607 N.W.2d 836 (2000). I acknowledge our discretionary power to depart from this rule in order to resolve issues which are unnecessary to the disposition of an appeal but are likely to recur during further proceedings. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). However, I disagree with the majority's invocation of this power as the basis for discussing the issue of when an audiotape player may be provided to a jury for the purpose of listening to tape-recorded evidence. This issue cannot recur on retrial of this case unless the

State offers sufficient foundation to establish the admissibility of the tape recordings. The issue of foundational sufficiency for this evidence in the first trial was assigned as error in this appeal but not discussed in the majority opinion. If it is unnecessary to reach the issue of whether the tapes are admissible, I cannot discern a reason for addressing the question of how they should be published to the jury. Even if we assume that on retrial the State will offer the tapes and that the district court will correctly determine that foundation is sufficient to establish admissibility, it is entirely speculative as to whether the jury on retrial will request playback equipment for the purpose of listening to the tape recordings during its deliberations. Thus, it seems to me that this cannot be accurately characterized as an issue likely to recur during further proceedings and that reaching it in this appeal amounts to issuing an advisory opinion, which is not our proper function. See *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999).

Second, assuming for the sake of argument that the issue is properly before us, I disagree with its resolution on the merits. The majority cites *Chambers v. State*, 726 P.2d 1269, 1275 (Wyo. 1986), for the "traditional common law rule" that a trial court has "no discretion to submit depositions and other testimonial materials to the jury room for unsupervised review, even if properly admitted into evidence at trial." However, the *Chambers* court also noted that a trial court "has broad discretion in deciding whether to submit *non-testimonial* exhibits, such as non-testimonial writings, audiotapes, or videotapes, to the jury during its deliberations." (Emphasis in original.) *Id.* Although the majority apparently regards the tape-recorded conversations between Dixon and Vasa as testimonial in nature, I do not. To "testify" is "[t]o give evidence as a witness." Black's Law Dictionary 1485 (7th ed. 1999). Dixon certainly was not giving evidence as a witness during his taped telephone conversation with Vasa. Rather, he was engaging in what he probably believed to be a private conversation with a person who, unbeknown to him, had admitted his own involvement in the crimes for which Dixon was eventually charged and was cooperating with law enforcement authorities. Dixon's statements to Vasa were certainly incriminating, but they were not testimonial in nature.

The majority cites *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), in support of its statement that "previously played portions of tape recordings, like testimony of an actual witness at trial, generally should not be reheard by jurors." In that case, the tape recording at issue was a taped statement given by a crime scene witness to police which the defendant had introduced and played in order to impeach the witness during his trial testimony. In *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989), also relied upon by the majority, we held that the trial court did not err in refusing to allow the jury to listen to tape-recorded testimony of certain trial witnesses during its deliberations because of the danger that undue emphasis would be placed upon that part of the evidence if reheard. Both *Jacob* and *Halsey* involved tape recordings of testimony, or matters utilized during testimony, of nonparty witnesses. I do not read these cases as supporting a proposition that a jury generally should not be permitted to rehear a properly admitted tape recording of nontestimonial incriminating statements made by a defendant in a criminal proceeding.

Assuming their admissibility, Dixon's tape-recorded statements to Vasa were not testimonial in nature, but, rather, constituted substantive evidence of his guilt, much like a tape recording of a crime in progress. Most jurisdictions permit trial judges broad discretion in allowing the jury to have unlimited access to evidence of this nature after it has been properly received. See, e.g., *U.S. v. Puerta Restrepo*, 814 F.2d 1236 (7th Cir. 1987) (finding no error in permitting jury to have transcripts of tape-recorded conversations in which defendant made incriminating statements to police informant); *State v. Castellanos*, 132 Wash. 2d 94, 935 P.2d 1353 (1997) (finding no error in allowing jury unlimited access to audiotapes of a drug buy and a playback machine during deliberations); *Pino v. State*, 849 P.2d 716 (Wyo. 1993) (finding no error in allowing jury to have tape recording of drug transaction and playback machine during deliberations); *State v. Halvorson*, 346 N.W.2d 704 (N.D. 1984) (holding tape recordings of conversations between defendant, his mother, and law enforcement officers were properly received in evidence and submitted to jury with playback equipment); *State v. Barbo*, 339 N.W.2d 905 (Minn. 1983) (finding trial court

did not err in permitting jury to have tapes and typewritten transcript of conversation between defendant and person cooperating with police during which defendant made incriminating statements).

If the tape recordings of Dixon's telephone conversations with Vasa were properly received in evidence, an issue which neither the majority nor I decide, I would hold that the trial court had broad discretion in deciding whether to submit the tapes and playback equipment to the jury for unrestricted review during its deliberations, and I would conclude that it did not abuse its discretion in doing so.

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RICHARD A. BILLINGSLEY, APPELLEE AND CROSS-APPELLANT, V. BFM LIQUOR MANAGEMENT, INC., DOING BUSINESS AS BRANDEIS FOOD MANAGEMENT AND BRANDEIS CATERING, INC., APPELLANTS AND CROSS-APPELLEES.

613 N.W.2d 478

Filed July 14, 2000. No. S-98-1013.

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 from the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ___: ___. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Final Orders.** To determine an action and prevent a subsequent judgment, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court; however, if the cause is retained for further action, the order is interlocutory.
6. **Fair Employment Practices: Discrimination: Final Orders: Case Overruled.** The proper procedure in an age discrimination action is for the trial court to submit the damages issue to the jury, if one is empaneled, and reserve ruling on a plaintiff's requested equitable relief until after the jury renders a verdict. A trial court should

then enter an order on the jury verdict and reserve entering judgment until after the court has considered any requests for equitable relief. The trial court should limit itself to entering but one final judgment based on all of the rights and remedies of the parties before it. To the extent that *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), holds that a jury serves in only an advisory capacity when a plaintiff seeks both legal and equitable relief in an age discrimination action, it is overruled.

7. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Jeffrey A. Silver for appellants.

Robert V. Broom, of Broom, Johnson & Clarkson, for appellee.

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

GERRARD, J.

Richard A. Billingsley brought an age discrimination action against BFM Liquor Management, Inc. (BFM), in the district court for Douglas County seeking damages, unpaid wages, and equitable relief in the form of front pay or reinstatement. Pursuant to a stipulation by the parties, the district court reserved ruling on the equitable issues and submitted the issues of the lawfulness of BFM's conduct and damages to the jury. The jury awarded Billingsley $59,963.93 in damages on his age discrimination claim and $4,469.88 on his unpaid wage claim. After judgment was entered on the jury verdict, Billingsley filed a motion to have the court consider his request for equitable relief and attorney fees. Before the hearing on Billingsley's motion, BFM appealed and Billingsley cross-appealed from the judgment on the jury verdict. For the following reasons, we conclude that we have no jurisdiction in this matter because the judgment entered by the trial court is not a final, appealable order. We, therefore, dismiss BFM's appeal and Billingsley's cross-appeal.

## FACTUAL BACKGROUND

Billingsley was employed by BFM Liquor Management, Inc., which also does business as Brandeis Food Management and

Brandeis Catering, Inc. (hereinafter collectively BFM), a company determined by the district court as a matter of law to be a "common enterprise" which shares employees and employs over 25 people. Billingsley was hired on August 24, 1988, to develop BFM's catering operations on the premises of the Ak-Sar-Ben coliseum in Omaha. Subsequently, an offsite catering company was separately incorporated as Brandeis Catering, Inc., and Billingsley was given additional responsibilities. Billingsley testified that during his tenure at BFM, he never received an oral or written reprimand, and that he had always performed his duties satisfactorily. As the catering operations of BFM grew, more people were hired to assist Billingsley.

BFM hired Tom Wolf in June 1993 to assist Billingsley with sales of catering engagements. Helmuth Dahlke, Billingsley's supervisor, informed Billingsley of the decision to hire Wolf. Wolf's employment arrangement was such that he was to be paid a commission on the sales of catering events he arranged. At that time, Wolf was 30 years of age.

In December 1993, Billingsley negotiated an employment agreement by which he would be paid, in addition to his salary, 3 percent of the gross monthly sales of BFM's off-premises catering and 2 percent of the gross monthly sales of BFM's on-site catering. Billingsley claims that he never received any of his commission after this agreement was finalized in January 1994. This employment agreement was in effect at the time of Billingsley's notice of termination of employment on May 23, 1994.

On May 19, 1994, Billingsley attended a management meeting called by Dahlke. At this meeting, Billingsley was given a new organizational chart for BFM's operations at Ak-Sar-Ben, pursuant to which he was informed that he would no longer report to Dahlke and that his supervisor would now be Dave Henningsen. Billingsley testified that Dahlke also informed him at this meeting that all of those people in top management, including Billingsley, would have a job with BFM until at least 1998, when BFM's contract with Ak-Sar-Ben expired. Dahlke's promise notwithstanding, Billingsley testified that Dahlke had a desire to give BFM a "younger image" and had on occasion instructed management to terminate the employment of employees because they were "old" and "useless" and hire employees

who were "younger and prettier"; other witnesses who were BFM employees at or near the same time as Billingsley testified at trial that they were aware of Dahlke's desire to give BFM a "younger image."

On Friday, May 20, 1994, a large catering event took place on the premises of Ak-Sar-Ben, after which the dishes and preparation materials were piled in a hallway at Ak-Sar-Ben and were not cleaned on the evening of that event. Dan Bice, who worked directly under Billingsley, testified that it was Bice's responsibility to make sure that the materials from the Friday catering event were cleaned in a timely fashion. Bice further testified that it was common practice to wait until the following Monday to clean materials from a large catering event held on Fridays, when that Friday event was large and there were other catering events scheduled for that same weekend. Because Billingsley was the supervisor of catering, he was contacted by Henningsen when it was discovered on May 22 that the materials from the May 20 catering event were not properly cleaned up. Billingsley was asked to drive to Ak-Sar-Ben to clean up the mess on May 22.

When Billingsley failed to appear at Ak-Sar-Ben on May 22, 1994, Sharon Smith, the chief officer for Douglas County at Ak-Sar-Ben, informed Henningsen and Dahlke that if Billingsley did not care enough to clean up the mess, he was not to be on the premises of Ak-Sar-Ben at all. Dahlke testified that this was the final incident in a process building up to his decision to terminate Billingsley's employment. Billingsley was notified by Dahlke of his termination of employment on May 23; Dahlke said Billingsley's position had been eliminated. BFM's records, however, reveal that Billingsley was replaced by Wolf.

After Billingsley learned that his employment had been terminated, he received a check from Dahlke to compensate him for wages, vacation pay, and severance. Prior to cashing this check, Billingsley contacted Larry M. Malerbi at Strategic Staff Management, the company upon whose account the check was drawn, and asked whether his cashing the check could be held against him in his legal actions against the company. Malerbi contacted the attorney for BFM in this action and received advice regarding Billingsley's cashing of the check. Based upon this advice, Malerbi advised Billingsley to cash the check and

informed him how to endorse it. Billingsley cashed the check approximately 2 years after his employment had been terminated.

On March 10, 1995, Billingsley filed a petition in the district court alleging, inter alia, wrongful discharge, breach of contract, and tortious interference with business relations; he also sought an accounting for all profits made by Brandeis Catering, Inc. After sustaining a demurrer to Billingsley's first three causes of action and twice allowing him to amend his petition, the district court sustained a demurrer to the first three causes of action on August 1. This order was noted in the trial docket, in which it was also noted that Billingsley would not be allowed to amend his pleadings any further. Other than the judge's minutes noted on the trial docket, the record before us contains no order finalizing the district court's decision on August 1.

On January 30, 1996, Billingsley filed a motion seeking leave to file a fourth amended petition, which was sustained by the district court on February 7. Billingsley amended his petition, alleging, inter alia, that BFM had discriminated against him on the basis of age in violation of Neb. Rev. Stat. §§ 48-1001 through 48-1010 (Reissue 1998), and Neb. Rev. Stat. § 20-148 (Reissue 1997). Billingsley also sought relief under Neb. Rev. Stat. §§ 48-1228 through 48-1232 (Reissue 1998) for unpaid wages. Billingsley requested backpay and other damages he had suffered due to BFM's actions; his petition also contained a prayer for reinstatement or front pay in lieu thereof and "further relief as the Court may deem just, proper, and equitable." BFM filed an answer in which it denied the allegations contained in Billingsley's petition and affirmatively alleged that Billingsley's petition was barred by collateral estoppel and res judicata pursuant to the trial docket entry on August 1, 1995.

The parties stipulated prior to trial that the district court would reserve ruling on Billingsley's request for equitable relief until after the jury determined the lawfulness of the discharge and the amount of damages, if any, Billingsley should be awarded. On August 24, 1998, the jury found that BFM had discriminated against Billingsley because of his age and awarded him damages of $59,963.93; the jury also awarded Billingsley $4,469.88 on his claim for unpaid wages, and the district court

entered judgment on the verdict that same day. On September 8, Billingsley filed a motion seeking an order regarding the equitable relief he had requested, as well as attorney fees; the motion was scheduled for hearing on September 16.

On September 15, 1998, BFM appealed the August 24 judgment. Billingsley filed a cross-appeal. We moved the appeal to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.

## ASSIGNMENTS OF ERROR

BFM alleges, restated, that the district court erred in (1) failing to find Billingsley's claims were barred by collateral estoppel and res judicata based on the August 1, 1995, trial docket entry; (2) not finding that Billingsley failed to sustain his burden of proof on his age discrimination claim; (3) finding that Brandeis Catering, Inc., was an employer within the parameters of § 48-1002; and (4) not finding that Billingsley was estopped from claiming additional wage payments after accepting his severance package.

The sole assignment of error in Billingsley's cross-appeal is that the district court erred in entering judgment on the jury verdict prior to its consideration of his prayer for equitable relief and attorney fees.

## STANDARD OF REVIEW

[1] 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 from the lower court's decision. *State v. Johnson, ante* p. 942, 613 N.W.2d 459 (2000).

## ANALYSIS

### APPELLATE JURISDICTION

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. See *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597

N.W.2d 394 (1999). The jurisdictional issue posed in this case is whether the judgment entered on the jury verdict but prior to the court's consideration of Billingsley's request for equitable relief is a final, appealable order.

[4] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *In re Estate of Peters, ante* p. 154, 609 N.W.2d 23 (2000); *Raney v. Blecha*, 258 Neb. 731, 605 N.W.2d 449 (2000). For the reasons stated herein, we determine that the judgment entered on the jury verdict in the instant case is not a final, appealable order and that we lack jurisdiction over BFM's appeal and Billingsley's cross-appeal.

[5] To constitute a reviewable final order, the August 24, 1998, judgment must be in conformity with one of the aforementioned categories of final orders. There is no question that the jury verdict and judgment entered thereon affect a substantial right. The judgment, however, was not entered during a special proceeding, as defined in *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998), nor was it entered pursuant to a summary application after judgment. We must therefore decide whether the August 24 order entered by the district court determines the action and prevents a subsequent judgment. To determine an action and prevent a subsequent judgment, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court; however, if the cause is retained for further action, the order is interlocutory. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). We have consistently stated that when a substantial right is undetermined and the cause is retained for further action, the order is not final. *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982).

The parties stipulated on the first day of trial that the district court would try only the damages issue to the jury and reserve ruling on Billingsley's request for equitable relief until after the jury had rendered its verdict. The parties' agreement notwith-

standing, BFM filed the instant appeal after Billingsley filed a motion asking the court to consider his request for equitable relief and attorney fees, but before the district court could hear arguments thereon. A determination whether Billingsley is entitled to equitable relief or attorney fees is necessary to completely dispose of the cause pending in the district court. Therefore, the judgment entered on the jury verdict, the judgment from which BFM has taken this appeal, is interlocutory and does not constitute a final, appealable order within the first category of final orders mentioned above.

AGE DISCRIMINATION CLAIM—TRIAL PROCEDURE

Because the instant case demonstrates how cases brought pursuant to § 48-1009 can cause confusion and result in premature interlocutory appeals, we take this opportunity to clarify our interpretation of § 48-1009 and the procedure by which a case thereunder should proceed at trial. At the time Billingsley filed the instant lawsuit, § 48-1009 provided:

> In any action brought to enforce the provisions of sections 48-1001 to 48-1009, the court shall have jurisdiction to grant such *legal or equitable relief as the court may deem appropriate* to effectuate the purposes of sections 48-1001 to 48-1009, including judgments compelling employment, reinstatement, or promotion, or enforcing liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.

(Emphasis supplied.)

This court has previously stated that § 48-1009 allows a plaintiff to invoke either the legal or equitable powers of the court and that when confronted with an appeal involving Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age (the act), we would look to the plaintiff's petition to determine whether an action is legal or equitable. See *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995). Further, we have consistently conformed our reading of the act to the federal courts' reading of the federal Age Discrimination in Employment Act of 1967 (ADEA), which the act closely parallels. See, e.g., *Humphrey v. Nebraska Pubic Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Allen*

*v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988). Our interpretation of the act in *Synacek v. Omaha Cold Storage, supra*, however, does not conform to the interpretation given portions of the ADEA similar to § 48-1009, thereby causing some confusion when age discrimination cases are brought to trial in state court.

The parties' confusion in the instant case may have originated from language in *Synacek v. Omaha Cold Storage, supra*, wherein we stated that when a plaintiff seeking relief under the act includes a prayer for equitable relief in his or her petition, the action is "pled in equity" and that "the jury empaneled to consider some of the issues in [the] case serve[s] only an advisory role, and its findings [are] not binding on the trial court." 247 Neb. at 247, 526 N.W.2d at 94. This interpretation of the act, however, is inconsistent with our prior statements that we will conform our reading of the act to the federal reading of the ADEA and is also contrary to the plain language of the statute. Thus, we deem it appropriate to reconsider a portion of the rationale in *Synacek v. Omaha Cold Storage* at this time.

The language of § 48-1009 does not suggest that a litigant who includes a prayer for equitable relief forgoes the opportunity to have a jury decide factual issues relating to the lawfulness of the employer's conduct and the damages related thereto. To the contrary, a litigant is entitled to have a jury determine the lawfulness of the employer's conduct and the amount of claimed past damages, *in addition to* having the court consider any request for equitable relief. The "either or" approach in *Synacek v. Omaha Cold Storage, supra*, whereby the lawsuit is classified as either a case at law or a case in equity, is inconsistent with both the language of the act and the way the federal courts have interpreted the ADEA. Compare *Humphrey v. Nebraska Public Power Dist., supra* (treating action under act as one at law when petition did not seek equitable relief), with *Allen v. AT&T Technologies, supra* (differentiating petitions of several plaintiffs and noting that those including prayers for equitable relief were to be tried in equity, while those with only monetary damages were to be tried at law).

We, therefore, examine the federal approach and find the case of *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir.

1982), to be instructive and typical of the well-established procedure utilized in the federal system. *Gibson v. Mohawk Rubber Co.* involved an age discrimination claim filed by a supervisor at a rubber plant. The primary issue therein was whether the jury was properly instructed on how to consider damages, but crucial to the instant appeal was the Eighth Circuit's explanation of the proper procedure for trial in age discrimination cases:

> After the jury trial on the foregoing damages issues, the district court should reconsider [the plaintiff's] request for equitable relief. The equitable relief that the district court may grant includes, *inter alia,* additional pension benefits, reinstatement, and monetary damages in lieu of reinstatement. . . .
>
> In fashioning its equitable remedy, the district court is not free to reject the jury's findings on whether [the defendant company] would have retained [the plaintiff] when the . . . plant closed, or on any other issues in this case. . . . Although the court below retains its discretion to consider all the circumstances in this case when it determines what equitable relief may be appropriate, it cannot base its decision on its own factual findings that conflict with those expressly made by the jury.

*Gibson v. Mohawk Rubber Co.*, 695 F.2d at 1100-01. See, also, *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635 (8th Cir. 1997); *Duke v. Uniroyal Inc.*, 928 F.2d 1413 (4th Cir. 1991) (stating that where both legal and equitable remedies are demanded, appropriate method of proceeding requires submission of case first to jury to resolve liability and all legal damages, after which district court conducts trial in equity to resolve all issues of equitable relief); *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391 (6th Cir. 1990); *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir. 1989); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541 (11th Cir. 1988); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987); *Maxfield v. Sinclair Intern.*, 766 F.2d 788 (3d Cir. 1985). Such a procedure is logical and has proved to be workable in the federal courts. We conclude that state court tri-

als brought under the Nebraska act should be conducted in the same manner.

[6,7] Thus, we determine that *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), was correct insofar as it noted the propriety of a trial court's submission of the damages issues involved in an age discrimination case to the jury; however, to the extent that *Synacek v. Omaha Cold Storage* holds that such a jury serves in only an advisory capacity when a plaintiff seeks both legal and equitable relief, it is overruled. The proper procedure, as noted in *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982), is for the trial court to submit the damages issue in an age discrimination case to the jury, if one is empaneled, and reserve ruling on a plaintiff's requested equitable relief until after the jury renders a verdict. A trial court should then enter an order on the jury verdict and reserve entering judgment until after the court has considered any requests for equitable relief. See *id.* In other words, the trial court should limit itself to entering but one final judgment based on all of the rights and remedies of the parties before it. In the instant case, the district court has not ruled upon Billingsley's motion for equitable relief and attorney fees. In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *In re Interest of Dustin H. et al., ante* p. 166, 608 N.W.2d 580 (2000).

## CONCLUSION

Because neither the equitable relief sought by Billingsley nor the attorney fees issue has been determined by the district court, we lack jurisdiction to decide the merits of these matters, as the judgment entered pursuant to the jury verdict on August 24, 1998, is not a final, appealable order. Accordingly, we dismiss BFM's appeal and Billingsley's cross-appeal.

APPEAL DISMISSED.

# STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE, V. CHEEPER'S RENT-A-CAR, INC., A NEBRASKA CORPORATION, APPELLANT, AND HEATHER BILLINGS AND NAOMI YOUNG, APPELLEES.

614 N.W.2d 302

Filed July 14, 2000. No. S-99-383.

1. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of a contract, including an insurance contract or policy, involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Contracts.** To create a contract, there must be both an offer and an acceptance.
5. **Insurance: Contracts: Motor Vehicles: Liability.** When controversies arise regarding insurance coverage because the applicable documents contain mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the owner's policy provides primary coverage and the driver's policy provides excess coverage.

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

John T. Rogers and M. Scott Vander Schaaf for appellant.

Rex A. Rezac and Tracy J. Edgerton, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee State Farm Mutual Automobile Insurance Company.

William M. Lamson, Frank J. Barrett, and Robert A. Mooney, of Lamson, Dugan & Murray for amicus curiae Car and Truck Rental and Leasing Association of Nebraska.

Roger R. Holthaus for appellee Heather Billings.

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

MILLER-LERMAN, J.

## NATURE OF CASE

In this declaratory judgment action, Cheeper's Rent-A-Car, Inc. (Cheeper's), appeals the order of the district court for Douglas County denying its motion for summary judgment and granting the cross-motions for summary judgment of State Farm Mutual Automobile Insurance Company (State Farm) and Heather Billings. For the reasons set forth below, which differ from the rationale of the district court, we affirm.

## STATEMENT OF FACTS

In their briefs, the parties have set forth the relevant facts, and there are no material facts in dispute in this case. The facts may be summarized as follows: Cheeper's is a corporation, doing business as a rental car company in Nebraska. On January 15, 1998, Billings rented an automobile from Cheeper's and executed a Cheeper's rental agreement as part of the rental process. Paragraph 5 of the January 15 rental agreement, which Billings signed, provides, inter alia, as follows:

> INSURANCE: Vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection at the main offices of CHEEPER'S RENT A CAR, INC. Said policy provides coverage and limits of liability at least equal to the liability coverage and limits of liability required of the operator to satisfy this State's financial responsibility motor vehicle laws. In all cases, CHEEPER'S automobile liability insurance is secondary to the Renter's liability insurance.

At the time Billings rented the car, she declined to purchase Cheeper's optional damage waiver, which consisted of collision and physical damage coverage.

The rental agreement which Billings executed on January 15, 1998, indicates that "State Farm Insurance Co.," policy No. 273961405, covered Billings' rental costs to the following extent: "Rental authorized thru 01/21/98 $16.00 RENTER responsible for: . . . Drop and pickup fees." The State Farm tele-

phone number provided was 597-5500. Thus, at the time she rented the automobile, Cheeper's was aware of the fact that Billings was an insured on a State Farm automobile insurance policy, which policy, according to the evidence, provided, inter alia, that when Billings rented a vehicle, such liability coverage was excess to the rental company's "insurance or self-insurance."

On January 23, 1998, Billings was involved in an automobile accident at the intersection of 114th and Dodge Streets in Omaha. Billings was driving the Cheeper's rental car when she struck an automobile driven by Naomi Young. Under "Section I — Liability — Coverage A" of the State Farm policy covering Billings, Billings had liability coverage for damages resulting from Billings' use of a "*temporary substitute car* or a *non-owned car*," as those terms were used under the policy. None of the parties to the instant litigation has disputed that Billings' use of the Cheeper's rental car meets the State Farm insurance policy's definitions of either a temporary substitute car or a nonowned car. The State Farm policy further provided in an amendment to the liability coverage:

> If a *temporary substitute car*, a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle*:
>
> a. has other vehicle liability coverage on it; or
>
> b. is self-insured under any motor vehicle financial responsibility law . . .
>
> then this coverage is excess over such insurance or self-insurance.

(Emphasis in original.)

Billings returned the rental car to Cheeper's on January 26, 1998. During the period of time when Billings had possession of the rental car, Cheeper's began using a different rental agreement form, and a copy of the new rental form, dated January 26, 1998, was given to Billings when she returned the rental car. Billings did not sign the new rental form. It is the new rental agreement form, dated January 26, 1998, upon which the district court based its ruling.

Paragraph 5 of the January 26, 1998, rental agreement form, which Billings did not sign, provides, inter alia, as follows:

> RENTER IS HEREBY NOTIFIED THAT CHEEPER'S RENT-A-CAR, INC. IS CERTIFIED AS A SELF INSURED COMPANY under the laws of the State of Nebraska to fulfill its liability insurance obligations under the applicable financial responsibility motor vehicle laws. Renter agrees that Cheeper's self insurance and any other insurance owed by Cheeper's shall be secondary to Renter's liability insurance.

Young has claimed that the January 23, 1998, automobile accident resulted from the negligence of Billings in the operation of the motor vehicle Billings was driving. On June 22, State Farm filed a declaratory judgment action against Cheeper's and Billings. In its petition, State Farm alleged that the terms of its insurance policy with Billings and the terms of Cheeper's rental agreement with Billings conflict as to which entity has the primary obligation to defend and indemnify Billings. For relief, State Farm asked the district court to "enter a declaratory judgment determining the rights and obligations of the parties with regard to the transactions and occurrences hereinbefore described."

On July 24, 1998, Cheeper's answered State Farm's petition and by way of a counterclaim, also sought a declaratory judgment from the court determining the parties' rights and responsibilities. On November 18, 1998, Cheeper's filed a cross-claim against Billings, seeking a declaratory judgment with regard to the parties' rights and responsibilities and further seeking a declaratory judgment that Billings was liable to Cheeper's for any amounts determined to be owed from Cheeper's as a result of Billings' accident with Young.

On December 2, 1998, Billings answered and filed her own counterclaim to Cheeper's cross-claim. Billings requested declaratory relief with regard to the parties' rights and obligations and denied personal liability to Cheeper's, claiming that she was insured under her State Farm policy as well as under Cheeper's rental agreement.

On December 10, 1998, State Farm moved for summary judgment against Cheeper's, alleging in its motion that Cheeper's had the primary obligation to defend and indemnify Billings with respect to any claim brought by Young. On January 15,

1999, Cheeper's filed separate motions for summary judgment against State Farm and Billings. In its motion against State Farm, Cheeper's sought a summary declaratory judgment that State Farm had the primary obligation to defend and indemnify Billings with respect to any claims brought by Young. In its motion against Billings, Cheeper's sought a summary declaratory judgment that Billings was responsible to Cheeper's for any amounts declared or adjudged to be owing from Cheeper's to Young arising out of any claim Young might bring as a result of the January 23, 1998, auto accident. On January 19, 1999, Billings filed motions for summary judgment against both State Farm and Cheeper's, seeking, inter alia, a summary declaratory judgment that either State Farm or Cheeper's had the duty and primary obligation to defend and indemnify her with respect to the claim of Young.

The parties' motions for summary judgment came on for hearing before the district court on January 28, 1999. The district court received evidence, including a stipulation of facts signed by State Farm and Cheeper's, to which were attached copies of Billings' automobile insurance policy with State Farm, the January 15, 1998, rental agreement, and the January 26 rental agreement form. State Farm and Cheeper's stipulated that Cheeper's has been self-insured since 1995 in accordance with Neb. Rev. Stat. § 60-562 (Reissue 1998). Also received in evidence was the affidavit of Richard R. Otten, president of Cheeper's, in which he testifies that "[o]n or about January 15, 1998, Cheeper's executed a written rental agreement with Defendant HEATHER BILLINGS ("Billings") for the rental of one Red 1994 Geo Prizm automobile." In addition to the evidence, the parties submitted written arguments.

On March 10, 1999, the district court granted State Farm's and Billings' motions for summary judgment against Cheeper's and entered judgment in favor of State Farm and Billings, determining that as between the State Farm insurance policy and the January 26, 1998, "rental agreement," Cheeper's had the primary responsibility of defending and indemnifying Billings from any claims filed by Young as a result of the January 23 accident. The district court denied all other summary judgment motions.

Cheeper's has appealed the district court's granting of State Farm's and Billings' motions for summary judgment and the denial of its motion for summary judgment. The Car and Truck Rental and Leasing Association of Nebraska joins in Cheeper's arguments on appeal as amicus curiae.

## ASSIGNMENTS OF ERROR

On appeal, Cheeper's has assigned 10 errors which combine to form 2. Cheeper's claims the district court erred (1) in granting State Farm's and Billings' motions for summary judgment against Cheeper's and denying Cheeper's motions for summary judgment against State Farm and Billings and (2) in failing to find Billings is responsible for indemnifying Cheeper's for any liability damages Cheeper's may have to pay to Young as a result of Billings' negligence.

## STANDARDS OF REVIEW

[1] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000).

[3] The interpretation and construction of a contract, including an insurance contract or policy, involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999); *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996).

## ANALYSIS

*Primary Liability.*

On appeal, Cheeper's claims that the district court erred in concluding that Cheeper's January 26, 1998, rental agreement form providing for self-insurance was primary and in granting State Farm's and Billings' motions for summary judgment and denying Cheeper's motions for summary judgment. Relying on the language in its January 26 rental agreement form, Cheeper's argues on appeal that it is only "*secondarily* liable" for liability arising from Billings' automobile accident and that State Farm, as Billings' personal automobile insurer, is primarily liable. Reply brief for appellant at 10. State Farm responds that under the language in its policy with Billings, its insurance is excess to the rental car company's insurance or self-insurance and that Cheeper's, as the owner of the car which Billings was driving at the time of the accident, is primarily liable.

Before the district court on summary judgment and before this court on appeal, both State Farm and Cheeper's have litigated this case as if the operable Cheeper's contract was the January 26, 1998, rental agreement form containing the provisions regarding Cheeper's self-insured automobile liability status, rather than the January 15 rental agreement contract referencing Cheeper's "automobile liability insurance." Contrary to the assertions of the parties, we conclude that the controlling contract is the executed rental agreement of January 15 which indicates that the vehicle "is covered by an automobile insurance policy" and that "CHEEPER'S automobile liability insurance is secondary to the Renter's liability insurance."

In the stipulation of facts submitted in connection with the motions for summary judgment, State Farm and Cheeper's stipulated:

> At the time that Billings agreed to rent the vehicle, she executed a rental agreement. A true and correct copy of the rental agreement executed by Billings on January 15, 1998 is attached hereto as Exhibit "A" and hereby incorporated by this reference.
>
> . . . During the period of time [in] which Billings had possession of the vehicle, Cheeper's began using a differ-

> ent rental agreement form which superseded the form signed by Billings on January 15, 1998.

Similarly, the Otten affidavit indicates that Cheeper's and Billings executed a written rental agreement on January 15, 1998. There is no dispute in the record that Billings signed the January 15 rental agreement, that she did not sign the January 26 rental agreement form, and that Cheeper's merely presented her with the superseding form at the time she returned the rental car.

[4] To create a contract, there must be both an offer and an acceptance. *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998). It is axiomatic that a contract is not binding unless it is signed or there is at least some manifestation of mutual assent to the terms of the unsigned writing. See *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998). In the present case, with respect to the January 26, 1998, rental agreement form, there is evidence of neither. See, also, *Carter v. Miller*, 128 Neb. 853, 260 N.W. 393 (1935) (fact that unaccepted offer purports to be contract does not change its legal effect or make it binding obligation before acceptance). Because Billings did not execute the January 26 rental agreement form and because there is no factual evidence of Billings' acquiescence to the terms of such form, the January 26 document is not binding upon Billings. Thus, the provisions of the January 26 rental agreement form regarding Cheeper's self-insured status, which provisions purported to place Cheeper's self-insurance secondary to Billings' liability insurance, are unenforceable, and due to Cheeper's inaccurate representation in the rental agreement which Billings signed that it had liability insurance, we treat Cheeper's self-insurance as insurance under the specific circumstances of this case.

Our determination that the unsigned January 26, 1998, rental agreement form is unenforceable and that Cheeper's self-insurance will be treated as insurance does not end our inquiry. When cross-motions for summary judgment have been ruled upon by the trial court, the appellate court may determine the controversy which is the subject of those motions or may make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575

N.W.2d 143 (1998). In its petition for declaratory judgment, State Farm sought declaratory relief "determining the rights and obligations of the parties with regard to the transactions and occurrences" surrounding Billings' rental of the automobile from Cheeper's. Those rights and obligations may be declared on the record before us.

There is no substantial controversy regarding the fact that Billings executed the January 15, 1998, rental agreement. In the January 15 rental agreement, Cheeper's states that it is insured by an automobile liability insurance policy, which is, "[i]n all cases . . . secondary to [Billings'] liability insurance." There is no dispute that Billings was covered by a State Farm liability policy which provided that when Billings was driving a rental vehicle covered by liability insurance, the State Farm coverage was "excess over such insurance." This court is thus presented with two contracts: Billings' January 15 rental agreement with Cheeper's, which we treat as incorporating liability insurance, and Billings' insurance policy with State Farm, each of which contains language which purports to place the primary responsibility in terms of liability on the issuer of the opposing contract.

[5] It is a well-established legal principle in Nebraska that when controversies arise regarding insurance coverage because the applicable documents contain "mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, . . . the owner's policy . . . provide[s] primary coverage and the driver's policy . . . provide[s] excess coverage." *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 508, 406 N.W.2d 640, 644 (1987). See, also, *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969); *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

Based upon our well-established case law, we conclude that given the mutually repugnant language of Billings' insurance policy and Cheeper's January 15, 1998, rental car agreement, Cheeper's, as the owner of the automobile driven by Billings

pursuant to a rental agreement in which Cheeper's represented that it had liability insurance which was secondary to that of the driver, has the primary liability in this case. We make no comment on the issue of priority where the owner of a rental car is self-insured and such fact is disclosed in the operative rental agreement. Accordingly, we conclude, albeit for different reasons, that the district court did not err in determining that Cheeper's had the legal responsibility to provide the primary liability coverage on its automobile and that it was responsible for defending and indemnifying Billings. See *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998) (when record demonstrates trial court decision is correct, although such correctness is based on different ground than that assigned by trial court, appellate court will affirm). Cheeper's first assignment of error is without merit.

*Indemnification.*

With respect to Cheeper's second assignment of error, we also conclude that the district court did not err in its order denying Cheeper's motion for summary declaratory judgment that Billings owed a duty to Cheeper's to indemnify Cheeper's for any and all amounts it might have to pay on Billings' behalf. We reject Cheeper's claim that Billings had an obligation to indemnify it either contractually or in equity.

The January 15, 1998, rental agreement contains no provisions regarding Billings' purported obligation to indemnify Cheeper's. Billings, therefore, is under no contractual obligation to indemnify Cheeper's.

Cheeper's argues that Billings is, nevertheless, liable under equitable principles to indemnify it. Cheeper's cites *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992), and *Motor Club Ins. Assn. v. Fillman*, 5 Neb. App. 931, 568 N.W.2d 259 (1997), in support of its position. These cases do not support Cheeper's argument, however, because they rest on the claim that the party seeking indemnification was required to pay damages which another ought to have paid, which is not the fact in the instant case. Cheeper's must afford primary coverage to Billings, and Billings' insurer, State Farm, is thereafter responsible for excess coverage to the extent of Billings' policy limits,

if Cheeper's insurance is exhausted. See *State Farm Bureau Ins. Co. v. Allied Mut. Ins. Co., supra*. Cheeper's reliance on equitable principles to require Billings to indemnify it is unavailing, and Cheeper's second assignment of error is without merit.

## CONCLUSION

In this case, Billings' automobile insurance policy states that it is excess to the rental car company's insurance, and Cheeper's enforceable rental agreement states that it is insured by an automobile liability insurance policy and that such policy is secondary to the renter's liability insurance. The two contracts contain mutually repugnant language. We conclude, for the reasons stated above, that under such circumstances, the owner of the vehicle, in this case, Cheeper's, shall be primarily liable. We conclude that the district court did not err in granting State Farm's and Billings' motions for summary judgment against Cheeper's and in denying Cheeper's motions for summary judgment.

AFFIRMED.

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# GEORGE COX, APPELLANT, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

614 N.W.2d 273

Filed July 14, 2000. No. S-99-591.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. ___: ___. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
3. **Constitutional Law: Termination of Employment.** The inquiry into whether a terminated employee's speech is protected under the First Amendment is a question of law.
4. **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.
5. **Constitutional Law: Public Officers and Employees.** The government cannot condition public employment on a basis that infringes on the employee's constitutionally protected interest in freedom of expression.

6. ___: ___. The government's interests as an employer in regulating the speech of its employees differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.
7. ___: ___. The threshold question in a determination of whether the First Amendment applies to a government employee's statement is whether the statement constitutes speech regarding a matter of public concern.
8. ___: ___. If a government employee's statement does not involve a matter of public concern, the First Amendment does not apply, and the inquiry into whether the statement is constitutionally protected ends.
9. ___: ___. If a government employee's statement involves a matter of public concern, the court must then balance the employee's interest in making the statement against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.
10. **Constitutional Law: Public Officers and Employees: Proof.** If it is determined that the speech of a government employee is constitutionally protected, the plaintiff must then prove that the speech was a substantial or motivating factor in the employment decision; the burden then shifts to the defendant to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity.
11. **Constitutional Law: Public Officers and Employees.** To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community.
12. ___: ___. The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community.
13. **Constitutional Law: Public Officers and Employees: Records.** Whether an employee's statement is a matter of public concern is determined by its content, form, and context, as revealed by the entire record.
14. **Constitutional Law: Public Officers and Employees: Intent.** Whether an employee intends to disseminate a statement's content to the public and the employee's motivation in making the statement are important factors in the content, form, and context analysis.
15. **Constitutional Law: Public Officers and Employees.** An employee's statement concerning an internal grievance is not generally considered to be a matter of public concern.
16. **Constitutional Law: Public Officers and Employees: Discrimination.** Employee statements alleging racial discrimination within a public agency are inherently matters of public concern.
17. **Constitutional Law: Public Officers and Employees: Termination of Employment.** A public employee might lose the protection of the First Amendment for knowingly or recklessly making false statements.
18. **Constitutional Law: Intent.** For a statement to be malicious or recklessly false, it must be more than negligently erroneous, and the court considers the speaker's actual state of mind instead of an objective analysis of what a reasonably prudent person would have said.
19. **Constitutional Law: Public Officers and Employees.** Erroneous statements of public concern will be protected unless they are shown to have interfered with the

employee's performance or the regular operation of his or her governmental agency.

20. **Constitutional Law: Employer and Employee: Public Officers and Employees.** In balancing an employee's and an employer's competing interests, six interrelated factors are considered: (1) the need for harmony in the office or workplace; (2) whether the government's responsibilities require a close working relationship to exist between a plaintiff and his or her coworkers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.
21. **Employer and Employee.** In balancing an employee's and an employer's competing interests, the balance is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case.
22. **Constitutional Law: Public Officers and Employees: Termination of Employment.** When close working relationships are essential to fulfill public responsibilities, a wide degree of deference to a public employer's judgment is appropriate.
23. **Employer and Employee: Termination of Employment.** It is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action.
24. ___: ___. Purely speculative allegations of workplace disruption are insufficient as a basis for disciplining an employee based on his or her statements regarding matters of public concern.
25. **Constitutional Law: Employer and Employee: Termination of Employment.** The more substantially involved in matters of public concern is an employee's speech, the stronger must be an employer's showing as to the disruptive effect upon close working relationships and efficiency.
26. **Constitutional Law: Public Officers and Employees: Termination of Employment.** Although a public employer has an interest in seeing that grievances are addressed through a chain of command, the fact that an employee moved quietly and did not attempt to provoke a public confrontation lessens the weight given to the employer when balancing the interests of the parties.
27. **Constitutional Law: Employer and Employee: Termination of Employment.** An employee's obtainment of permission to speak weighs heavily against the employer's ability to terminate the employee based on the statements that were ultimately made.
28. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court.
29. **Attorney Fees: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-824 (Reissue 1995), "frivolous" means an attempt to relitigate the same issues resolved in prior proceedings with the same parties or a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position.
30. **Actions.** Any doubt as to whether a legal position is frivolous should be resolved in favor of the party whose legal position is in question.

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

Michael P. Dowd, of Dowd & Dowd, for appellant.

James S. Jansen, Douglas County Attorney, and Jennifer K. Johnson for appellee.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

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

CONNOLLY, J.

The Douglas County Department of Correctional Services (Department) brought disciplinary charges against the appellant, George Cox, after he spoke to a reporter regarding allegations of racial discrimination within the Department. Cox had the permission of several of the Department's correctional center supervisors to speak to the reporter. Following a predisciplinary hearing, the Department terminated Cox's employment. Cox appealed his termination of employment to the Douglas County Civil Service Commission (Commission), which affirmed. The district court affirmed after hearing Cox's petition in error. Cox appealed, and we granted his petition to bypass the Nebraska Court of Appeals. We determine as a matter of law that the termination of employment violated Cox's First Amendment right to freedom of speech. Accordingly, we reverse.

## BACKGROUND

After speaking with a television reporter, Cox was sent a letter notifying him of a predisciplinary hearing which stated:

> The charge(s) against you are:
>
> On 20 AUG 98, at approximately 1610 hours, you were in Administration stating that you had to call Trina Crieghton [sic], Channel 3. You went to the break room in the Administrative Offices and used the telephone. Another employee overheard your conversation with Ms. Crieghton [sic]. During the conversation, you stated that the jail had a racial problem and that the union president has a hood in his trunk. Later in the conversation you stated that we have a Captain that's Hitler . . . Capt. [John] Lee. You went on

> to say that the Sheriff is trying to take over the jail and does not have any black supervisors. You also stated that we have a black warden that doesn't have any duties. Also during the telephone conversation you stated that we had a Warden who summoned a black female officer to her office but never acknowledged her presence or stated that she was in a meeting, just made the black officer wait outside her office.
>
> This type of misconduct is covered by the Douglas County Civil Service Commission Personnel Policy Manual, Article 13: Section 5, Offense 15; and General Order 6-97, Rules of Conduct.
>
> Knowingly making false or malicious statements with the intent to harm or destroy the reputation, authority or official standing of individuals or organizations.

Cox's employment was terminated following the predisciplinary hearing. The letter notifying Cox of his termination stated that Cox admitted making the statements and was signed by the Douglas County sheriff, Timothy F. Dunning. Cox appealed his termination to the Commission.

### Department's Evidence

At the hearing before the Commission, the Department presented evidence from Susan Fletcher, a staffing coordinator at the Department. Fletcher testified that on August 20, 1998, she entered a break room where Cox was on the telephone and overheard his side of the conversation. At the time, Fletcher was unaware of to whom Cox was speaking. Fletcher testified that Cox was aware of her presence, that he was speaking in a normal tone, and that she could hear him clearly. Fletcher testified that another employee was also present in the break room.

Fletcher testified that she heard Cox state that the sheriff was trying to take over the correctional center and did not have any black leadership; that there was a black warden, but he did not have any duties; and that he felt that some correctional center employees were racists. Fletcher later stated it was the general consensus at the correctional center that it was true there was a black warden with no duties. Fletcher also testified that she heard Cox say there was a female warden who summoned a

black female officer to her office and then made the officer stand in the hallway and never acknowledged the officer's presence. Fletcher later testified that she had been told by another employee that such an incident had occurred. Fletcher testified that Cox stated that a union president carries a hood in his trunk, but then stated, "No, that's rumor," and that he finished the conversation by stating, "We have a captain that acts like Hitler" and "His name [is] Captain Lee." When asked if Cox appeared to be answering questions or offering information, Fletcher stated that he appeared to be "story-telling." Following the incident, Fletcher wrote a report of the incident on the request of Warden Bill McPhillips. On cross-examination, Fletcher admitted that she did not have knowledge of whether Cox was possibly repeating questions that were asked of him.

Ross Stebbins, the union president and a sergeant at the correctional center, testified regarding the rumor that he had a hood in his trunk. Stebbins stated that he interpreted this to mean a Ku Klux Klan hood and testified that if such a rumor were to get out around the correctional center, his life could be in danger. As a result, Stebbins filed a complaint of a hostile work environment based on that rumor. At one point, Stebbins testified that he felt he was defamed by the allegation because of the damage such a statement could do to his reputation.

Stebbins testified that in the past, Cox had spoken to him about racism at the correctional center and that Cox had stated that he was going to "blow the lid off the County" because he felt he was being treated unfairly and there was racism within the Department. Stebbins' testimony indicates that Cox may have felt he was being treated unfairly because he had previously been demoted. However, the record is not clear regarding the details of the demotion. Stebbins' testimony indicates that he was Cox's union representative at the time these statements were made and that although he found the content of Cox's comments to be inappropriate, it was not inappropriate for Cox to bring such complaints to him. Cox denies making any such statements to Stebbins.

Dunning, who was in charge of employment decisions at the correctional center, testified that he believed the remarks made by Cox brought disrepute to the correctional center. Dunning

also testified that the comments could affect the safety and security of employees and inmates by causing undue violence within the correctional center. Dunning testified that following an investigation, the accuracy of the comments made by Cox was not substantiated. However, Dunning's testimony indicates that the accuracy of the comments was not disproved by his investigation either. Dunning admitted that Cox had been given permission by McPhillips to speak with Creighton and that there was not a rule in effect that prohibited officers from speaking with the media. He then stated that he believed that when Cox spoke with Creighton, he went beyond the scope of permission he was given to talk to her. However, Dunning was unable to state with any specificity based on personal knowledge what that scope might have been.

Dunning stated he had recommended that Cox's employment be terminated due to the severity of the remarks and the fact that a prior hostile work environment complaint had been filed against him. The record contains no further details regarding the prior complaint other than the fact that Cox later testified that the complaint was still pending. Dunning also stated that even if Cox had been repeating Creighton's questions and had expressed only his personal opinion, he still would have recommended that Cox's employment be terminated. The record indicates that regardless of the circumstances, Dunning would have terminated Cox's employment because he went outside the chain of authority when making allegations of racial discrimination.

Dunning signed the letter notifying Cox of his termination of employment. Dunning admitted that he sat on the predisciplinary hearing board and stated that he felt it was appropriate for him to serve in that capacity in Cox's case even though one of the topics of Cox's conversation with Creighton concerned statements that Dunning was trying to take over the correctional center and that Dunning had no black supervisors in his office.

### Cox's Evidence

At the hearing, Cox testified that prior to his termination, he held the position of sergeant and was the team leader of a 10- to 16-person team. According to Cox, on August 20, 1998, he

received two to three messages that Creighton was trying to get in touch with him. Cox then informed McPhillips that Creighton had been trying to get in touch with him. Cox testified that he asked McPhillips if he had McPhillips' permission to talk to Creighton and that McPhillips answered, "Yes." Cox then testified that he reemphasized his request by stating: "Can I talk to her, answer any questions that she asks me about anything other than inmates . . . because I know policy is you cannot discuss inmates." Cox testified that McPhillips replied "you're right." Following this conversation, Cox attended a meeting and then went with McPhillips to see Warden Ann O'Connor, the warden in charge of uniformed officers, about Cox's speaking with Creighton. The record indicates that Cox did this because he wanted to avoid any repercussions that could occur from "jumping the chain of command" by speaking to Creighton without permission. According to Cox, O'Connor did not voice any objections to his speaking with Creighton, and McPhillips did not indicate to Cox that he was limited in the scope of his conversation with Creighton. After speaking with O'Connor, Cox also informed a third warden that he was going to speak with Creighton. Cox testified that at the end of the day, he again sought out McPhillips and asked if he could answer questions from Creighton about anything other than inmates. According to Cox, McPhillips answered "yes." There is no evidence in the record that disputes Cox's testimony that he had permission to talk with Creighton.

Cox next went to a break room, where a telephone for general use was available, and called Creighton. When Cox first began his conversation with Creighton, the break room was empty. However, while he was on the telephone, other people entered the room. On the whole, Cox estimated that his conversation with Creighton lasted 15 to 20 minutes and that other people were present in the room during approximately 5 to 10 minutes of the conversation. Cox testified that he did not invite anyone else to take part in the conversation, that he did not give Creighton permission to distribute any portion of the conversation to others, and that he told Creighton numerous times that he would not appear on television out of concern that his statements would be perceived as statements of fact rather than as his personal opinion.

Cox admitted that the people in the break room with him were able to hear his conversation, and he stated that he did not attempt to hide the conversation from them. Cox stated that it did not really bother him if the people in the break room heard him because he was expressing his personal opinions. Cox testified that at the end of the conversation, he again refused to participate in a television appearance even if his face would be disguised.

Cox testified that during his conversation with Creighton, he responded to questions posed by her. Specifically, Cox testified regarding the following questions and responses:

(1) Cox testified that Creighton asked him if he felt there was a "racial problem with some racial tension" within the correctional center. Cox responded "[y]es, I do" to this question. Cox testified that he still held this belief at the time of the hearing but that he never indicated to Creighton that some of the correctional center employees were in fact racists.

(2) Cox testified that Creighton asked him if he heard anything about the union president, Stebbins, possibly having a hood in his trunk. Cox responded, "I have heard that rumor." Cox testified that he also repeated the statement made to him by Creighton that "[t]he union president has a hood in his trunk" and stated "[y]es, I think he may have." Cox testified that he never made a statement indicating that the union president did, in fact, have a hood in his trunk.

(3) Cox testified that Creighton asked him about concerns she indicated were expressed to the county board that Dunning was "taking over the jail for one main purpose only." Cox stated that Creighton specifically asked "since you've been here 11 or 12 years, do you know of any black supervisors in the Sheriff's Department?" Cox responded that to the best of his knowledge, there had never been a black supervisor in the sheriff's department during his tenure.

(4) Cox testified that Creighton asked him about a black warden, Larry Johnson, by stating, "I've known Larry for a long time. What's going on down at the Correctional Center?" In response, Cox explained that Johnson used to be in charge of all uniformed officers, but then employees were told that O'Connor was assigned to take his place for a period of months in order to

learn the position, while Johnson was to learn the position held by McPhillips and a Warden Miller. Miller subsequently retired, and no one assumed his duties. The record indicates this caused people to question whether Johnson still had a job. Cox testified that he then told Creighton, "To the best of my knowledge, he basically has no duties."

(5) Cox testified that on one occasion, Rita Walker, an employee on his team, came to him with a complaint and stated that she wished to talk with O'Connor. As a result, a meeting was arranged. However, Walker reported to Cox the next day that she had been kept waiting outside of O'Connor's office with no explanation and stated that "[w]ell, I'll bet if I was a white officer, she wouldn't have made me wait." Cox testified that this statement made him nervous and that he arranged for a new appointment to be made for Walker to talk to O'Connor. Cox testified that in regard to this incident, Creighton stated to him, "I heard that you was [sic] involved with an incident where one of the people on your team was summoned to the warden's office and she wasn't talked to." Cox testified that he replied, "Yes . . . that's right."

(6) Cox testified that Creighton asked him " '[w]hat's up with this Captain Lee that just thinks he does what he wants when he wants? . . . I've had people make comments that he acts like he's a dictator or possibly even a Hitler, or something of that nature.' " Cox testified that he told Creighton that he had just left a meeting in which it was discussed that Lee ran his shift the way he wanted, that there was some animosity regarding this, and that he was referred to as "Hitler" at the meeting. Cox testified that he did not tell Creighton that Lee was in fact "a Hitler" and that he did not create the term or first use the term in relation to Lee during the conversation.

Cox testified that following the call, he informed McPhillips that he had completed the call and that McPhillips did not make any inquiry regarding the substance of the conversation. Cox testified that all of the statements he made were not false and were expressions of his personal opinion. Cox also testified that he had no intent to harm others by making the statements.

Regina Davis, as the union steward, represented Cox at his predisciplinary hearing. Davis testified that Cox never stated or

admitted during the hearing that he told Creighton as a matter of fact that the union president had a hood in his car. Davis testified that based on her observations and experience within the correctional center setting, she agreed with the statement that the correctional center had a problem with racial discrimination. Davis also testified that over the course of her experience with the Department, she could not recall a black supervisor within the sheriff's department. In regard to the warden who was alleged to have no job duties, Davis indicated that at the time Cox spoke with Creighton, the statement was consistent with her understanding of the situation. Davis testified that the statement regarding the black officer who was made to wait outside O'Connor's office was correct. Finally, Davis testified that she had heard Lee referred to as "Hitler" by employees prior to Cox's conversation with Creighton.

Creighton was subpoenaed, but refused to testify under a "shield law" for newscasters. However, she signed a letter, which was entered into evidence, stating that Cox spoke with her at her request, that he responded to questions posed by her, and that he expressed his personal opinions regarding various subjects instead of expressing statements of fact.

On a vote of 2 to 1, the Commission voted to uphold the employment termination decision. Alleging in part that there was insufficient evidence to support his termination of employment and that the termination violated his First Amendment rights, Cox appealed via a petition in error to the district court. The district court, without discussing the First Amendment issue in its order, found the Commission's decision was supported by sufficient evidence and affirmed. Cox appeals.

## ASSIGNMENTS OF ERROR

Cox assigns, rephrased, that the district court erred in affirming the employment termination decision of the Commission on the basis that the decision was (1) in violation of his constitutional right to freedom of speech; (2) unsupported by fact or law because there was a lack of competent evidence that Cox knowingly made false or malicious statements with the intent to destroy the reputation, authority, or official standing of any individuals; (3) motivated by political agenda; and (4) in violation of his right to due process.

## STANDARD OF REVIEW

[1,2] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence. *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

[3,4] The inquiry into whether a terminated employee's speech is protected under the First Amendment is a question of law. *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), citing *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Susan H. v. Keith L., ante* p. 322, 609 N.W.2d 659 (2000); *Turner v. Fehrs Neb. Tractor & Equip., ante* p. 313, 609 N.W.2d 652 (2000).

## ANALYSIS

Cox contends that his termination of employment violated his constitutionally protected interest in freedom of speech under the First Amendment. The Department contends that Cox's termination of employment was not in violation of the First Amendment on the basis that Cox was not speaking on matters of public concern and his statements had the potential to cause serious disruption within the correctional center.

[5,6] It is clear that the government cannot condition public employment on a basis that infringes on the employee's constitutionally protected interest in freedom of expression. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997), citing *Connick v. Myers, supra.* The government's interests as an employer, however, in regulating the speech of its employees "'"differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."'" *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. at 431, 571 N.W.2d at 59, quoting *Connick v. Myers, supra*, and

*Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

[7-9] The threshold question in a determination of whether the First Amendment applies to a government employee's statement is whether the statement constitutes speech regarding a matter of public concern. See, *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *Vinci v. Nebraska Dept. of Corr. Servs., supra*; *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). If the statement does not involve a matter of public concern, the First Amendment does not apply, and the inquiry ends. *Id.* But if the statement does involve a matter of public concern, we must then balance the employee's interest in making the statement against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.*

[10] If it is determined that the speech in question is constitutionally protected, the plaintiff must then prove that the speech was a substantial or motivating factor in the employment decision. *Wulf v. City of Wichita, supra*, citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). The burden then shifts to the defendant to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity. *Id.*

## PUBLIC CONCERN

Cox contends that allegations of racism within the correctional center are matters of public concern. However, the Department, relying heavily on our decision in *Vinci v. Nebraska Dept. of Corr. Servs., supra*, contends that Cox was speaking only about matters internal to the correctional center.

[11-14] "To fall within the realm of 'public concern,' an employee's speech must relate to a 'matter of political, social, or other concern to the community.'" *Morris v. Crow*, 117 F.3d 449, 456 (11th Cir. 1997), quoting *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public

employee's right as a citizen to speak on issues of concern to the community. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997), citing *Connick v. Myers, supra*; *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995). Whether an employee's statement is a matter of public concern is determined by its content, form, and context, as revealed by the entire record. *Vinci v. Nebraska Dept. of Corr. Servs., supra*, citing *Rankin v. McPherson, supra*. We have stated that whether an employee intends to disseminate a statement's content to the public and the employee's motivation in making the statement are important factors in the content, form, and context analysis. *Vinci v. Nebraska Dept. of Corr. Servs., supra*.

[15,16] An employee's statement concerning an internal grievance is not generally considered to be a matter of public concern. See, e.g., *Connick v. Myers, supra*. For example, in *Vinci v. Nebraska Dept. of Corr. Servs., supra*, an employee of the Nebraska Department of Correctional Services was disciplined after using racially and sexually offensive language to refer to other employees of the department. We noted that the employee was not attempting to stimulate public dialog regarding a matter of public concern, but was simply referring to his supervisor using an inflammatory and offensive slur. Further, the employee was not attempting to disseminate the statement's content to the public. Thus, we concluded that the First Amendment did not protect the employee from discipline. But courts have consistently stated that employee statements alleging racial discrimination within a public agency are inherently matters of public concern. See, e.g., *Connick v. Myers, supra*; *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000); *Victor v. McElveen*, 150 F.3d 451 (5th Cir. 1998); *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996); *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988); *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983); *Kemp v. State Bd. of Agriculture*, 803 P.2d 498 (Colo. 1990); *Indiana Dept. of Highways v. Dixon*, 541 N.E.2d 877 (Ind. 1989).

In this case, Cox's statements touched on matters of public concern. The statements all related to allegations of problems of racial discrimination and tension at the correctional center. Although Cox did not give Creighton permission to further pub-

licize his statements, the fact that they were made to a reporter investigating the issue shows an intent on Cox's part to disseminate the statement's content to the public. Certainly, Creighton could have used Cox's statements to further her investigation, whether she had permission to directly quote him or not.

The Department's reliance on *Vinci v. Nebraska Dept. of Corr. Servs., supra*, is misplaced. Unlike *Vinci*, Cox was not expressing a personal dissatisfaction with his supervisors which was of no concern to the public at large. Rather, Cox was speaking to a reporter and candidly answering her questions regarding concerns of racial discrimination at the correctional center. See *Barrett v. University of Colorado*, 851 P.2d 258 (Colo. App. 1993) (distinguishing between statements that merely reflect racial bias of speaker and statements alleging racial discrimination). The fact that the news media was interested in the allegation of potential racism at the correctional center and was actively seeking information from Cox about it further indicates the public concern regarding the matter. See, generally, *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (subject matter of speech was covered by newspaper). The case law clearly recognizes that allegations of racism in a public agency are of concern to the community at large.

[17-19] The Department argues that Cox's statements were false or malicious and made with the intent to harm or destroy the reputation, authority, or official standing of individuals or organizations. Therefore, the Department contends that First Amendment protection is precluded. It has been suggested that a public employee might lose the protection of the First Amendment for knowingly or recklessly making false statements. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). We may assume that false statements deliberately or recklessly made by public employees are either unprotected by the First Amendment or, at least, would weigh heavily against protection. See *Pickering v. Board of Education, supra*; *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir. 1995). However, this does not alter our conclusion. In this case, the Department has failed to show that Cox made the statements knowing they were false or with reckless disregard for their veracity. For a statement to be malicious or recklessly

false, it must be more than negligently erroneous, and we consider the speaker's actual state of mind instead of an objective analysis of what a reasonably prudent person would have said. See *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985). Further, erroneous statements of public concern will be protected unless they are shown to have interfered with the employee's performance or the regular operation of his or her governmental agency. *Brasslett v. Cota, supra*, citing *Pickering v. Board of Education, supra*.

In this case, the record is clear that Cox believed his statements to be true, was merely expressing his personal opinions, and had reason to believe that the facts behind his expressions of opinion were correct. Thus, even if we assume the possibility that one or more of Cox's statements could be false, a factual issue we need not decide, and could be interpreted to have been made in a manner that exhibited an intent to harm the reputation of others, we do not find support in the record that any such statements were made in a recklessly false or malicious manner so as to preclude First Amendment protection. See *Wulf v. City of Wichita*, 883 F.3d 842 (10th Cir. 1989) (employee's statements of employer misconduct based on his own suspicions were not recklessly or maliciously false and were matters of public concern). We conclude that Cox's statements were in regard to matters of public concern and subject to First Amendment protection.

## BALANCING

Because Cox's statements involved matters of public concern, we must next address the more difficult task of balancing Cox's First Amendment interest in making the statement against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. Cox contends that the balance is in his favor, particularly because he had permission to speak with Creighton. The Department contends that the balance is in its favor because Cox's statements had the potential to disrupt the workplace and cause undue violence at the correctional center.

[20,21] In balancing an employee's and an employer's competing interests, the Eighth Circuit Court of Appeals has consid-

ered six interrelated factors: (1) the need for harmony in the office or workplace; (2) whether the government's responsibilities require a close working relationship to exist between a plaintiff and his or her coworkers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties. *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993). The balance is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Id.*

[22-25] When close working relationships are essential to fulfill public responsibilities, a wide degree of deference to the employer's judgment is appropriate. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986), citing *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Thus, police organizations have generally been given additional deference when balancing an employee's speech regarding a matter of public concern against the need of the employer to prevent disruption in the workforce. See *Shands v. City of Kennett, supra.* It has been said that it is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action. *Id.* However, purely speculative allegations of workplace disruption are insufficient as a basis for disciplining an employee based on his or her statements regarding matters of public concern. *Wulf v. City of Wichita, supra.* In addition, the more substantially involved in matters of public concern is an employee's speech, the stronger must be an employer's showing as to the disruptive effect upon close working relationships and efficiency. *Id.* See, also, *Powell v. Gallentine*, 992 F.2d 1088, 1091 (10th Cir. 1993) (" 'an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption' ").

[26] The Department's evidence focuses on the contention that the allegations of racial discrimination stated by Cox had the potential to disrupt the workplace and jeopardize the safety of inmates and employees. Evidence was also presented that

Cox went outside the chain of command when making the statements. These are considerations that weigh in favor of the Department's ability to terminate Cox's employment even though his speech regarded matters of public concern. The record indicates, however, that no disruption actually occurred and that Cox specifically sought to limit any possible disruption his statements might have. Cox specifically stated to Creighton that he did not want his comments published and that he refused to appear on television. In addition, although the Department has an interest in seeing that grievances are addressed through a chain of command, the fact that an employee moved quietly and did not attempt to provoke a public confrontation lessens the weight given to the employer on this factor. See *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996). See, also, *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988) (discussing disruption in workplace in regard to employee interview with reporter and noting that employee did not seek out interview but was instead contacted by reporter). Further, the record indicates that Cox's statements concerned issues that were already a topic of discussion and concern within the correctional center before he spoke with Creighton. Thus, any potential disruption would not be caused solely by Cox's statements. See *Wulf v. City of Wichita*, 832 F.3d 842 (10th Cir. 1989) (discussing similar situation).

[27] Of particular importance is the context in which Cox made his statements. Cox repeatedly sought and was granted permission to speak to Creighton about anything except the inmates. Cox was responding to Creighton's call, and there is no indication that he knew what Creighton was going to ask him. By providing Cox with permission to discuss anything other than the inmates with Creighton, it was the actions of the Department itself that left open the possibility of workplace disruption. These circumstances weigh heavily against the Department's ability to terminate Cox's employment based on his statements to Creighton. See, *Victor v. McElveen*, 150 F.3d 451 (5th Cir. 1998) (fact that employee made statement critical of his employer after receiving express permission to comment freely weighed heavily in employee's favor); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (context factor weighed in favor

of employees who complained at meeting following statement by administrator that they could talk about anything that was on their minds). In addition, there is no evidence that Cox's statements impaired his ability to perform his duties, and as previously discussed, the statements were in regard to matters that are commonly referred to as "inherently" matters of public concern. See *Connick v. Myers, supra*. See, also, *Victor v. McElveen, supra* (indicating that public interest in prevention and elimination of racial discrimination outweighs employer's interest in preventing disruption in workplace). In balancing the interests of each party, we think that Cox's First Amendment interest in making the statements trumps the Department's interest as an employer concerned with the efficiency of the public services it performs. Thus, we determine that the Department could not terminate Cox's employment on the basis of his statements to Creighton. There is no evidence in the record that the Department would have terminated Cox's employment on any other basis. Accordingly, we reverse.

[28-30] Cox has moved this court for an award of attorney fees on appeal pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) on the basis that the legal position of the Department is frivolous. An appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998). For purposes of § 25-824, "frivolous" means an attempt to relitigate the same issues resolved in prior proceedings with the same parties or a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position. Any doubt as to whether a legal position is frivolous should be resolved in favor of the party whose legal position is in question. We conclude that the Department's approach to the disciplinary proceedings and the appeal were not frivolous. Thus, Cox's motion for attorney fees on appeal is denied.

## CONCLUSION

We conclude that Cox's statements were in regard to matters of public concern and that his interest in making those state-

ments outweighed the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. As a result, we conclude that the termination of Cox's employment violated his constitutionally protected interest in freedom of speech. The district court erred in affirming the decision of the Commission. Accordingly, we reverse. Because we reverse based on Cox's first assignment of error, we do not address the remaining assignments of error.

REVERSED.

McCORMACK, J., not participating.

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BLUE CREEK FARM, INC., APPELLANT, V. AURORA COOPERATIVE ELEVATOR COMPANY, APPELLEE.

614 N.W.2d 310

Filed July 14, 2000. No. S-99-608.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
2. **Judgments.** In a bench trial, the trial court's entry of judgment in favor of a certain party warrants the conclusion that the trial court found in the party's favor on all issuable facts.

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

Neil E. Williams, of Lane & Williams, P.C., for appellant.

David A. Jarecke, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

CONNOLLY, J.

Appellant, Blue Creek Farm, Inc. (Blue Creek), brought this action seeking a declaration that its contractual obligation to deliver corn to appellee, Aurora Cooperative Elevator Company (Aurora), between March 1 and 31, 1996, had expired. Blue

Creek further sought a declaration that each party's obligations under the contracts were excused by Aurora's attempt to invoke the contracts' force majeure provisions. The district court for Hamilton County determined that time was not of the essence and that an 11-day delay in performance was reasonable and, therefore, dismissed Blue Creek's claim. We affirm.

## BACKGROUND

Under two separate grain purchase contracts, Blue Creek agreed to sell and Aurora agreed to buy a total of 25,000 bushels of No. 2 yellow corn. Although the contracts were executed in January and October 1995, both contracts specified that the seller would deliver the corn to Aurora's elevator at Chapman, Nebraska, between March 1 and 31, 1996. Because of a shortage in railcar availability, however, Aurora was not able to take delivery in March 1996.

Blue Creek's president, Larry Paschke, testified that he called Aurora on several occasions during the month of March 1996 to obtain permission to deliver the corn. Each time he contacted Aurora, however, he was informed that Aurora could not accept delivery of Blue Creek's corn.

On March 29, 1996, Aurora sent a letter informing Blue Creek that Aurora was extending the contracts with Blue Creek for an additional 30 days due to the delay of rail carrier service. The letter from Aurora to Blue Creek stated:

> Pursuant to paragraph 4 of the grain contract(s) . . . we are extending such contract(s) for an additional 30 days due to the delay of rail carrier service. We are making efforts to accept delivery of these contracts and you may wish to contact your local elevator for delivery if you have not already done so. If you have any questions concerning these contracts, please call Verda at 402-694-2106 or 800-642-6795.

Paragraph 4 on each of the grain contracts, referenced in Aurora's letter, provided that "[b]uyers performance under this contract is contingent upon conditions beyond buyers control, such as, but not limited to, labor disputes, and disturbances, accidents, fire, delay of carriers, act of god or war."

On Monday, April 1, 1996, railcars were available and Allen Boltz, an employee of Aurora, called Paschke to request that

Blue Creek immediately begin its delivery. Paschke testified that he was working in the field on April 1, however, and did not receive the message until too late in the day to do anything about it. On April 2, Aurora called Paschke to inform him that Blue Creek was not to deliver its corn because the railcars were now full. On April 10, Aurora sent Blue Creek's attorney written authorization for Blue Creek to begin delivery immediately. Blue Creek made its first delivery on April 11, and its last delivery on April 16. Before trial, the parties stipulated that Blue Creek had delivered the corn to Aurora without prejudice to Blue Creek's claim.

## ASSIGNMENTS OF ERROR

Blue Creek assigns as error the district court's failure to determine that (1) Aurora repudiated the contracts by attempting to invoke their "force majeure" clauses and (2) Blue Creek had the option of treating the contracts as terminated due to Aurora's repudiation.

## STANDARD OF REVIEW

[1] In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000).

## ANALYSIS

Blue Creek argues that paragraph 4 on each of the grain contracts is a force majeure provision. In general, a force majeure provision is a contractual provision that allocates the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. See Black's Law Dictionary 657 (7th ed. 1999). Blue Creek argues that once Aurora invoked the contracts' force majeure provisions, Aurora repudiated its contractual obligations and gave Blue Creek the option of treating the contracts as terminated. Aurora contends that it did not repudiate the contracts, but merely delayed performance by a reasonable amount of time.

Blue Creek's argument, that Aurora's exercise of the force majeure provisions resulted in a repudiation of the executory contracts, is similar to the argument made in *Crowder v. Aurora*

*Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986). In *Crowder*, a farmer sued Aurora for damages caused by Aurora's alleged anticipatory breach of a grain contract when Aurora refused delivery of contracted corn. Likewise, Blue Creek sued Aurora for alleged anticipatory breach of the grain contracts when Aurora allegedly invoked the force majeure provision to excuse its performance under the contracts.

In *Crowder*, we set forth the pertinent law on anticipatory repudiation of a contract for the sale of goods:

> "When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> "(a) for a commercially reasonable time await performance by the repudiating party; or
>
> "(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
>
> "(c) in either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704)." Neb. U.C.C. § 2-610 (Reissue 19[92]).

Comment 1 to § 2-610 states: "[A]nticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." Additionally, comment 2 for § 2-610 contains: "It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation." See, also, *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 680-81, 279 N.W.2d 849, 853 (1979) ("An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future"); *Selig v. Wunderlich Contracting Co.*, 160 Neb.

> 215, 222, 69 N.W.2d 861, 867 (1955) ("'Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has . . . an option to treat the contract as ended so far as further performance is concerned . . .'").

223 Neb. at 712-13, 393 N.W.2d at 257.

The court in *Crowder* determined that whether Aurora had repudiated its agreement was a question of fact for the jury. In this case, we also conclude that whether Aurora repudiated the contracts by sending the letter to Blue Creek which referenced paragraphs 4 was a question of fact.

[2] In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Vistar Bank v. Thompson*, 253 Neb. 166, 568 N.W.2d 901 (1997). In a bench trial, the trial court's entry of judgment in favor of a certain party warrants the conclusion that the trial court found in the party's favor on all issuable facts. *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994).

In finding for Aurora, the trial court impliedly found that the letter from Aurora to Blue Creek did not constitute a repudiation of the contracts. We agree. The letter evinces no intention on the part of Aurora not to perform its obligations under the contracts. Rather, it informs Blue Creek that although it intends to perform, its performance will be delayed by up to 30 days. Even Paschke, when questioned, could not testify that the letter suggested that Aurora would not honor the contract. On cross-examination, Paschke was asked to read the language of the letter quoted above. When asked where in that language the letter suggested that Aurora would not honor the contract or would not take receipt of Blue Creek's corn, Paschke answered, "I see no place in there."

## CONCLUSION

We conclude that the district court was not clearly erroneous in finding that Aurora did not repudiate the contracts by sending the letter informing Blue Creek that it intended to delay performance by 30 days. Therefore, we need not reach Blue Creek's second assignment of error.

AFFIRMED.

# STATE OF NEBRASKA EX REL. NEIL EMMACK AND PEGGIE EMMACK, INDIVIDUALS AND AS PARENTS, GUARDIANS, AND NEXT BEST FRIENDS OF KEELY EMMACK AND MIKAILA EMMACK, APPELLANTS, V. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEE.

614 N.W.2d 300

Filed July 14, 2000. No. S-99-628.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
3. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
4. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.

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

Richard M. Jones and Dennis P. Lee, of Lee & Bucchino Law Firm, for appellants.

Don Stenberg, Attorney General, and John R. Thompson for appellee.

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

CONNOLLY, J.

Appellants, Neil Emmack and Peggie Emmack, brought this action seeking a writ of mandamus compelling appellee, Don Stenberg, Attorney General of the State of Nebraska, to pursue and obtain judgments on all forfeited recognizance bonds in criminal cases or, in the alternative, to order the appellee to require the county attorneys of the various counties to obtain such judgments. The district court for Lancaster County denied appellants' application for peremptory writ of mandamus and vacated the alternative writ previously issued by the district

court for Douglas County. Because appellants have failed to show a clear legal duty on the part of appellee to seek judgment of default and execute upon forfeited recognizance bonds, we affirm.

## BACKGROUND

Appellants are the parents of Keely Emmack and Mikaila Emmack, minor children who now attend or in the future will attend the Omaha public school system. Appellants filed a petition for a writ of mandamus on behalf of their children to compel appellee to collect or aid in the collection of moneys allegedly due to the State of Nebraska, which moneys are to be held in trust for the benefit of Nebraska's school system.

The district court for Douglas County issued an alternative writ of mandamus. Upon appellee's motion, the action was transferred to the district court for Lancaster County, where venue was proper. A hearing was held, and the district court for Lancaster County denied appellants' application for peremptory writ of mandamus and vacated the alternative writ issued by the district court for Douglas County.

## ASSIGNMENT OF ERROR

Appellants assign that the district court erred in dismissing their petition for a writ of mandamus.

## STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Susan H. v. Keith L., ante* p. 322, 609 N.W.2d 659 (2000); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

## ANALYSIS

[2] To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999).

Appellants argue that appellee has a legal duty to seek judgment on all forfeited recognizance bonds in criminal cases or, in

the alternative, to require the county attorneys of the various counties to seek such judgments. To prove the existence of a legal duty on the part of appellee, appellants cite to three sections of the Nebraska Constitution, which they argue are mandatory, not discretionary. First, appellants cite to article VII, § 1, which provides:

> The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.

Next, appellants cite to article VII, § 5(1), which provides that "all fines, penalties, and license money . . . shall be appropriated exclusively to the use and support of the common schools." Finally, appellants cite to article VII, § 7, which provides that the net proceeds of lands and other property and effects that come to the State of Nebraska, by escheat or forfeiture, are declared to be perpetual funds for common school purposes.

[3,4] Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Pratt v. Nebraska Bd. of Parole, supra*. We note that at one time, there was a statutory duty imposed upon the prosecuting county attorney to prosecute forfeited recognizance. Prior to 1953, Neb. Rev. Stat. § 29-1102 (Reissue 1948) provided:

> Whenever such recognizance shall have been forfeited as aforesaid, it shall be the duty of the prosecuting attorney of the county in which the recognizance was taken, to prosecute the same by civil action for the penalty thereof; and such action shall be governed by the provisions of the code of criminal procedure or so far as the same may be applicable.

This section was repealed, however, in 1953. See 1953 Neb. Laws, ch. 88, § 6, p. 260. There is no longer any language in

chapter 29, article 11, entitled "Proceedings Upon Forfeiture of Recognizance," that imposes a clear legal duty on the prosecuting attorney to pursue judgment and execution on forfeited recognizance. See Neb. Rev. Stat. § 29-1105 et seq. (Reissue 1995).

Appellants have relied on three provisions of the Constitution of the State of Nebraska to show a legal duty on the part of appellee to seek judgments on forfeited criminal recognizance. None of these provisions impose a duty on appellee, either directly or by implication, to prosecute forfeited criminal recognizance. Therefore, appellants' petition for a writ of mandamus cannot succeed.

## CONCLUSION

We conclude that appellants have not shown a clear legal duty on appellee's behalf to seek judgment on criminal recognizance. Therefore, the district court's dismissal of appellants' petition for writ of mandamus was not erroneous. We affirm.

AFFIRMED.

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GORDON DESEL AND DEE DESEL, APPELLEES, V.
CITY OF WOOD RIVER, NEBRASKA,
A MUNICIPAL CORPORATION, APPELLANT.

614 N.W.2d 313

Filed July 14, 2000. No. S-99-657.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Words and Phrases.** Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances.
3. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual.

4. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.
5. **Negligence.** Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances.
6. ___. Duty is a question of whether a defendant is under any obligation for the benefit of a particular plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
7. ___. The question of whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Keith D. Sinor for appellees.

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

MCCORMACK, J.

## NATURE OF CASE

Gordon Desel and Dee Desel filed an action pursuant to the Political Subdivisions Tort Claims Act (the Act), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1991 & Cum. Supp. 1994), against the City of Wood River, Nebraska (the City), seeking recovery for property damage which occurred when a sewerline, owned by the City, backed up and flooded the Desels' basement. The trial court entered judgment in favor of the Desels, finding that the City was negligent in maintaining the sewerlines. The City filed a motion for new trial, which was overruled. It is from this ruling that the City appeals. On our own motion, we removed this matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We affirm.

## BACKGROUND

On May 8, 1996, a sewerline, owned and operated by the City, backed up, causing sewage water to flood into the basement of the Desels' residence. The Desels filed an action against

the City, pursuant to the Act, alleging three causes of action: (1) strict liability, (2) negligence, and (3) breach of warranty. The City filed a motion for summary judgment, which was sustained as to the strict liability and breach of warranty causes of action. The remaining negligence claim was tried to the court.

The Desels called two witnesses at trial, Steve Timmons, the City's assistant utilities superintendent, and James A. Smith, the City's utilities superintendent. Timmons testified that as the assistant utilities superintendent, he responds to complaints about sewer backups. Timmons testified that prior to May 1996, the City's maintenance program for its sewer system included "flushing" or "jetting" the sewerlines at least once every year. "Flushing" refers to using a fire hydrant and a hose and running fresh water down the lines. "Jetting" involves using a high-pressure hose that is put into the sewerline. Timmons also testified that when the City receives frequent calls about a particular sewerline, a "TV inspection" is done, wherein a video camera is inserted into the sewer to attempt to analyze the problem.

Timmons testified that he was familiar with the sewer backups that have occurred on the particular line involved in this action because of his official duties and as a resident whose sewerline is approximately 50 feet downstream from the Desels and is attached to the same sewer main. Timmons testified that from 1980 to 1993, there had been sewer backups once per year in the sewer main located adjacent to the Desels' residence and that from 1993 to 1996, there had been "more trouble with it." Timmons also testified that he has sewer backup problems at his residence in the spring and fall.

Timmons testified that he had determined with a reasonable degree of certainty that roots in the sewerline were the source of the particular blockage that caused the backup into the Desels' residence. Timmons further testified that roots commonly invade the sewer system and that he was not aware of any way to prevent the roots from doing so. Timmons testified that the City tries to control the roots in the sewer system by pouring acid into the sewerlines to kill the roots and by using a mechanical root cutter. Timmons explained that if the City does not try to control the root masses, the roots can continue to grow until they form an obstruction and block the sewer main.

Timmons testified that he is not aware of any industry standard, rule, or regulation which requires the City to foresee sewer backups or any industry standard, rule, or regulation which requires the City to prevent roots from invading the sewer system. Timmons was also not aware of any industry standard, rule, or regulation which required the City to determine when roots begin to invade a sewerline. Timmons was not aware of any industry standard, rule, or regulation that would indicate that the City's maintenance program prior to May 1996 was inadequate.

Smith testified that, as utilities superintendent, he is responsible for the maintenance program of the City's sewer system, including the sewer main located adjacent to the Desels' residence. Smith described the City's maintenance program prior to May 1996 as being on an "as-needed basis." That is, if one of the City's sewerlines backed up, the City would send someone out to clean the line. Smith said that the reasoning behind the "as-needed basis" was that the City could not predict when the backups were going to occur and that the City does not have the capability to monitor all of its sewerlines to determine when and where a blockage may occur. Smith was not aware of any industry standard, rule, or regulation which requires the City to conduct such monitoring. Smith further testified that a waste treatment operator is responsible for the day-to-day maintenance of the sewer system and that part of his job is to periodically check manholes to see if there is a problem that is cause for maintenance, such as flushing the line. Smith also testified that the City has its own engineer whom it consults regarding sewerline maintenance, construction, and operation. Smith testified that the only guidelines the City's engineer has provided regarding the operation and maintenance of the sewerlines are regular flushing and regular maintenance of the City's sewer mains.

Smith testified that he determined that the probable cause of the backup in question was roots in the main sewerline. Smith also stated that it was the City's responsibility to maintain the sewer mains in an operable condition and that the City has the responsibility to eliminate roots that block the sewerlines. Smith also agreed with Timmons' testimony that if the roots are allowed to grow, they will eventually block the sewerlines.

Smith testified that there are several possible courses of action the City can take to prevent sewer backups caused by root incursion into sewerlines. These include (1) treating the roots that get into the line with chemical treatments, such as acid; (2) using root saws to cut the roots that get into the lines; (3) regulating the planting of trees and shrubs adjacent to the sewerlines; and (4) replacing the present sewerlines with PVC pipe. Regulating the planting of trees and shrubs adjacent to the sewerlines and replacing the present sewerlines with PVC pipe are the only ways Smith knew to completely prevent roots from invading the sewer system. Smith testified that he was not aware of any industry standard, rule, or regulation which required the City to take either of these two actions to prevent roots from entering the sewerlines.

Smith also testified that he was not aware of any industry standard, rule, or regulation which required the City to treat roots in the sewerlines differently than it does, nor was he aware of any industry rule or regulation which would indicate that the City's policy prior to May 1996 with regard to the maintenance of the sewer main adjacent to the Desels' residence was improper or inadequate.

When called as a witness by the City, Smith agreed with Timmons' testimony that the City tries to flush all the sewerlines at least once a year. Smith further explained that the City flushes all the sewerlines once a year and some are flushed more frequently on an "as-needed basis," meaning that in some sewer mains, problems have developed over time and must be treated more frequently. Smith also testified that prior to the backup in May 1996, there was no reason to believe that the sewerline that caused the backup into the Desels' residence needed more treatment than once a year.

The trial court found that the City had a duty to maintain the sewerlines and that it breached that duty, and awarded the Desels $6,266.30. The amount of damages had been previously stipulated to by the parties in the event the trial court found the Desels were entitled to judgment.

## ASSIGNMENTS OF ERROR

The City assigns that the trial court erred (1) in finding in favor of the Desels and against the City, (2) in finding that the

Desels met their burden of proof in the absence of any evidence establishing the City's duty of care, and (3) in finding that the City failed to properly maintain the sewerline in the absence of any evidence establishing the City's duty of care.

## SCOPE OF REVIEW

[1] In actions brought pursuant to the Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Norman v. Ogallala Pub. Sch. Dist., ante* p. 184, 609 N.W.2d 338 (2000); *Baldwin v. City of Omaha, ante* p. 1, 607 N.W.2d 841 (2000).

## ANALYSIS

[2-4] Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances. *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998); *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996). A negligence action brought under the Act has the same elements as a negligence action against an individual. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. *Bargmann v. Soll Oil Co., supra*; *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997), *overruled on other grounds, Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999). In accordance with the foregoing rule and to prevail in their action against the City, the Desels had to prove that the City had a duty to maintain the sewer system, that the City breached its duty, and that the breach proximately caused the damage claimed by the Desels.

[5] Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances. *Bargmann v. Soll Oil Co., supra*; *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976).

[6,7] Duty is a question of whether a defendant is under any obligation for the benefit of a particular plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. *Bargmann v. Soll Oil Co., supra*; *Gans v. Parkview Plaza Partnership, supra*. The question of whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation. *Bargmann v. Soll Oil Co., supra*; *Gans v. Parkview Plaza Partnership, supra.*

The City concedes there was a duty, but claims the breach of that duty was not established because the Desels did not prove the standard of care. The City argues that the operation, care, and maintenance of a municipality's sewer system is not within the general knowledge of laypeople and that as such, the Desels were required to provide expert testimony as to the applicable standard of care. The City contends that because the Desels failed to offer such expert testimony, the Desels did not prove a prima facie case of negligence and that the trial court erred in finding that the City was negligent.

Although the Desels did not present any expert testimony as to the applicable standard of care, the Desels did present sufficient evidence for the trial court to find that the City breached its duty and was negligent. The City knew that the sewer main adjacent to the Desels' residence had recurring problems with backups. Timmons testified that from 1980 to 1993, there had been sewer backups once a year in the sewer main located adjacent to the Desels' residence and that from 1993 to 1996, there had been "more trouble with it," specifically, that the backups had occurred more than once a year. Timmons also testified that he has sewer backup problems at his residence, which is just downstream from the Desels, in the spring and fall. The record also contains the complaint report, filled out and signed by Smith, for the sewer backup that is the subject of this litigation. Under the "Follow-up Procedures or Comments" section of the report, it states in part, "2nd time in approx[imately] 6 months that had problem there."

Smith testified that the City had a duty to maintain the sewerlines in an operable condition. Smith also acknowledged that the duty included eliminating roots that blocked the sewerlines. Smith further testified that there are several possible courses of action the City can take to prevent sewerline backups caused by root incursion, which included acid treatments, cutting the roots, regulating the planting of trees and shrubs adjacent to the sewerlines, and replacing the present sewerlines with PVC pipe.

Smith testified that the City's maintenance program for the sewer system prior to May 1996 was on an "as-needed basis," meaning that when the City received a complaint of a backup, it would send someone out to clean the line. When called as a witness by the City, Smith testified that the City flushes all the sewerlines once a year and that some are flushed more frequently on an "as-needed basis," meaning that in some sewer mains, problems have developed over time and must be treated more frequently. Despite Timmons' testimony that there had been backups in the sewer main adjacent to the Desels' residence more than once a year in the past 3 years and Smith's testimony that these backups would be considered an established problem, Smith testified that he felt that a once-a-year maintenance of that particular line was sufficient. Despite the City's knowledge of the recurring backups on this particular sewerline and its knowledge of ways to treat or prevent root incursion into the sewerlines, the City did nothing and simply continued to maintain this line in the same manner it maintained the properly working lines, on an "as-needed basis."

If the City had taken any course of action to prevent backups in the sewer main adjacent to the Desels' residence, it would then become a subject of expert testimony as to whether or not the City's actions were reasonable under the circumstances. However, the City did not take any course of action to prevent backups in the sewer main adjacent to the Desels' residence. The City's failure to take any action when there were several courses of action available is not reasonable, and the trial court did not need an expert opinion in order to come to that conclusion.

The City knew there was a problem with the sewer main adjacent to the Desels' residence and knew of several alternative courses of action that were available to prevent sewer backups

caused by root incursion, yet it did nothing. The City breached its duty to maintain the lines in an operable condition. The trial court found that the City had a duty to maintain the sewerlines and that it breached that duty. We conclude that the trial court's findings were not clearly wrong.

## CONCLUSION

For the reasons stated herein, the decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DARREN MCCRACKEN, APPELLANT.
615 N.W.2d 882

Filed March 24, 2000. No. S-97-944.

The above-captioned matter was argued before this court on October 5, 1998. The argument predominately concerned two issues, which issues this court ordered the parties to brief: (1) whether the trial court properly ordered appellant Darren McCracken's original direct appeal reinstated and (2) whether McCracken properly raised assignments of error related to his original direct appeal when the notice of appeal is from the district court's order granting postconviction relief.

For the reasons stated herein, we conclude that the district court properly granted McCracken a new direct appeal. The fact that his notice of appeal is from the grant of postconviction relief does not deprive this court of jurisdiction of the instant appeal.

This case, however, presents the next question in the analysis: After such an appeal is granted, how should an appellant proceed in this court?

We have consistently held that

> [w]here the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power, in a post conviction proceeding, to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence.

*State v. Blunt*, 197 Neb. 82, 92-93, 246 N.W.2d 727, 734 (1976). At the same time, we have also stated that when a district court reinstates a direct appeal, "the postconviction record is necessarily before the court as a prerequisite to this court's jurisdiction." *State v. Jones*, 241 Neb. 740, 745, 491 N.W.2d 30, 33 (1992). The question remains, and is presented in this case, as to how a "reinstated direct appeal" should proceed in this court once it has been granted as postconviction relief by the district court. Aware that this court has never delineated exactly how an appellant is to proceed when a district court grants a new direct appeal as postconviction relief, we attempt to provide some guidance herein for future cases.

The confusion in cases such as this results from language in *State v. Blunt, supra*, and its progeny, which indicates that district courts may properly "reinstate" a defendant's direct appeal when the court finds that a defendant was prejudiced by ineffective appellate counsel in her or his prior criminal proceedings. Under *State v. Blunt, supra*, we conclude that a district court should more properly grant a "new direct appeal," rather than reinstate a past one. Thus, a defendant obtaining such relief could then appeal from his or her original conviction and sentence based on the grant of such postconviction relief. The record before this court would then necessarily contain the same record as if the "new direct appeal" were the original direct appeal, in addition to some indication that the defendant was awarded postconviction relief of a new direct appeal, and the jurisdictional time limits for the "new" appeal would run from the day postconviction relief was granted. Such a procedure would allow this court to properly exercise jurisdiction over the new direct appeal, while still allowing district courts to grant proper relief when the defects in the prior proceedings occurred only at the appellate level.

THE COURT, ON ITS OWN MOTION, HEREBY ORDERS that the State of Nebraska, the appellee, shall have 30 days from the date of this order to respond to the appellant's original brief filed in case No. S-97-944, and the appellant shall have 14 days after the filing of the appellee's brief to reply thereto in accordance with Neb. Ct. R. of Prac. 9A(3) (rev. 1997). The matter shall then be advanced for oral argument on the merits.

DATED: February 3, 2000.

BY THE COURT

/s/ John V. Hendry
John V. Hendry, Chief Justice

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